

Swaziland

Democracy and Political Participation



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

Lomcebo S Dlamini

March 2013

 2013 Open Society Foundations

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Published by:
The Open Society Initiative for Southern Africa

ISBN: 978-1-920677-08-4

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List of abbreviations and acronyms

ACP	African, Caribbean and Pacific Group of States
AfDB	African Development Bank
AGOA	African Growth and Opportunity Act
AU	African Union
AUDP	African United Democratic Party
BADEA	Arab Bank for Economic Development in Africa
CANGO	Coordinating Assembly of Non-Governmental Organisations
CDC	Constitutional Drafting Committee
CPS	Communist Party of Swaziland
CRC	Constitutional Review Commission
CSC	Council of Swaziland Churches
DBSA	Development Bank of Southern Africa
DRC	Democratic Republic of Congo
EAC	European Advisory Committee
EBC	Elections and Boundaries Commission
EISA	Electoral Institute of Southern Africa
EU	European Union
HIV/Aids	Human Immunodeficiency Virus/Acquired Immune Deficiency Syndrome
HUMARAS	Human Rights Association of Swaziland
IFAD	International Fund for Agricultural Development
INM	Imbokodvo National Movement
JSC	Judicial Service Commission
Legco	Legislative Council
MISA	Media Institute of Southern Africa
MP	Member of Parliament
NACODEC	National Congress for Democratic Change
NCA	National Constitutional Assembly
NEPAD	New Partnership for Africa's Development
NGO	non-governmental organisation
NNLC	Ngwane National Liberatory Congress
PAC	Public Accounts Committee
PEPFAR	President's Emergency Plan For AIDS Relief
PUDEMO	People's United Democratic Movement
RA	Regional Administrator
RCC	Royal Constitutional Commission
RS	Regional Secretary
SACU	Southern African Customs Union
SADC	Southern African Development Community

SACPN	Southern African Conflict Prevention Network
SBIS	Swaziland Broadcasting and Information Service
SCCCO	Swaziland Coalition of Concerned Civic Organisations
SFTU	Swaziland Federation of Trade Unions
SIF	Swaziland Independent Front
SNAT	Swaziland National Association of Teachers
SNC	Swazi National Council
SPP	Swaziland Progressive Party
SPTC	Swaziland Post and Telecommunications Corporation
SUDF	Swaziland United Democratic Front
SUF	Swaziland United Front
SWADEPA	Swaziland Democratic Party
SWAGAA	Swaziland Action Group Against Abuse
SWANAFRO	Swaziland National Front
SWAPOL	Swaziland Positive Living
SWAYOCO	Swaziland Youth Congress
SZL	Swaziland Emalangeni (currency)
TRC	Tinkhundla Review Commission
TUCOSWA	Trade Union Congress of Swaziland
UN	United Nations
UNAIDS	Joint United Nations Programme on HIV/AIDS
UNDAF	United Nations Development Assistance Framework
UNDP	United Nations Development Programme
UNHRC	United Nations Human Rights Council
UNICEF	United Nations Children's Fund
UPR	Universal Periodic Review
USA	United Swaziland Association
USD	United States dollar (currency)
WHO	World Health Organisation
WLSA	Women and Law in Southern Africa

Preface

The Africa Governance Monitoring and Advocacy Project (AfriMAP) is an initiative that was established in 2004 by the Open Society Foundations to monitor observance of standards relating to human rights, the rule of law and accountable government, by both African states and their development partners. African states have undertaken increasing commitments to good governance since then.

Among these commitments are the provisions of the Constitutive Act of the African Union (AU), in which member states agree to promote human rights, democratic principles and institutions, popular participation and good governance. Other newly adopted documents include the New Partnership for Africa's Development (NEPAD) and the African Peer Review Mechanism (APRM), the Convention on Preventing and Combating Corruption and the Charter on Democracy, Elections and Governance. AfriMAP's research is intended to facilitate and promote respect for these commitments by highlighting key issues, and providing a platform for national civil society organisations to engage in their own monitoring efforts.

AfriMAP's methodology is based on standardised reporting frameworks that link respect for good governance and human rights to development that benefits poor people. Through a process of expert consultation, AfriMAP has developed reporting frameworks in three thematic areas: the justice sector and the rule of law; democracy and political participation; and the effective delivery of public services. The frameworks include questionnaires, among them the questionnaire on democracy and political participation that guided this report. The questionnaire can be accessed on the AfriMAP website – www.afriMAP.org – in the section tabbed 'Our research'.

The reports are written and researched by experts from the countries concerned in close collaboration with the Open Society Institute's network of foundations in Africa and AfriMAP's own staff. Drafts of this report were reviewed by a range of experts, with their comments and criticisms reflected in the final content. The aim is that the reports should form a resource both for activists in the country concerned, and for others working across Africa, to improve respect for human rights and democratic values.

Acknowledgements

This study on political participation and democracy in Swaziland would not have been possible without the contributions of a cross-section of stakeholders, who are as diverse as they were invaluable. Sincere appreciation is expressed to all involved.

Many individuals from government departments and institutions, academics, members of civil society organisations, faith-based institutions and development partners gave up their time to be interviewed and then made insightful contributions during the validation of the report. The Swaziland Coalition of Concerned Civic Organisations (SCCCO), a non-governmental organisation, played a critical role as the host institution that oversaw the implementation of the project. The SCCCO's networks and engagement with the sector enabled access to key actors and important sources of information.

The author, Lomcebo Dlamini, worked diligently to produce a high-quality, credible and relevant report. Jeanette Minnie, of Zambezi FoX, an international freedom of expression and media consultant, did a thorough editing job, adding value with her in-depth regional knowledge of the political and democratic landscape of the sector. The AfriMAP/OSISA team of Roshnee Narrandes, Jeggan Grey-Johnson and Ozias Tungwarara supported the process by reviewing drafts, facilitating the validation workshop and providing administrative support.

Part I

Swaziland: Democracy and Political Participation

Discussion Paper

Introduction

A number of noteworthy political anniversaries occur in Swaziland's historical calendar during 2013. This year marks 45 years of Swazi independence, 40 years since the 1973 Proclamation that repealed the 1968 Constitution and 27 years since King Mswati III's ascension to the throne. The second national election under the 2005 Constitution is also due this year.

It is therefore apt to consider the democratic health of the Kingdom – an island of autocratic rule in the Southern African Development Community region, where the practice of democracy and multi-party politics stretches as far back as 48 years in at least one case.¹ In 1973, King Sobhuza II decreed the abrogation of the 1968 Constitution and with it the removal of a Bill of Rights and the banning of political parties, and assumed supreme power as the Head of Government and all its branches. The effect was to close all space to those with differing political views, not only in the expression of those views, but also in terms of association with others in the collective pursuit of political and governance objectives. By declaring them illegal, the decree removed the ability of political parties to compete in elections for political power and to govern according to their manifestoes and proposed policies. The 1973 Decree's imposition of a state of emergency and proscription of all political activity succeeded in dissuading political discussion, quieting dissent and temporarily driving political opposition underground.

During the past four decades since the decree, Swaziland has been grappling with calls for democratic transformation in the context of balancing tradition and 'modernity'. The issues listed below have emerged as essential components to be addressed in a programme of democratic change and improved political participation. This paper will focus on a discussion of these issues:

- The constitutional framework;
- Multi-party politics;
- Political parties and participation – what do the people of Swaziland want?
- The 2013 elections question – to boycott or participate?
- Dialogue on democracy and political participation: conditions and processes; and
- Civil society clarity on the establishment of a new pluralistic and democratic order.

¹ Botswana held its first multi-party elections in 1965.

1. Constitutional framework

The 1990s brought a change to the southern African region's political landscape as repressive regimes fell and democratic transformation began to take root in many countries. Ceding to national and international pressure, Swaziland began a constitution-making process in 1996. This process was an opportunity to engage in an earnest nation-building exercise of dialogue, negotiation and consensus-building about issues such as the governance framework of the country and the mechanisms for broad-based participation through political parties. Instead the process was largely exclusionary and the political climate remained hostile to free expression on governance and political matters.

As a result the Constitution adopted in 2005 is not enjoying legitimacy and acceptance by the general populace. While there was clearly an attempt to balance the interests of those calling for the respect of human rights and democracy and those calling for retention of the position prior to the Constitution, the Constitution remains conceptually skewed in favour of the 1973 Decree. The positive effect of many of the Constitution's progressive provisions is vitiated by the numerous inconsistencies, contradictions, overbroad limitations of human rights and deficiencies in the independence of constitutional bodies. The credibility of the Constitution has been further compromised by non-adherence to its provisions for legislative reform in order to align existing laws to constitutional principles.

The governing authorities, who are primarily responsible for the production of the current document and its implementation, have also expressed misgivings about the Constitution. The main concern of the traditional authorities with the Constitution is based on the issue of power. They interpret the Constitution as having severely truncated the power of the monarch and the traditional institutions in that they are now subject to the Constitution's provisions. In displaying their displeasure with provisions they are either opposed or not committed to, the governing authorities have gone to the extent of simply ignoring constitutional direction on certain matters. Examples include ignoring the provisions relating to the appointment and election of women into Parliament; the Cabinet not resigning after a vote of no confidence was passed in it by Parliament – nor the King dissolving Cabinet; and not appointing a Swazi Chief Justice after seven years after the commencement of the Constitution. These violations have been left unchallenged due to, among other things, the constitutional immunities of the King and the lack of independence of the judiciary.

Two schools of thought exist in Swaziland's pro-democracy movement regarding the Constitution. One asserts that the illegitimacy of the Constitution, based on the unacceptable nature of the constitution-making process, is such that it should be completely rejected. The other, while acknowledging the Constitution's procedural and substantive weaknesses, argues that the inclusion of a Bill of Rights (albeit in a diluted form), and other positive provisions, moves the country forward. The Bill of Rights provides civil society with a concrete legal platform on which to defend and protect the populace against human rights abuses, which was not the case before. Notwithstanding this debate, people in fact do refer to the Constitution as the supreme law and are using it to protect their rights, as evidenced by the numerous court

cases invoking the provisions of the Constitution. Even those challenging the legitimacy of the Constitution refer to its contents in seeking to protect their rights.

The process of strengthening democracy and political participation will necessitate reform and review of the Constitution to ensure it meets international standards. Agreement will have to be reached on whether the existing Constitution is to be repealed in its entirety and whether the constitution-making process will have to start afresh, or whether the current Constitution can be used as a working document and as a base for revision and amendment. The provisions for amendment of the current Constitution are extremely rigid and this may affect the length of time it could take to effect changes. In the interim, however, it is submitted that opportunities exist in the current Constitution to help open up the limited space of political participation. Continued civic education on human rights, democracy and good governance will contribute to the empowerment of the populace in terms of understanding what these rights mean. It will also mobilise them into action to seek redress for human rights violations and to hold authorities accountable for their actions, both individually and collectively. Continued advocacy through strategic litigation will also be important to test the Constitution and to position the courts to determine and clarify key issues affecting democracy and participation.

2. Multi-party politics

Swaziland's no-party system of governance is manifestly undemocratic and in need of transformation into a politically plural dispensation with the requisite policy, legal and institutional frameworks to promote and protect the practice of democracy and participation, as set out in section 58 of the Constitution on 'Political objectives', which stipulates that:

- Swaziland shall be a democratic country dedicated to principles which empower and encourage the active participation of all citizens at all levels in their own governance; and
- All associations aspiring to manage and direct public affairs shall conform to democratic principles in their internal organisations and practice.

In order to appreciate the contestation around the issue of political parties, it is necessary to examine the constitutional provisions on the freedoms of association and assembly in relation to the country's system of governance. In this regard, the relevant provisions – section 25 and section 79 – state the following:

Section 25. Protection of freedom of assembly and association

- A person has the right to freedom of peaceful assembly and association; and
- A person shall not except with the free consent of that person be hindered in the enjoyment of the freedom of peaceful assembly and association, that is to say, the right to assemble peacefully and associate freely with other persons for the promotion or protection of the interests of that person.

Section 79. System of government

- The system of government for Swaziland is a democratic, participatory, *tinkhundla*-based system which emphasises devolution of state power from central government to *tinkhundla*² areas and individual merit as a basis for election or appointment to public office.

The implication of the principle set out in section 25 is a tacit end to the ban on political parties and a guarantee of the rights of persons to establish, join as well as use political parties to further their interests. However, the establishment of the system of governance on the basis of individual merit militates against this interpretation. Section 79 prevents political parties entering the election contest as groups representing their constituencies. It is as if the right to form political parties is given with one hand and taken away by the other. What is the point of political parties existing when they cannot by supreme law fulfil the very reason for which they are formed?

Accepted contemporary wisdom on political parties is that they are:

organised group[s] ... formed with the sole purpose of articulating and aggregating the interests of the group, contesting control over state power and government, and directing a country's development process in line with [their] ideological orientations and policy frameworks, as defined in party manifesto[es].³

There are four central functions of political parties in modern representative democracies:

- To develop consistent policies and government functions (the interest articulation function);
- To pick up demands from society and bundle them (the interest aggregation function);
- To recruit, select and train people for positions in government;
- To oversee and control government.⁴

If the above is accepted, then the continued denial by Swaziland's governing authorities of space to political parties to operate and contest elections is directly in violation of the multiple regional and international instruments on democracy and political-party participation to which the country has committed itself. Yet, despite committing to these instruments, government remains intransigent on the issue of political parties.

At the March 2012 Session of the United Nations Human Rights Council's Universal Periodic Review, the following recommendations, among others, were made on Swaziland:

Consider allowing the registration and operation of political parties, including greater political freedoms through free, fair, transparent elections (77.48); to remove all legislative and practical restrictions impeding the free exercise of civil and political

² An *inkhundla* (plural, *tinkhundla*) is an area comprising several – about four or five – chiefdoms which, at election time, serves as a constituency area for the election of a parliamentary representative.

³ EISA, *Political Parties and Democratisation in the Southern African Development Community: The Weakest Link?*, 2005, p. 2.

⁴ International Institute for Democracy and Electoral Assistance, *Effective Party Assistance: Stronger Parties for Better Democracy*, 2007, p. 7.

rights, in particular those related to freedom of expression, with a view, to allow the creation of political parties and respect for trade unions (77.51); to enact legislative measures to facilitate the existence of political parties (77.52); to take steps to further democratisation efforts, including enacting laws that facilitate the registration of political parties (77.55).

But the response of the Minister of Justice and Constitutional Affairs, Chief Mgwagwa Gamedze, indicated a firm government rejection of these proposals. Minister Gamedze stated that:

The intervention made by the Swaziland delegation on 4 October 2011 explained that political parties are not banned. Section 25, read together with section 32 of our Constitution protects the right to freedom of association including the rights of Trade Unions. However by virtue of section 79 of the Constitution, election to public office is by individual merit and therefore political parties cannot field candidates in national elections. The Constitution is a product of wide consultations and hence reflects the views of the majority of Swazis. For those reasons Swaziland is not yet ready to accept the recommendations relating to permitting political parties to contest elections.⁵

Contrary to the minister's statement, the Swaziland pro-democracy movement argues that the people of Swaziland want a change in the manner in which the country is governed. They specifically want to exercise the freedom to form political parties that are able to participate in elections and provide policy alternatives from which the people can choose. By not allowing political-party candidates to participate in elections as representatives of political parties and confining them to individually based participation, the whole reason behind the existence and operation of political parties is undermined and the political parties are rendered useless in their quest for the power to govern. Further reinforcing this position is government's refusal to enact legislation that recognises political parties and enables them to register and operate. The government's actions in this regard give credence to the assertions that there was never any political will by those in authority to actually implement the 2005 Constitution.

There is also the matter of political parties and organisations that are proscribed entities. Their illegality, which originally derived from their banning by the 1973 Decree, was overridden by the 2005 Constitution, which allows the existence of political parties (but prevents them from contesting elections). Proscribed political parties and organisations are now banned under the 2008 Suppression of Terrorism Act. This law was enacted ostensibly as part of Swaziland's commitment to contributing to the 'global war on terror' and the state was simply adhering to the agreements made by the international community and following in the footsteps of many other countries that were also enacting similar legislation. However, the use of terrorism legislation to limit the activities of certain political organisations is simply a guise behind which to suppress effective challenges to the status quo.

⁵ Minister of Justice and Constitutional Affairs, Chief Mgwagwa Gamedze, *Statement to the Human Rights Council*, Geneva, 15 March 2012.

The competing narratives on political parties in Swaziland in the public domain have been based on three issues. Firstly, there has been an assertion by the governing authorities that the Swazi people are not ready and do not want political parties because they are divisive, threaten the unity and way of life of the Swazi people and the peace of the country. On the other hand, proponents of multi-party democracy have continued to insist that this assertion is false and that it is the governing authorities that are against political parties because these would allow political diversity and threaten their hold on power. The third issue has been that in reality there is general ignorance about what political parties are, how they operate and what their role is in politics, democracy and good governance. This is linked to the deliberate de-politicisation of the populace since the 1973 Decree, which resulted in the people's exclusive exposure to the monarchy and current system. They therefore lack basic knowledge and understanding of what other alternatives exist.

Theories abound about the supposed political preferences of the populace. However, in reality, no one knows what these preferences are because most Swazis have been either unable or too afraid to voice their opinions. Methods such as referenda have been suggested as possible ways in which to determine the views of the Swazi populace on political parties. However, while national discussion of the issue is necessary, this should by no means be interpreted as placing the constitutional right to freedom of association and assembly under review. As has been emphasised repeatedly by the pro-democracy movement, it is untenable that Swazis should be put in a position to vote on enjoyment of this fundamental freedom.

3. Political parties and participation

A holistic concept of democracy, whether as a value, a social process or as a practice, is underpinned by the presence and participation of the people in a society. It is the recognition that people have a right to participate in matters of governance, to exercise choice in determining, through their chosen representatives, the policies they believe have the potential to develop a community or country. The governance infrastructure of a country must therefore contain mechanisms by which the people can exercise this choice.

At the heart of both government's and the pro-democracy movement's justification of their polar opposite positions on political parties and their participation in the governance of the country, are their claims that they are articulating the wishes of the people of Swaziland. Yet, since the banning of political parties in 1973, no open national discussion has occurred between those representing these different shades of political opinion. This is despite the results of the governing authorities' own consultative processes such as the Tinkhundla Review Commission, who recommended in 1992 that 'the nation's opinion on multi-partyism/political parties' unbanning be tested in the near future'.⁶ The recommendation was never implemented.

As stated above, the governing authorities have always given the impression that the position they hold is based on listening to the people and that Swazis are content with the current system. Although this assertion can be challenged, the governing authorities have always been

⁶ *Report of the Tinkhundla Review Commission*, June 1992, p. 81.

able to showcase the thousands of Swazis participating in national ceremonies as evidence that Swazis supports the monarchy and its current position on the governance of the country. The elections have also consistently demonstrated relatively high numbers in terms of registration and voting and this has been cited as evidence of support for the incumbent system. However, counterarguments exist that the numbers of people that participate in these events do not do so out of love for the monarchy and system of government, but as a result of factors such as poverty, hunger, coercion and threat of sanction from traditional authorities if they do not participate. Indeed, in past meetings at the *Sibaya* royal cattle byre,⁷ many people have taken the opportunity to affirm their allegiance to the King and disassociate themselves from ‘progressives’ promoting human rights and multi-partyism in the hopes of securing, among other things, educational opportunities, employment and appointment to public office.

Criticism of the system of governance and government itself has been extremely limited in such forums in the past. This is influenced by the fear of criticising the King (through criticising the government he appointed) at his own residence and the resulting sanction that could be visited on the individual and her or his family. Unlike in the past, under the current manipulation of Swazi tradition and culture it is unacceptable to criticise the King, even indirectly. However, the temper of the people during the August 2012 *Sibaya* was unlike any other previous gathering of the nation. Those who made submissions were highly critical of government and were calling for change, including the sacking of Cabinet and the transformation of the system into a multi-party dispensation ahead of the 2013 elections.

Of significance is that these critical submissions were not being made by the ‘usual suspects’ in the leadership of the pro-democracy movement, who have been easily dismissed in the past as an elitist minority out to destroy the values and unity of Swazi society by wanting to import ‘foreign’ ideas into the country. While some civil society and political-party leaders did participate in the *Sibaya*, it was largely ‘ordinary’ Swazis from the most rural and remotest of areas who were complaining most bitterly about the failures, corruption and incompetence of the government in leading the country and poorly advising the King. Speaker after speaker requested changes in the government, including the introduction of political parties in the contest for political power, both generally, as well as with specific reference to the 2013 elections. The myth that the people are content with things the way they are has now been exposed as a blatant untruth. While it is not yet clear what actions will be taken by the governing authorities in response to the recommendations of the *Sibaya*, the vocal and highly visible expression of discontent of the people attest to the truth asserted by civil society and political groupings that Swazis want change. It nevertheless remains a challenge for civil society to leverage this energy in persuading the governing authorities to enter into a genuine dialogue about democratic change.

At the same time Swaziland’s system of governance is not invincible and its weaknesses are gradually being exposed by, among other things, the country’s continuing economic and fiscal crisis. The existing vulnerabilities of the system, for instance in terms of divisions and growing disaffection within the governing authorities (government, royalty, traditional authorities and

⁷ Section 232 of the national Constitution states that, ‘The people through *Sibaya* constitute the highest policy and advisory council (*Libandla*) of the nation’; and that ‘*Sibaya* functions as the annual general meeting of the nation but may be convened at any time to present the views of the nation on pressing and controversial national issues.’

security forces) are also contributing internally to pressure for change. The pro-democracy movement must invest time in better understanding this dimension of the political dynamics at play in Swaziland, so that it can identify and also use newly arising opportunities to sustain and strengthen its push for democracy.

4. The 2013 elections question

As elections are an important process in the creation of government, the question of participating in or boycotting elections is always a predominant feature in an election year; 2013 is no exception and as usual the different positions of civil society groupings and political parties have been a thorny and divisive issue.

The stated rationale behind the calls for boycotting is that the elections are a farce since they fail to meet most universally accepted standards of democratic practice. This view points out that no amount of good intentions, qualifications and talent can make an impact on the existing structures of government – executive and legislature – that are constituted after an election. It views it as futile to enter a system of government headed by an executive monarch in his capacities as both *iNgwenyama* and King, where no view or action contrary to those of the traditional structures will be accepted.

Those who have decided to participate in the elections have expressed the view that participation – albeit within tightly circumscribed parameters – is an opportunity to enter the playing field and at least attempt to open up the political space using available governance machinery. This approach views the attempt – even if it does not lead to immediate success – as better than doing nothing. Boycotting is seen as indirectly colluding with the authorities in enabling the system to continue, whereas the presence of at least some opposition members in Parliament will influence the decisions that are made. Civil society organisations, while acknowledging the undemocratic nature of the current system of governance and advocating democracy and political pluralism in its work, have for the most part asserted their non-partisan nature in this dispute. Civil society sees its role as equipping the populace, particularly in the rural areas, with knowledge about human rights, democracy and good governance, as well as systems of governance and the importance and implications of elections as the exercise of a civic right and responsibility. It is then up to members of society to make their own informed decisions on the positions and actions they want to take.

While still contentious, recent months have seen some consensus within the pro-democracy movement that the diverse positions on elections are strongly held. Rather than engage in a futile effort to convert everyone to one position, civil society and political parties should accept this diversity, but not allow these differences to become a distraction from the bigger systemic transformation that needs to take place. The various pro-democracy organisations and political parties have instead agreed that it is possible to converge around the one central idea that they all accept – the restoration of a democratic multi-party dispensation in Swaziland.

Growing maturity in the pro-democracy movement is being demonstrated by the acceptance of the need to focus on the bigger issue of the system of governance, rather than the event of an

election. The various umbrella bodies that unite civil society and political parties are beginning to collaborate as a united front on advocacy campaigns with a common purpose. These include the Swaziland Coalition of Concerned Civic Organisations, the Constituent Assembly of Civil Society and the Swaziland United Democratic Front. While areas of sharp disagreement still remain, the fact that these umbrella formations have begun discussing cooperation, the pooling of resources and comparative advantages with the aim of more effectively pushing for multi-party democracy – in particular, the legal and institutional reform that will enable political parties to register, operate and participate in elections – is a good start. Through these actions, the pro-democracy groups are also beginning to deepen their own democratic values by learning to respect each other's differences.

5. Dialogue on democracy and political participation

Questions remain about the response of the governing authorities to the calls for the transformation of the system. The pro-democracy movement in Swaziland has been consistent in the past few years in collectively expressing the need for political change through peaceful means, primarily through dialogue between the different 'sides' on the issue of a multi-party electoral system. As stated, government's position clearly does not accommodate positive consideration of the establishment of a multi-party dispensation.

Among the issues that arise is therefore the question of what will motivate the governing authorities to pay attention to the calls for a multi-party democracy to the extent of engaging in a process of dialogue about the matter. After all, as one member of the King's Advisory Council put it many years ago, dialogue and negotiation are about giving and taking and using what you have to leverage for or against positions you support or oppose. On what basis and with what leverage can the pro-democracy movement demand dialogue with the incumbent authorities? All the power is in the King's hands, as is the control of national resources and the state security apparatus. Civil society has no threat to issue and no benefit to offer – and thus there is no incentive for the governing authorities to even listen to these calls, let alone initiate a dialogue on them. From their perspective there may not even be a problem to address. This question raises the stark reality that the existing power relations are such that the governing authorities currently have the upper hand in determining the political direction of the country.

However, the fact that the people have spoken out in the *Sibaya* gives the pro-democracy movement a good basis on which to strengthen popular support for change on the ground. This 'people power' will be the most valuable component of advocacy for change in Swaziland and the pro-democracy movement must harness it accordingly.

Activism of the people on the ground is extremely important because, while it is acknowledged that change will result from both internal and external complementary actions, the 'struggle' for democratisation must be primarily waged by Swazis from within Swaziland. It is predominantly the visibility of mass support for multi-party electoral change within Swaziland that will make the case for external actors, such as regional and international civil society and intergovernmental

bodies, to lend their support. The international community, through diplomatic representation to Swaziland and structures such as the African Union's African Commission on Human and Peoples' Rights, European Union, Commonwealth and United Nations, have already publicly given support to the principle of democratic transformation in Swaziland.

Another reality is that Swaziland, with its small population of a million people, is perceived as a mainly peaceful and stable country, compared for instance to some of its sub-regional neighbours like Zimbabwe. In addition, it lacks the kind of mineral wealth and other natural resources that could evoke more regional or international interest. As far as the world can see, while Swaziland may have its share of problems, it hardly qualifies as a 'crisis country' relative to, for instance, bigger, better resourced and violence-ridden countries such as the Democratic Republic of Congo, Syria, Sudan, Mali and Zimbabwe. Inasmuch as the concerns are registered, a greater international prioritisation of or at least focus on Swaziland will only occur as a buttress to local efforts.

With all the advocacy efforts taking place and set to continue, it is inevitable that dialogue will eventually occur in Swaziland. When the time comes, it is equally important that there is agreement on the manner in which the dialogue will be conducted and on the process to be followed. There will have to be agreement on the appropriate forum for conducting the dialogue. Forums such as the Smart Partnership Dialogues, the Social Dialogue (involving only labour, government and the private sector) and the *Sibaya* have all been discredited because the governing authorities control both the agenda as well as the later outcomes of these discussions. In all these cases it is the government that remains in control of the implementation of any recommendations. The manner of representation and mandates of those groups and persons who will be engaging directly in the dialogue, and a statement of intent or commitment to the implementation of the decisions, will have to be addressed. If the dialogue is to be genuine and meaningful, the existing limitations on the freedoms of expression (including of the media), association and assembly will also have to be removed.

6. Civil society participation

There is a need to think beyond the mere declaration of multi-partyism and to contribute to practical preparations for the establishment of the new envisaged democratic order. Having mobilised popular support, the position of the pro-democracy movement on key issues will be important.

For instance, the pro-democracy movement cannot afford to be vague about the content of the necessary constitutional and legal reforms that will be necessary. There is a need for clarity on the substantive content of legislation that will deal with the registration, operations and electoral participation of political parties. There will have to be consideration of the actual electoral system that is most likely to ensure participative democracy for the people. Will the current first-past-the-post system be retained or replaced by proportional representation, the mixed-member proportional system or a combination of some of these systems? How will the issue of representation of women and other marginalised groups be dealt with? After all,

the issues of participation in Swaziland are not limited to the legalisation of political parties alone. Exclusion from political participation arising from gender-based discrimination, physical disability and issues of immigration are also serious problems in Swaziland that need to be addressed in a fully participatory and democratic dispensation. Civic education initiatives over the years have contributed to correcting misinformation and misunderstanding in communities about the concepts of human rights and democracy and emphasising the role that citizens can play in promoting them. It is imperative that civic education of this kind continues even as other awareness-raising, mobilisation and advocacy activities are being implemented.

Another issue to be addressed is the implication of a 'constitutional monarchy' in a new dispensation. While the phrase is differently interpreted, almost all groups agree that it should mean that the monarchy should be removed from involvement in any form of partisan and executive politics. The monarchy should remain, but only as a unifying and non-partisan symbol of the Swazi nation and symbolic Head of State. As pressure for the country to democratise has increased, the issue of the status and role of the King and monarchy in a democratic dispensation has become paramount. At a recent *Indaba*⁸ on political alternatives for Swaziland, political parties were requested to share their views on the position of the monarchy. The diversity of views demonstrated how complex consideration of this question was. *Sive Siyinqaba*, the Ngwane National Liberatory Congress and the National Congress for Democratic Change seem to accept the notion of a constitutional monarch, while the Communist Party of Swaziland advocates for a republic. The African United Democratic Party's position seems to lean towards a republic with the monarchy continuing to exist, albeit in a subordinate position to a President. The People's United Democratic Movement, which has toyed with both the idea of a republic and a constitutional monarchy, was non-committal, simply stating that it advocates for a democratic multi-party dispensation and once this is attained it will be the role of the people to decide on how to position the monarchy.

There can be no talk of Swaziland's democratic transformation if this question is not confronted. Concrete proposals in terms of how the constitutional monarchy will function in practice in a democratic Swaziland, and how the monarchy will be maintained, must be formulated.

It is therefore submitted that research, consultation and the drafting of policy and legislative proposals on these issues will contribute to assisting the pro-democracy movement in sharpening its work and ensuring that it would be a viable dialogue partner in the democratisation process.

7. Challenges for pro-democracy civil society

In view of the challenges and the absence of a level playing field for the promotion of democracy, it is critical that the various components of civil society work together, because only a collective effort will have any chance of bringing about political transformation in the country. However, the unity of the pro-democracy movement has been tenuous – even while accepting that they all want a democratic multi-party dispensation. Differences in opinion, strategies and competing

⁸ Keynote consultative conference.

personalities have led to deep suspicion and mistrust within the movement. For instance, positions on the boycott of or participation in the 2013 elections are almost religiously held, elevating matters of tactic and strategy to matters of principle and ideology. The consequence is that some political-party leaders have difficulty working with those with an opposing view, petulantly claiming they 'have nothing in common'. There have been various initiatives to encourage dialogue and collaboration between civil society and political parties. While there is some progress on the part of civil society, it is clear that there is a need to continue working with political parties in order to sustain their cooperation in working for the common goal of a multi-party dispensation.

Leadership development within the pro-democracy movement is critical. This not only involves the current leadership in office, but should be aimed at creating several layers of leadership from which a pool of leaders can be drawn (and further mentored) to ensure sustainability of the movement's work. Capacity-building should include components that deal with policy formulation; good governance and the practice of internal democracy within the various organisations and political parties; negotiation; political advocacy and communication as well as conflict resolution and transformation. The need for development in these areas has been a recurring observation and will be core to ensuring that those who promote democracy also have the ability to manage its practice effectively.

In the context of the existing power imbalance, the pro-democracy movement must implement multifaceted and multilayered strategies. Civil society needs to be proactive in being able to recognise and use opportunities that exist or present themselves. An example is when Parliament passed a motion of no confidence in the Cabinet last year (and later reversed the vote in controversial circumstances), but ignorance, misconceptions and misunderstanding of the structures of government acted as a barrier to effective civil society action in this regard.

Most of the engagement with the governing authorities on democratisation and political participation initiatives have been at national level and focused on national systems and structures. Yet there are a number of governance levels starting with local government – both in urban and rural areas – whose possible utility for promoting democracy has not been investigated or used as part of the process. Additionally, civil society should take time to understand traditional processes as these may also lead to the uncovering of formerly existing traditional methods of popular participation and checks and balances in the exercise of power.

There is a need for creativity and innovation when considering strategies for change. For instance, there are persons within the governing authorities and structures who are well disposed to democratic development and they can be urged to support the calls for democracy without unduly being exposed or compromised. The policy- and law-making processes of Parliament (including parliamentary committees) as well as the periodic reporting of the executive to Parliament can also be used as opportunities to contribute to ongoing advocacy efforts. Even with regard to traditional authorities, it should be considered whether their presence 'on the inside' can be used to benefit transformation. The aversion to the undemocratic nature of the system must not be such that it 'blinds' civil society to the possibilities that may exist in non-traditional methods of civil-society work.

Another consideration is that of the environment within which advocacy for democracy and political participation in Swaziland is being conducted and its security implications. With the attitude that government has displayed thus far in suppressing the freedoms of expression, association and assembly, and the often violent reprisals faced by human rights defenders and political activists, coupled with the increasing militarisation of the state, and the high degree of infiltration of civil society, it is anticipated that amplified calls for democratisation will result in greater repressive measures being undertaken by the state. The nature of the change being demanded and the level of resistance by government are such that confrontation of one sort or another is inevitable. Civil society should prepare itself for this eventuality, through, for example, establishing mechanisms that will deal with retaliation by the state and the targeting of pro-democracy activists. Such preparations will alleviate the impact of repressive measures unduly disturbing the momentum of pro-democracy work.

Conclusion

The current system of governance in Swaziland does not meet any of the regional and international standards on democracy and political participation that the country has committed itself to and the authorities simply do not have the political will to promote compliance by opening up the necessary political space. On the contrary, repressive measures in both law and action have demonstrated that the closed political space is intended and the exclusion of popular participation in the form of organised formations such as political parties is deliberate. The limited space for citizen engagement in policy- and law-making processes is further reduced when these processes threaten to touch on political issues and where there is likely to be dissent about the authorities' proposals. The monitoring of the implementation of and compliance with Swaziland's obligations must continue and be strengthened in this climate as it will contribute to the body of evidence that informs the advocacy work of the pro-democracy movement.

The hostile attitude of government means that calls for democracy and political participation cannot depend on the good will of the governing authorities, but must be amplified through mass mobilisation and advocacy activities that make it difficult for the authorities to ignore them. The pro-democracy movement must therefore work hard at community and 'grassroots' levels with all sectors of society. The four decades of deliberate de-politicisation of the populace have produced a nation that is filled with fear, apathy and resignation to the indefinite continuation of Swaziland's undemocratic system of governance. The primary task therefore is the development of political awareness among the people so that they not only understand their civic rights and responsibilities, but are also willing to take action to protect them. The main challenge for the pro-democracy movement as it conducts mass mobilisation will be to craft their messages on democracy and political participation in a manner that resonates with people's lived realities. The current system, through law, custom and even religion have presented multi-party politics as a spectre to be avoided at all costs rather than a vehicle by which the populace can meaningfully participate in matters of governance at all levels.

Part II

Swaziland: Democracy and Political Participation

Main Report

1

Background and context

The Kingdom of Swaziland became a sovereign state on 6 September 1968, attaining independence from Britain and thus being released from its former status as a protectorate, which had seen the territory variously administered by both South African and British colonial powers since the mid-19th century.

While Swaziland's status as independent had been recognised and guaranteed by the Swaziland Conventions of 1890, 1893 and 1894, the incorporation of Swaziland (together with the other 'High Commission territories', the then Bechuanaland and Basutoland) into the Union of South Africa, had long been the subject of discussion between the colonial authorities and South African government. However, fate intervened and ultimately the attainment of sovereignty was the by-product of the recurrent conflicts between the Boers⁹ and the British at the turn of the 20th century. At the end of the Anglo-Boer War in 1902, the British victory meant that control of the Transvaal and Swaziland, which had previously been held by the Afrikaners (Boers), was now transferred to the British. According to Matsebula:

On 25 June 1903 Britain issued the Swaziland order-in-council, under the British Foreign Jurisdiction Act, whereby the administration of the territory was formally taken over. This order placed Swaziland directly under the governor of the Transvaal, who was vested with executive powers ... in the name of the King of England.¹⁰

The British system of 'indirect rule' in colonial governance essentially enabled the traditional

⁹ 'The discovery of diamonds, and later gold, was one of the catalysts that triggered the 19th-century conflict known as the Anglo-Boer War, as the Boers (original Dutch, Flemish, German, and French settlers) and the British fought for the control of the South African mineral wealth.' http://en.wikipedia.org/wiki/South_Africa. The Anglo-Boer War is nowadays often referred to as the 'South African War'.

¹⁰ Matsebula, J.S.M., *A History of Swaziland* (3rd edn), Longman Penguin Southern Africa, 1988, p. 179.

system, using customary law and structures – at the apex of which was the *Ngwenyama*¹¹ – to continue operating and enforcing its authority over the indigenous Swazis while making laws and administering the territory primarily for the protection and benefit of the settler community who formed the European Advisory Committee (EAC) to represent their interests. In this regard, the 1903 order-in-council stated that the governor was to ‘respect any Native laws by which the civil relations of any Native Chiefs, tribes or populations are now regulated except in so far as [these] may be incompatible with the due exercise of His Majesty’s power and jurisdiction or is clearly injurious to the welfare of the said Natives’.¹²

Therefore, while the colonial administration was in charge of the territory, Swazi traditional governance institutions remained fully operational. These institutions, underpinned by the institution of chieftaincy, were subordinate to the colonial authorities. The *Ngwenyama*, designated ‘Paramount Chief,’ was subordinate to the British monarch, who was regarded as the head of the territory. The laws enacted by the colonial administration and the structures they created, were regarded as superior to the customary law and the indigenous Swazi also had to submit to their dictates. In 1907, Roman-Dutch common law was officially incorporated as the general law of Swaziland. This effectively created a dual legal system, setting the stage for the subsequent years of uncertainty in the law that persist even today because of the inherent conflict in the application of two distinct sets of laws whose requirements are often very divergent.

A. Swaziland attains independence

The handover of power and authority to the Swazi to govern themselves is often hailed as peaceful, unlike the case of the Kingdom’s immediate and regional neighbours. Yet, despite the absence of overt and visible signs of the conflicts that had manifested themselves as wars in other parts of the African continent, behind the peaceful civility portrayed at the independence celebrations, the reality was that the road to self-rule was fraught with disagreements, suspicions, tensions and fractured relationships within and among the various segments of Swazi society, as each engaged in a variety of political manoeuvrings to secure their interests in an independent Swaziland. Many of the questions that created and fuelled the conflict – political parties, human rights, land, the duality of the system of governance – have continued to frustrate political progress in the country to date.

Swaziland’s independence was in keeping with the end of the colonial era and the wave of independence that was sweeping across Africa at the time, with Ghana having been the first country to have attained this status from Britain in 1957. However, as stated, the journey towards independence was not an easy one. The issues and questions that occupied the thinking and discussions on what self-government would entail for Swaziland included the nature of the constitutional framework that would govern the country, the features of the political landscape, the institutions that would be put in place to ensure effective governance, the manner of representation of the people (including electoral processes and the highly contentious issue of political parties), race relations, natural resources such as land and minerals, and the position and

¹¹ *iNgwenyama* is the title of the traditional head of the Swazi nation; *iNgwenyama* is currently also the King and Head of State of the Kingdom of Swaziland.

¹² Matsebula, J.S.M., *A History of Swaziland*, p. 179.

role of the institution of the monarchy and of Swazi customary law. Dealing with these questions has since seen the proposal and implementation of a number of different formulations in search of what might be suitable for the Swazi people.

A key issue during this progression towards independence was the manner of representation of the indigenous Swazi people in any process to determine what the future of self-government would look like. The *Ngwenyama* and traditional authorities were convinced of the sole legitimacy of the *Sibaya*, the Swazi National Council (SNC), in playing this role. The SNC was a traditional institution, comprised of all adult Swazi males and was an advisory body to the King. It was the view of the traditional authorities that no other structure was necessary in representing Swazis' interests. This meant that other structures such as political parties were excluded from representing their constituencies. The patriarchal nature of the traditional system also meant that women were excluded from full participation in matters of governance.

The persistent emergence of four distinct but inextricably intertwined issues in the country's fitful journey towards democracy demonstrate the extent to which issues of participation and exclusion are core to the political and democratic development of Swaziland. The first are the constitutional processes that have taken place since the early 1960s to date. The second is the issue of representation – the preference for individual merit as opposed to organised representation. Thirdly, an examination of the history reveals that the issue of political parties and their role in the national political arena has always been contentious. Finally and perhaps most importantly – in view of the centrality of the institution to Swazi politics and its evolution – the role of the monarchy has always been a key issue to be addressed. The original contestations around these issues remain unresolved to date: 45 years of independence and eight years of a new national Constitution have not brought the various elements of Swazi society any closer to a consensus.

B. Constitutional processes

Issues of broad-based participation in Swaziland's political affairs began to come to the fore in the late 1950s as the inevitability of independence for all colonies became a reality and the British wanted to ensure the establishment of democratic frameworks and institutions for the newly independent African nations. Initial tentative discussions between the SNC, the EAC and the colonial administration on possible constitutional arrangements that would be suitable for the soon-to-be independent country, started in 1959.

The first Constitutional Committee was set up in November 1960 and on it were represented the various shades of Swazi society at that time – the SNC, purportedly representing the interests of the indigenous Swazis; the EAC representing the white settler community; and the colonial administration. Despite the fact that political parties were already in existence, they were not represented on this body. Three members of the Swaziland Progressive Party (SPP) were appointed to the committee, but as individuals and members of the SNC, not as representatives of their party and its policies. The committee presented constitutional proposals in its report of December 1961, which was officially released in March 1962 for public comment. Further constitutional discussions took place in London from 28 January to 12 February 1963.

In London, however, irreconcilable differences emerged in the views of the different groups represented. Eventually, the Secretary of State, Duncan Sandys, made the final decision on the Constitution, stating that:

since the lengthy discussions and consultations had failed to reconcile differing opinion, he had been obliged to decide on his own responsibility what form the new Constitution should take. He also claimed that he had endeavoured to take account of the traditional Swazi institutions; the contributions of the European community to the economy of the country; and the need to provide an opportunity for political expression of those who, while respecting the position of the *Ngwenyama* and the Swazi National Council, do not feel themselves adequately represented by the tribal structure.¹³

The Constitution established a Legislative Council (Legco) of 24 members – eight elected by ‘traditional method’ via the SNC, eight Europeans, half of whom would be elected on the European roll and the other half on the national roll, and eight elected on the national roll. The Resident Commissioner retained the executive power. This Constitution was promulgated in November 1963, and the first elections set for 1964.

The dissatisfaction of the Swazi traditional authorities with the 1963 Constitution was communicated to the British via a petition that:

sought relief ‘in the name of justice’ from the new Constitution which seeks to impose a system of electing members of the Legislative Council which is wholly unsuitable to and unacceptable by the people of Swaziland; ignores its protectorate status, and ... the rightful position of the King of Swaziland; takes away from the Swazi nation its rights to land and minerals, and from the nation, and the National Council and the *Ngwenyama*-in-Council powers in regard to its own institutions. It contended that the election procedure was complicated and confusing, and would ‘force the majority of people to participate in a form of political activity which it does not want and does not understand’.¹⁴

London also received correspondence from two political parties who also claimed to represent the views of the Swazis disassociating themselves from the petition. These very divergent views, each ostensibly coming from representatives of the Swazi people, created confusion in London as to which of them were the actual representatives of the Swazi people.

In order to demonstrate that he had the support of the people in objecting to the Constitution, King Sobhuza II, the reigning monarch of the time, instituted a referendum in May 1964 whose sole question was ‘Do you or do you not agree with the petition submitted by the *Ngwenyama* to the British government?’ Symbols were used to indicate the replies of respondents to the question – the lion by those who indicated support for the petition and the reindeer for those who were opposed to the petition. It has been suggested that the use of symbols was a necessity because over 75% of the Swazis eligible to vote were illiterate. However, some commentators

¹³ Kuper, H., *Sobhuza II: Ngwenyama and King of Swaziland*, Duckworth, 1978, p. 236.

¹⁴ *Ibid.*, p. 241.

have argued that the *Ngwenyama* had an unfair advantage and used the symbols to manipulate the electorate. The use of a symbol of an unfamiliar animal such as the reindeer, which had also previously been used to negatively describe political parties, would necessarily have yielded a result in which the Swazi voters would have leaned towards the lion as an animal they both respected and were familiar with. Whatever the case, the results of the referendum were overwhelmingly in support of the petition with over 122 000 voting for the petition and 154 voting against it in an eligible voter population of almost 125 000 people.

In March 1967, a new Constitution was promulgated. This was a consequence of continued discomfort with the 1963 Constitution that had established the Legco, but had continued to vest executive power in the local representative of the British monarch. The Imbokodvo National Movement (INM), having won the elections in 1964, had already expressed its intention to initiate a process to review the 1963 Constitution. This was accepted by the British in August 1965, leading to the establishment of a committee comprised of representatives of the INM, the United Swaziland Association (USA; a political party founded in 1964) and government. The resulting Constitution essentially established a multi-party dispensation with a constitutional monarch and a bicameral Parliament with the Prime Minister being the leader of the ruling party. It was this Constitution that governed the elections in April 1967 which were contested by the INM led by Prince Makhosini, the Ngwane National Liberatory Congress (NNLC) led by Dr Ambrose P. Zwane, the SPP led by J.J. Nquku, as well as the Swaziland United Front (SUF) led by Obed M. Mabuza. These elections were won by the INM with over 79% of the vote, leading to the party winning all 24 seats in Parliament.

The next development of constitutional significance was the 1972 elections. The elections of 1964 and 1967 had been overwhelmingly won by the INM which occupied all the then 24 seats in Parliament. In the 1972 elections, however, the NNLC was able to win one constituency and return three of its members to Parliament, signifying the first time the traditional authorities and the INM had been faced with an official opposition. Despite the fact that the INM was still the majority party in Parliament with 21 seats, the NNLC victory in Mpumalanga was clearly disturbing to the traditional authorities and the ruling party, which were both headed by the *Ngwenyama*. Shortly after the election, efforts were made to challenge the election of one of the NNLC candidates, Thomas Bhekindlela Ngwenya, with the allegation that he was not a Swazi citizen and therefore did not qualify for electoral candidacy. When government deported Ngwenya, he challenged this in court and the deportation order was set aside. Government then sought to amend the immigration legislation to establish a tribunal that would have the exclusive jurisdiction to deal with citizenship matters instead of the High Court. When Ngwenya's matter was brought before the tribunal by the minister that had appointed it, the tribunal unanimously found that Ngwenya was not a citizen of Swaziland. However, Ngwenya had challenged the law's amendment in the Appeal Court and the court struck down the amendment as unconstitutional.¹⁵

Through this episode reality seemed to dawn on the INM that its status as a ruling party with almost absolute power was not guaranteed. Firstly, the courts could compel it to adhere to judgments in conflict with its own positions and secondly, it would be possible over time – even

¹⁵ *Bhekindlela Thomas Ngwenya vs. the Deputy Prime Minister* 1973 SLR 120 AC.

with the King at the party's helm – that growth in opposition parties could mean the weakening of the INM and in turn, the King's power and authority. This realisation appears to have given credence to the traditional authorities' view that political parties were divisive and led the INM to assert that the existing constitutional framework was unsuitable for Swaziland. Consequently, on 12 April 1973, the Independence Constitution was repealed by the King's Proclamation to the Nation of 1973 (generally referred to as the '1973 Decree'). It is instructive to note the proffered rationale behind this decision in the following excerpt from the Proclamation:

- The Constitution has indeed failed to provide the machinery for good government and for the maintenance of peace and order;
- The Constitution is indeed the cause of growing unrest, insecurity, dissatisfaction with the state of affairs in our country and is an impediment to free and progressive development in all spheres of life;
- The Constitution has permitted the importation into our country of highly undesirable political practices alien to, and incompatible with the way of life in our society and designed to disrupt and destroy our own peaceful and constructive and essentially democratic methods of political activity; increasingly this element engenders hostility, bitterness, and unrest in our peaceful society;
- There is no constitutional way of effecting the necessary amendments to the Constitution; the method prescribed by the Constitution itself is wholly impracticable and will bring about the disorder, which any Constitution is meant to inhibit.

In repealing the Constitution, the King simultaneously dissolved Parliament, stating, 'I have assumed supreme power in the Kingdom of Swaziland and that all legislative, executive and judicial power is vested in myself and shall, for the meantime, be exercised in collaboration with a Council constituted by my Cabinet.' In addition, the King announced the deployment of the army and the police force, to all 'strategic places ... government places and all public services' to 'ensure the maintenance of peace, order and good government'.

In September 1973, King Sobhuza II appointed the Royal Constitutional Commission (RCC) among whose tasks was 'To enquire into the fundamental principles on which the Kingdom of Swaziland's Constitution should be based, having regard to the history, the culture, the way of life of the people of Swaziland, and the need to harmonise these with the modern principles of constitutional and international law.'¹⁶ While the report of the RCC was not published as a Constitution per se, it is widely understood that its recommendations were the basis of the Establishment of Parliament Order of 1978. This Order brought about changes to the constitutional framework in that it formalised the use of the *tinkhundla*¹⁷ system. According to the Order, the country was divided into forty constituencies from which a representative was to be elected. These elections however took place without secrecy of the ballot. Furthermore, the forty winning candidates formed an Electoral College, which then elected representatives to Parliament. It is important to note that since this Order, and despite some improvements to this

¹⁶ Levin, R., *When the Sleeping Grass Awakens*, Witwatersrand University Press, 1997, pp. 103–104.

¹⁷ An *inkhundla* (plural, *tinkhundla*) is an area comprising several (about four or five) chiefdoms which, at election time, serves as a constituency area for the election of a parliamentary representative.

system, candidates only contest elections based on individual merit and not according to political party or any other form of organisational representation.¹⁸

After ascending to the throne in 1986, King Mswati III also had to contend with the constitutional question in response to political advocacy by trade unions, international pressure and several commissions (also referred to as *Vuselas*). For instance, the Tinkhundla Review Commission stated, 'there should be a written Constitution for Swaziland.' According to Jan Sithole, former Secretary-General of the Swaziland Federation of Trade Unions (SFTU), which organised a nationwide strike in the mid-1990s, the demand for a written Constitution was 'demand No. 21' in the Federation's list of '27 demands' to government.

In 1996, King Mswati III appointed a 30-member Constitutional Review Commission (CRC) chaired by one of his senior brothers, Prince Mangaliso Dlamini,¹⁹ with the following terms of reference:

- Consider and provide for appropriate provisions and or entrenchments on the Monarchy, other Swazi traditional institutions, the three arms of government, legislation, citizenship, the public service, finance, the environment and natural resources (land and minerals) in the new Constitution;
- Examine and provide for fundamental human rights and freedoms of the individual and other rights in the new Constitution and for this purpose examine any legal instruments or documents that may contain them;
- Examine and determine the desirability of including principles of state policy in the new Constitution on certain vital matters affecting the people of Swaziland;
- Consider and provide for appropriate constitutional mechanisms to amend the new Constitution; and
- Ensure good governance, by including in the new Constitutions such other issues as may be necessary or appropriate.

In doing this, the decree stated that the commission was to:

compile and document the current constitutional framework of the country and circulate the same to all *tinkhundla* centres; receive oral submissions, representations and information from members of the general public on matters covered in its terms of reference and for this purpose visit all *tinkhundla* centres to access such members; and receive written submissions, representations and information from members of the public on the matters covered in its terms of reference.²⁰

¹⁸ Dlamini, L., 'Interesting times' in the Kingdom of Swaziland: The advent of the new Constitution and the challenge of change, In: *Outside the Ballot Box: Preconditions for Elections in Southern Africa 2005/6*. Minnie, J. (ed.), Media Institute of Southern Africa, 2006.

¹⁹ Prince Mangaliso Dlamini is also known as Chief Logcogco. He is currently Chairperson of *Liqoqo*, the King's Advisory Council.

²⁰ The report of the CRC states that these matters were: The Head of State; Citizenship; Three Arms of Government; Bill of Rights and Freedoms; Land; Minerals and Natural Resources; Civil Service; Finance; Good Governance; Foreign Relations; Environment; Attorney General; Swazi National Council; Government Based on Tinkhundla System; Matters Regulated by Swazi Law and Custom; Political Parties; Amendment of the Constitution and any other topic of the person's choice.

The commission was also empowered to seek advice from experts on Swazi law and custom, constitutional law and any other issue that the commission deemed appropriate. In 2000, the decree was amended and the time for the commission to complete its work extended until the end of October 2000 when the commission had to submit its final report to the King, which would include details of the work undertaken, including all records of submissions, representations and opinions heard and received by the commission and a draft of the proposed national Constitution.

When the CRC did not deliver a draft Constitution, the King established a 16-member Constitutional Drafting Committee (CDC) in 2002 chaired by another of the King's senior brothers, Prince David Dlamini, to produce a draft Constitution and conduct a national validation exercise of the document. The draft Constitution was presented at a *Sibaya*²¹ in October 2004, subsequently debated by Parliament and promulgated in July 2005, and came into force on 8 February 2006.

c. Individual merit and representation

The preference of individual participation by Swaziland's authorities in governance processes has been a consistent feature of Swaziland's political history. In the 1960 constitutional committee, members of the SPP were selected to form part of both the broader constitutional and the smaller working committees, but their participation was based on their individual qualifications as members of the Swazi National Council and not as members of their political parties. When they therefore sought to present SPP party positions, conflict would arise with the other members, particularly those from the SNC. One such instance resulted in an SPP member being expelled from the working committee and the other two members resigning in solidarity.

The preference for only recognising 'individual merit' has continued to date in the various national processes aimed at examining issues of governance in Swaziland. For instance, among the 12 persons appointed to the Tinkhundla Review Commission (TRC) were members of 'progressive' groups including Mandla Hlatshwako, then organising secretary for the People's United Democratic Movement (PUDEMO) and Samuel Mkhombe, then president of the Human Rights Association of Swaziland (HUMARAS). Hlatshwako subsequently resigned, citing among other issues the commission's terms of reference:

It is my contention that this country will know no peace or economic development if it does not honestly and frankly address its own problems. The call for a multi-party democracy, respect for fundamental human rights and the lifting of the state of emergency, coupled with emergence of political parties can no longer be reversed. This is a challenge which the terms of reference are conspicuously avoiding to confront.²²

Mkhombe, however, chose to see the process through despite pressure from HUMARAS to resign either as its president, or as a commissioner. In terms of participation by Swazis in making submissions to the TRC, section 6 of the Establishment of the Tinkhundla Review Commission

²¹ *Sibaya* means 'cattle byre' and is a structure that is found in most Swazi traditional and rural households. At the national level, *Sibaya* refers to the cattle byre at the main Royal Residence which serves as the location for meetings of the Swazi nation convened by the King to discuss national issues. *The Sibaya* is also known as the Swazi National Council.

²² Levin, *When The Sleeping Grass Awakens*, p. 224.

stated that, 'The commission may publish the necessary invitations calling on individual members of the Swazi nation to make written and/or oral submissions to the commission in regard to the aspects mentioned in the terms of reference of the commission.' This provision resulted in the prevention of group submissions representative of any collective interests.

In the 1996 CRC, members of progressive entities and political parties were again appointed, but again in their individual capacities. For various reasons relating to their discomfort with the process, four of these resigned: Nkonzo Hlatshwako (then a senior lecturer in law at the University of Swaziland); Mhawu Maziya (also a senior lecturer in law at the University of Swaziland); Mario Masuku (president of PUDEMO) and Dr Jerry Gule (then member of the Institute for Democratic Leadership). Masuku stated that he and his party had taken the appointment as an opportunity to represent PUDEMO's views on the constitution-making process and that he regarded his involvement in the process as 'deployment' by the party. However, when it became clear that his representative capacity was not going to be accommodated in the CRC's work, he felt that he did not have the mandate to continue participating in the commission and resigned, his 'deployment' effectively being withdrawn by PUDEMO.²³

In 2002 when the CDC was appointed, the appointments were again made according to the principle of individual merit. Unlike the constitutional processes of the 1960s that had invited and accepted both individual and group submissions, the CRC and the CDC were confined to receiving submissions from individuals. In this regard, section 4 of the Establishment of the Constitutional Review Commission Decree No. 2 of 1996 stated, 'Any member of the general public who desires to make a submission to the commission may do so in person or in writing and may not represent anyone or be represented in any capacity whilst making such submission to the commission.'

The preoccupation with individual merit has found its way to the current 'new' constitutional dispensation in relation to political participation. While section 25 provides for freedom of assembly and association, which by implication allows for the existence of political parties, section 79 stipulates that, 'The system of government for Swaziland is a democratic, participatory, *tinkhundla*-based system which emphasises devolution of state power from central government to *tinkhundla* areas and individual merit as a basis for election or appointment to public office.' This section effectively prevents political parties contesting elections as political parties, and in turn severely curtails their ability to exert influence on the politics and governance of the country.

D. Political parties and multi-party politics

Despite the suspicion and animosity towards political parties by Swaziland's governing authorities, political parties have always been part of the country's modern political landscape, the difference only being their level of activity due to the changes and fluctuations in the degree of their official recognition.

The formation of political parties gained momentum as independence drew closer. Between the formation of the first political party – the Swaziland Progressive Party (SPP) – in 1960 and the first elections in 1964, the following additional political parties were formed:

²³ Interview with Mario Masuku, President of PUDEMO, Mbabane, September 2012.

- Mbandzeni National Convention;
- Ngwane National Liberatory Congress (NNLC);
- United Swaziland Association (USA);
- Swaziland United Front (SUF);
- Swaziland Independent Front (SIF); and
- Imbokodvo National Movement (INM).

The resistance of the traditional authorities to political parties was temporarily brought to an end by the British insistence that the constitutional framework for an independent Swaziland should entail a multi-party dispensation. According to Kuper, in response to King Sobhuza's reservations about the system being entrenched in the Constitution, Sir Brian Marwick (then Resident Commissioner) stated that 'the Constitution was already drafted and some concessions made. If Sobhuza was so sure of the support for his viewpoint he should not fear the results of an election.'²⁴ When it became clear, even after the referendum that the British stance on the issue of political parties was not going to change, the traditional authorities had to confront the question of how they would engage with this arrangement. To this end, in April 1964, the King summoned the Swazi National Council to a *Sibaya* to discuss participation in the context of the new constitutional framework, in particular as elections were slated for June 1964.

The decision by Sobhuza to enter the political fray through a political organisation seems to have been one of last resort in the face of the inevitability of the multi-party dispensation that was to be introduced in preparation for independence. According to Kuper:

Faced with a Constitution that he and his Council opposed, he had three alternatives: to take no part in the elections; to support a general boycott; to enter the struggle as the *Ngwenyama*, King of the Swazi ... Sobhuza had been prepared to abide by the initial reaction of some of his advisors in the Council and ask his people to boycott the election. But to be effective such action would have to be total, or an unwelcome political minority on the basis of a few votes could claim victory.²⁵

Ultimately, the King made the announcement regarding the formation of the INM at the *Sibaya* meeting and that the movement would contest the upcoming elections.

Discomfort in relation to the monarch entering partisan politics, and aligning himself with a particular political party was also felt by the 'progressive' movement. The NNLC also submitted a memorandum to the King, signed by Dumisa Dlamini, himself a prince, in which they warned of the King's involvement in party politics: 'The King's participation in party politics shakes royalty to its foundations and threatens the entire nation with strife, disunity and unheard of pandemonium, since the defeat of the party which he, a born king leads, will logically spell the downfall of the royalty.'²⁶ Nonetheless, the INM continued with its plans to contest the elections. Perhaps in the final analysis it was simply expedient for Sobhuza to accede to the clear tide against him and the traditional system, knowing that once independence had been attained, the

²⁴ Kuper, *Sobhuza II: Ngwenyama and King of Swaziland*, p. 247.

²⁵ *Ibid.*, p. 249.

²⁶ *Times of Swaziland*, 15 May 1964, cited in Levin, *When the Sleeping Grass Awakens*, p. 72.

Swazis – represented by himself and the SNC through the INM – being in control as the ruling party, would restore the dispensation they wanted. After all, independence was the priority, even if it meant temporarily compromising on the issue of political parties.

The 1973 repeal of the Independence Constitution was a watershed in Swaziland's constitutional and political history, in particular in its outright banning of political parties and their consequent removal from participating in governance as per sections 11, 12 and 13 of the 1973 Decree:

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

Kuper seems to suggest that King Sobhuza II was not opposed to democracy per se, but simply wary of the manner in which it was being proposed for Swaziland, believing that the traditional system was a sufficiently strong foundation on which to build a modern, independent Swaziland.²⁷ Though acknowledging the exigencies of the changing times and the imperatives of 'modern' progress, he was against the wholesale adoption of a completely 'foreign' system and its institutions, in particular one that would create a multi-party dispensation, which he viewed as essentially Western-inspired.

King Sobhuza II had lived through the difficult colonial era where the indigenous people and their traditional institutions were regarded as inferior and during which his efforts to deal with the land question and restoration of Swaziland's boundaries, including various deputations to England, had been fruitless. He had also witnessed the impact of the 'winds of change' on African politics and the rise of African nationalism and pan-Africanism as many colonies were granted independence. He had observed the subsequent jostling for political power within newly independent states and the numerous cases of violent conflict and civil war that erupted to the detriment of African societies. Locally, he had also received reports of the nascent political parties and their leaders also behaving violently towards each other.

According to Kuper, Sobhuza II's preoccupation in the face of these developments was for the Swazi nation not to go down the route of violence, but to retain its unity and evolve politically in its own way within the context of the political turbulence of the time. It is unsurprising therefore that he regarded political parties as divisive and was suspicious of them. This made

²⁷ Kuper, H., *Sobhuza II: Ngwenyama and King of Swaziland*, Duckworth, 1978.

him reluctant to accord them a status that would enable them to participate in governance outside of the traditional system that had been operational prior to independence.

However, there are writers and commentators who suggest that Sobhuza's views, the actions inspired thereby, and their subsequent impact on the politics of the country, were simply motivated by a desire to retain political power in the hands of the monarchy and that the resistance to political parties was a deliberate and calculated political manoeuvre to remove the imminent threat of the erosion of this power. In this regard, Mzizi asserts that:

The King's intentions were not so obvious in the 1973 proclamation until one discovered that it was not the entire Independence Constitution that was under attack. In fact, it was the growing strength of the opposition that worried the King and his Swazi National Council. Proscribing party operation in terms of the Constitution was not an option; nor was it all that easy to amend a constitutional provision. The way out was to repeal the Independence Constitution with some reservations, which did not include the Bill of Rights enshrined in chapter 2 of the Constitution.²⁸

Subsequent constitutional processes have also had to grapple with the issue of political parties amid contestation about whether the Swazi people want political parties and the role of parties in governance. For instance, in its report, the 1973 RCC unequivocally recommended 'Swaziland should be declared a no-party state with the Swazi National Council as the only policy-making body.'²⁹ This recommendation fell in line with the position held consistently by the traditional authorities and government even prior to independence. However, the reality is that there has been neither free and open public discussion nor consensus on this issue. There has been some attempt in some of the consultative processes to reflect the diversity of opinion pertaining to political parties. The following excerpt from the report of the 1992 Tinkhundla Commission is instructive on the different perspectives that have informed the evolution of opinion regarding the operation of political parties in the country:

Most of those who made presentations to the commission as well as to the Prince Masitsela Committee were of the view that Swaziland was not yet ready for political parties; and that political parties were divisive. They agreed that the *tinkhundla* system should be improved by broadening the democratic base (allowing and encouraging popular participation) with greater emphasis on development. Some people argued that there could not be any democracy without multi-partyism.

The commission has carefully considered both views and is of the view that:

- Multi-partyism is not one of the principles of democracy whilst it is certainly one of its mechanisms;
- Since change is a dynamic process, the proposed changes to the *tinkhundla* system should be given a chance to determine the success or otherwise;
- In the near future and depending on the nation's political evolution, the view of Swazi nationals should be sought as to the need for further changes in the political structure.

²⁸ EISA, Mzizi, J.B., *Political Movements and the Challenges for Democracy in Swaziland*, 2005, p. 30.

²⁹ Matsebula, *A History of Swaziland*, p. 265.

A minority view on this issue was expressed as follows:

- The question of the unbanning of political parties failed to attract as much support as one would have expected from the proliferation of political parties that preceded the appointment of the commission.
- Most of those who made presentations to the commission as well as to the Prince Masitsela Committee were of the view that Swaziland is not yet ready for political parties. These presenters said that political parties were unknown in Swaziland, and they are divisive. A modified no-party *tinkhundla* system should be retained. This should involve more people in government at grassroots, with greater emphasis on development rather than politics.
- None of the presenters, however, indicated how the majority of the Swazi could understand political parties without lifting the ban on parties.
- It should be noted, however, that most of the known proponents for political parties seem to have grown cold feet and ‘ducked’ the commission. Only a handful owned up to support the unbanning of political parties before the commission.
- In terms of the Prince Masitsela Committee meetings, it was at the Mbabane *inkhundla* that there was a clear balance of speakers in favour of the unbanning of political parties and the disestablishment of the *tinkhundla* system.
- Even though there was a consensus among the commissioners that political parties not be unbanned presently, it should not be understood that all the commissioners are agreed that political parties are necessarily and always divisive or that they would have no role in the democratisation of Swaziland. The consensus within the commission would seem to be in line with what numerous presenters felt in that the *tinkhundla* system should be given a chance under a new management.
- It is generally agreed, however that democracy is not necessarily guaranteed by the existence of political parties. Political parties, if uncontrolled, can undermine democracy and the freedom of choice of the individual.
- The minority, however, is of the view that political parties have a definite role to play in shaping and sharpening public opinion on many of the big issues of the day that every government must deal with and make decisions on.
- It is also true that the pros and cons of political parties have not been openly and fairly canvassed in Swaziland. This issue could be tested, at a convenient date, by a national referendum or any other acceptable method.³⁰

The commission’s recommendation ‘on other issues to promote and to sustain the democratic process’, was that ‘the nation’s opinion on multi-partyism/political parties’ unbanning be tested in the near future’.³¹

³⁰ *Report of the Tinkhundla Review Commission*, June 1992, pp. 78–81.

³¹ *Ibid.*, p. 81.

On the issue of political parties, the 1996 CRC report states that:

An overwhelming majority of the nation recommends that political parties must remain banned. They do not want political parties in the Kingdom. There is an insignificant minority which recommends that political parties must be unbanned. The recommendation is that political parties must remain banned in the Kingdom. The existing laws regarding this position must be enforced.³²

The current Constitution's provisions are an attempt to find a middle ground on the issue of political parties. Section 25 recognises the freedoms of association and assembly and therefore implies the unbanning of political parties. However, any progress that was being attempted in this ostensibly non-threatening way is vitiated by the contradictory designation of the system of governance as based on individual merit, which does not enable political parties to contest elections on a multi-party platform. The government has also refused to enact legislation to enable political parties to function as part of the governance infrastructure of the country – from registration and operation to contesting elections.

E. Protection of the monarchy and Swazi law and custom

Throughout the period of colonialism and independence to date, and central to the various attempts to establish a democratic governance framework for Swaziland, has been the Swazi authorities' preoccupation with ensuring that Swazi customs, traditions and institutions are not weakened by 'modernisation' or 'alien' practices. Criticism of the content of the current national Constitution is centred on the assertion that the governance status quo envisaged by the 1973 Decree – namely that the King exercises supreme authority – still remains in place. Indeed, according to the 2005 Constitution, the King is an executive monarch who may exercise his executive power either directly or through a Cabinet minister. The King is also part of the legislature and no law can be passed without his assent. The judiciary on the other hand is designated as independent in the Constitution. However, it is argued that in practice, through the King's appointment of bodies such as the Judicial Service Commission (JSC), which advises the King on judicial appointments, the King can influence the JSC as well as judicial officers who are likely to defer to the King's wishes, thus compromising the independence of the judiciary. The institution of the monarchy is additionally protected by the immunities of *iNgwenyama* (the King), *iNdllovukazi* (Queen Mother/Queen Regent) and the Senior Prince, in effect elevating them above the Constitution and beyond the reach of the law.

Any discussion regarding improving democracy and participation in Swaziland cannot ignore the issue of the position of the King. The 1968 Independence Constitution established a constitutional monarchy, which was revoked by the 1973 Decree. As pressure for the country to democratise has increased, the issue of the status and role of the King and monarchy in a democratic dispensation has been paramount. At a recent *Indaba* (consultative conference) on political alternatives for Swaziland, political parties were requested to share their views on the position of the monarchy. The diversity of views demonstrates how complex the considerations

³² *Report of the Constitutional Review Commission, 2002, p. 95.*

of this question are. *Sive Siyinqaba*, the NNLC and the National Congress for Democratic Change (NACODEC) seem to accept the notion of a constitutional monarch while the Communist Party of Swaziland (CPS) advocates for a republic. The position of the African United Democratic Party (AUDP) seems to lean towards a republic with the monarchy continuing to exist albeit in a subordinate position to a President. PUDEMO, which has toyed with both the idea of a republic and a constitutional monarchy, was non-committal, simply stating that it advocates for a democratic multi-party dispensation and once this is attained, it will be the people who will decide how to position the monarchy.

F. Role of trade unions

In the absence of legal political parties, workers' organisations have played a critical role in the quest for democracy in Swaziland, benefiting from the protection afforded by the Conventions of the International Labour Organisation, in particular those related to freedom of association and assembly. From labour's protest actions in the early 1960s to those of recent years, advocacy for democracy and good governance has been an integral part of the advocacy for workers' interests.

As a result of the crackdown on free political activity, it was difficult to pursue overtly political agendas and over time trade unions became the vehicle through which the larger populace could express dissatisfaction, not only on worker conditions, but also with the general socio-economic and political situation in the country. The three key labour organisations – Swaziland Federation of Labour, Swaziland Federation of Trade Unions (SFTU) and Swaziland National Association of Teachers (SNAT) – have continued with the tradition of using their protected voice to express the concerns of the pro-democracy movement. The labour movement sees the struggle for workers' rights as inextricably linked to the governance of the country and the struggle for democracy. For instance, as stated above, the SFTU included in its famous '27 Demands' the demand for a written Constitution, alongside the demand, for example, for maternity rights for female workers.

Labour in Swaziland has also successfully created strong support networks among fraternal bodies over the world such as the Congress of South African Trade Unions and the International Trade Union Confederation, who have been consistently supportive of the approach of the Swazi trade unions in dealing with national issues. The recently established Trade Union Congress of Swaziland (TUCOSWA) has also pledged to continue along these lines, refusing to artificially separate socio-economic issues from political issues as demanded by the government. At its launch in March 2012, one of the resolutions taken was the boycott of the 2013 national elections, which firmly located TUCOSWA within the 'progressive' movement and on a collision course with authorities, a position that has led to the de-registration of the union by government.

The trade union movement however, has also encountered challenges including competition among political parties to influence the direction and decisions of workers. This has contributed to a level of division among trade unions as they attempt to strike a balance between their role and independence as workers' organisations and their broader pursuit of social justice and democratic governance in the country's highly charged political environment.

G. Impact of the land-tenure system

The issue of land is critical to Swazi politics on two levels. The first level deals with the issue of the borders of the country. The Border Adjustment Committee is seeking to resolve the long-standing matter of Swaziland's borders between South Africa and Mozambique. Secondly, and more importantly, is the issue of how land questions impact on popular participation. The land-tenure system includes Swazi Nation Land on which about 70% of Swazis reside and which is under the administration of chiefs and their councils. Chiefs have the power and authority to both allocate land and evict families from their homesteads. The allegiance that is demanded by this system means that the expression of dissent by those who live on Swazi Nation Land places them at risk of sanction from the traditional system. Political-party members and pro-democracy groups conducting work at community level have also been questioned by local traditional authorities about their activities and warned against continuing the promotion of 'politics' in these communities.

H. Critical issues regarding participation

During 2013, Swazis go to the polls for national elections. The prevailing atmosphere in Swaziland is one of suspense and trepidation at how the ongoing political conflicts will shape the governance architecture of the country going forward, if at all. Politics has always been a subject evoking fear among Swazis, and over the past few years, as pro-democracy groups and the international community have increased the pressure on the country to democratise, the tensions between these groups and the governing authorities have also increased.

This has been exacerbated by actions of government and other socio-economic developments that have graphically exposed the weaknesses in the current system of governance. Even though the fear still exists, current calls for change are not only emanating from 'the usual suspects' in the progressive movement, but are being echoed by 'ordinary' Swazis, even those from rural communities where traditional power and respect of and deference to the King and monarchy have been strongest and where criticism against these institutions and government has not been tolerated. Reports of civic education meetings at community level reveal that community members are beginning to understand the nexus between their current conditions and governance and that issues of lack of access to services, healthcare, education, potable water, poverty, unemployment and access to justice are all political issues.

From 6 to 11 August 2012, King Mswati III convened the *Sibaya* for discussion and recommendations on six issues: the economic crisis being faced by Swaziland; employment opportunities; poverty; how Swaziland can sustain itself with limited resources; various United Nations conventions, treaties and charters that need ratification; and the 2013 elections. It is thought that the convening of the *Sibaya* was precipitated by the impasse between government and the SNAT due to the protracted strike by teachers in which, during their seven-week absence from classes, the two parties had been engaged in varied legal processes on the legality of the SNAT's strike action. The strike – as is the case with protest actions conducted by other trade unions, civil society organisations and students – was simply yet another visible symptom of the political problems the country is facing, but which the authorities refuse to acknowledge.

Economically, Swaziland has been experiencing a fiscal crisis arising from years of overreliance on Southern African Customs Union (SACU) receipts. Income from these receipts had become the lion's share of government revenue and comprised up to 60% of the national budget. Coupled to over expenditure this situation resulted in a liquidity crisis in government when the income from the SACU dropped sharply by 62% in 2009/2010, leading to a budget deficit of about Emalangeni 3.65 billion (approximately USD 483.34 million). The deficit resulted in a situation where government had difficulty in meeting its obligations and proposing measures such as salary cuts for civil servants. While government attempted to formulate a Fiscal Adjustment Road Map to engineer a turnaround, attempts to secure loans from institutions such as the International Monetary Fund and African Development Bank were unsuccessful in the face of government's failure to put in place a number of structural conditions to support the recovery of the economy. Various countries were also approached by the government for loans, with South Africa finally agreeing to loan Swaziland SZL 2.4 billion against Swaziland's income from its SACU receipts, but also including some governance-related conditionalities. In 2012 an unexpected windfall from the SACU in excess of SZL 7 billion temporarily relieved the pressure. SACU receipts are expected to also rise in 2012/2013. However, even if the SACU were to deliver another windfall unexpectedly, the concerns regarding fiscal management would remain, and the pressure to address systemic governance problems is unlikely to abate. The projected decline of receipts in 2013/ 2014 may again make Swaziland financially vulnerable as in 2011, and in turn revive the discussions of democratic reforms being linked to financial assistance for the country.

The economy is not the only sector in crisis. Socially, endemic poverty, high and increasing unemployment, HIV/Aids prevalence in the midst of a crumbling health system plagued by shortages of drugs and other treatments, an estimated population of over 100 000 orphaned and vulnerable children, weakened social safety nets and inadequate social welfare and security mechanisms are all creating a heightened level of frustration with government among the populace. Land evictions and homestead demolitions, abuse of women and children and a concerted limitation of the rights to freedom of expression and association are just some of the human rights violations that are committed with impunity and in turn intensifying the populace's questions about alternatives to the current system.

Politically, official intolerance of dissent has grown and violence and repressive measures against political entities and pro-democracy activists have become more frequent. The institutions charged with oversight and citizen protection, such as the courts, have been weakened. As a consequence of the breakdown of the rule of law in 2011, Swaziland saw a judicial crisis sparked by the suspension and subsequent dismissal of Justice Thomas Masuku (who had been a strong advocate for the judiciary's independence and the application of the law without fear or favour). This was followed by a five-month boycott of the courts by lawyers. These developments have eroded public confidence in the ability of this institution to play its proper role of protecting citizens against state violations. The country is currently also facing a constitutional crisis with the executive refusing to recognise a vote of no confidence in it by Parliament and the subsequent and equally controversial reversal of the vote by Parliament.

Present-day Swaziland has been battered by the increasing deterioration of socio-economic and political conditions over the past decade. Battle lines have been drawn in terms of political

participation and society is becoming increasingly polarised on this front. Government and the traditional authorities have not concealed their unwillingness to allow greater political expression and pluralism while pro-democracy groups remain unmoved from their position that the current system of governance is undemocratic and in need of drastic transformation. Even within the two 'camps' themselves there is a diversity that has created internal friction about how to deal with the situation.

It is not yet clear what will be done to take forward the recommendations made by Swazis at the *Sibaya*. Members of civil society and pro-democracy groups are not convinced that anything will be done about the views expressed in this forum. They doubt the sincerity of calling the *Sibaya*, as in the past it has been seen as simply being used to praise royalty and canvass for appointment and employment. Furthermore, it has been used to showcase 'Swazi democracy' to international critics and attest to the assertion that Swazis are constantly consulted and are free to express themselves on national issues. However, there is acknowledgment that the tone of this last *Sibaya* was unlike any previous gathering of the nation in that those who made submissions were highly critical of government. They called for change including the sacking of Cabinet and the transformation of the political system into a multi-party dispensation ahead of the elections. The issue of the 2013 elections, therefore, with all the debate it inspires, particularly on whether pro-democracy groups and political parties should boycott or participate, is central to the issues examined in this study. Dialogue and negotiations must inevitably form a central part of any inclusive political reform process and space must be created for civil society leaders to engage government meaningfully in this regard.

2

Constitutional framework

The Kingdom of Swaziland is party to major international and regional instruments relating to democracy and participation. For instance, at the level of the Southern African Development Community (SADC), the country has committed itself to the SADC Treaty, SADC Principles and Guidelines Governing Democratic Elections, as well as the SADC Protocol on Gender and Development. Table 1 shows Swaziland's official status in relation to relevant instruments at the level of the African Union (AU) and the United Nations (UN).

The various international and regional instruments essentially recognise the substantive rights associated with democracy and political participation such as equality and non-discrimination and the freedoms of expression, association and assembly. They also promote the establishment of appropriate legal and institutional frameworks to support the practical enjoyment of these rights. These include the separation of powers and the establishment of independent oversight bodies to strengthen accountability of government institutions. In doing so, the various instruments also collectively oblige state parties to take the necessary measures through legislative and another means to create an environment that is conducive for democratic practice.

Section 2 of Swaziland's Constitution pronounces it as 'the supreme law of Swaziland and [that] if any other law is inconsistent with this Constitution that other law shall, to the extent of the inconsistency, be void'. It is the pre-eminent document that defines the nature of governance in the country and the mechanisms by which the populace engages with governance processes. Consequently, the degree of consistency of its provisions with those of the various international instruments can provide some indication of the quality of democracy and political participation in the country.

Table 1: Swaziland's official status in relation to instruments of the African Union and the United Nations

Instrument	Status
Constitutive Act of the African Union	Signed by Swaziland on 1 March 2001, ratified on 8 August 2001.
African Charter on Human and Peoples' Rights	Signed on 20 December 1991, ratified on 15 September 1995.
African Charter on Democracy, Elections and Governance	Signed on 29 January 2008. Not yet ratified.
Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa	Signed on 7 December 2004. Media reports suggest that it was ratified by Parliament in September 2012 following discussions at the <i>Sibaya</i> .
Convention on the Elimination of All forms of Racial Discrimination	Ratified on 7 May 1969.
International Covenant on Civil and Political Rights	Ratified on 26 June 2004.
International Covenant on Economic, Social and Cultural Rights	Ratified on 26 June 2004.
Convention Against Torture and Other Cruel, Inhuman and Degrading Punishment or Treatment	Ratified on 25 April 2004.
Convention on the Elimination of All forms of Discrimination Against Women	Ratified on 25 April 2004.

Section 1(t) of the Constitution establishes the country as 'a unitary, sovereign, democratic Kingdom'. Section 79 provides that 'The system of government for Swaziland is a democratic, participatory, *tinkhundla*-based system.' Also included in the Constitution are the recognition and protection of human rights in chapter III. These include equality before the law, freedom of expression and freedom of assembly and association as enshrined in sections 20, 24 and 25 respectively. In terms of political participation, the Constitution provides in section 58(1) that 'Swaziland shall be a democratic country dedicated to principles which empower and encourage the active participation of all citizens at all levels in their own governance.' The right to participation is guaranteed by section 84(1), 'Subject to the provisions of this Constitution, the people of Swaziland have a right to be heard through and represented by their own freely chosen representatives in the government of the country.'

The Constitution also establishes and sets out the functions of the structures that will be involved in governance – the main tiers of government are national, regional and local. At the national level are the executive and legislature. The four regions of Swaziland are administered by Regional Administrators with the support of regional development councils. Both 'modern' and traditional structures operate at the local level – municipalities and town boards administer the urban areas while chief's councils operate in the rural areas. In terms of the modern system of national government, there is an executive that is responsible for formulating and executing national policy, while the legislature has the three-fold responsibility

of representation of constituencies, oversight of government, and law-making. There is also a judiciary that is charged with interpreting the law. Other bodies are also established to support the implementation of the Constitution such as the Elections and Boundaries Commission (EBC) and the Commission on Human Rights and Public Administration (and which doubles up as the 'Integrity Commission'). The methods of appointment of the relevant officials are also provided for. In addition to the 'modern' structures, the Constitution also recognises traditional institutions and their role in governance.

Due to the duality of the system of governance there is always a continued interplay between the two. Traditional structures and institutions such as the *Sibaya*, which is the highest policy-making institution of the Swazi nation, operates parallel to, and on an equal level with structures of the modern system. Swazi law and Custom has equal status with civil law and legitimacy to enforce adherence to its requirements.

To some extent, at least in letter, the Swaziland Constitution seems to comply with the democratic standards collectively articulated by the various instruments. However, the Constitution is itself a subject of serious contention and this has compromised the potential that it may contain for tangible change, particularly in issues of governance.

While it is cited as the supreme law of Swaziland and its provisions are being used to challenge inconsistencies in subordinate law, the Constitution has suffered a crisis of legitimacy since its adoption in 2005. In a sense, this was inevitable in view of how the Constitution came into being. From the onset of the constitution-making process, there was criticism from civil society that the process was not inclusive and the environment prohibitive of the free expression of views. With respect to the former criticism, it was pointed out that the unilateral management of the process in terms of how it would unfold, the lack of representivity in the appointment of members of the Constitutional Review Commission (CRC) and the Constitutional Drafting Committee (CDC), the absence of civic education that would have empowered the populace to effectively engage with constitutional issues, and that group submissions were not permitted, have been raised as examples of the process's exclusionary nature. Efforts by civil society to conduct civic education at community level were stifled and in certain instances, traditional community authorities or police disrupted meetings alleging that only the CRC and the CDC were entitled to conduct work on the constitutional process.

According to Maxwell Nkambule, an attorney and Chairperson of Lawyers for Human Rights Swaziland, these challenges in the process raise the question 'whether the process was a national process or a royal project'.³³ A respondent,³⁴ who is a legal officer in one of the non-governmental organisations working on human rights issues, was of the same opinion, stating that it was not surprising that these consultations had taken place at *tinkhundla* level and that only individual views were permitted. In her view, the absence of group representation is indicative of the refusal of the right of choice and the current Constitution was drawn and crafted in such a way as to suit and serve the interests of those in power and the status quo as a whole. If this system of governance was to be changed, the Constitution would invariably have to be changed as well.

³³ Interview with Maxwell Nkambule, Attorney, Manzini, September 2012.

³⁴ The respondent requested to remain anonymous.

The prevailing environment during the constitution-making process was hostile to freedom of expression, creating fear of recrimination among those who made submissions. The 1973 Decree with its limitations on free political activity was still in force, the country was also faced with a rule-of-law crisis caused by interference with the judiciary and government's refusal to adhere to court judgments, and various human rights violations were being perpetrated by the state with impunity. An additional criticism of the Constitution is that the substantive content does not take the country any further in its journey towards democratisation, but rather entrenches the pre-Constitution status quo with all its weaknesses.

Among these weaknesses are provisions that do not comply with or are simply in conflict with key democratic and constitutional principles. With respect to the supremacy of the Constitution, the immunities that are provided for as well as the seeming protection of Swazi law and custom, have the effect of removing certain structures from the ambit of the Constitution. With respect to the separation of powers, while the executive, legislature and judiciary are separately established with their own functions, it has been argued that there is no separation of powers in that the King is an executive monarch who effectively heads these arms of government. The judiciary is established as independent in section 141 of the Constitution. Nonetheless, it has been argued that the judiciary's independence is dubious because judicial officers are appointed by the King on the recommendation of the Judicial Service Commission whose members are themselves appointed by the King. In addition, since customary law has been retained, it also has its own structures of governance and justice delivery at the apex of which stands the King in his capacity as *iNgwenyama* and who is also the final arbiter in the customary justice system.

The Constitution's inclusion of a Bill of Rights was largely regarded as a positive step. However, there has also been widespread criticism of the limitations that are contained in the various clawback clauses and derogations and the Constitution is seen as giving rights with one hand while taking them away with the other. The limitations on the rights have been criticised as being overbroad and beyond those that are justifiable in an 'open and democratic society'. There are also numerous contradictory and inconsistent provisions within the Constitution itself. For instance, in relation to participation in politics and governance, the constitution on the one hand recognises the freedoms of association and assembly, which enables political parties to be legalised. On the other hand, the system of governance is based on individual merit alone, which clearly excludes the participation of political parties. Another example is in terms of equality before the law and non-discrimination, which are recognised in section 20, but in the very same document the citizenship provisions are blatantly discriminatory. It is therefore submitted that in addition to issues of process, the Constitution is also substantively deficient and therefore does not meet the standards to which Swaziland has committed itself regionally and internationally.

As a result, a number of legal challenges have been brought against both the architects of the Constitution in terms of the process as well as the Constitution itself on the basis of its provisions. In 2002, Lawyers for Human Rights Swaziland submitted a communication³⁵ to the African Union's African Commission on Human and Peoples' Rights, alleging violations by the 1973 Decree of, among others, the rights to freedom of association and assembly.

³⁵ African Commission on Human and Peoples' Rights (ACHPR), Communication 251/2002, *Lawyers for Human Rights vs. Swaziland*.

The commission recommended, 'that the state engages with other stakeholders, including members of civil society, in the conception and drafting of the new Constitution'.³⁶ Subsequent litigation was instituted by the National Constitutional Assembly (NCA), the Swaziland National Association of Teachers and the Swaziland Federation of Trade Unions³⁷ in partnership with political entities that sought, among other things, the striking down of the Constitution based on its flawed process. In the NCA case of *Jan Sithole N.O. and Others vs. The Prime Minister of the Kingdom of Swaziland and Others*³⁸ one of the prayers was:

Suspending and setting aside the Constitution of Swaziland Act No. 1 of 2005 for a period of two years and referring to a broadly representative institution to correct its sections which do not give effect to the second respondent's obligations under the African Charter and the NEPAD [New Partnership for Africa's Development] declaration as well as under international human rights and international customary law.

The NCA, in its ongoing challenge to the official constitution-making process, also began a parallel process of drafting a shadow Constitution that would be a more accurate reflection of the views of the populace.

The Acting Chairperson of the Human Rights Commission, Mr Sabelo Masuku, acknowledges that the popular acceptance of the Constitution faces challenges from both the 'progressives' who advocate for the democratisation of the country as well as from the state and traditional authorities. In his view the two groups have problems with the Constitution for different reasons – while civil society's criticism hinges mainly on process issues and the assertion that the Constitution is simply an entrenchment of the 1973 Decree with limited modification, the concerns of traditional authorities are about the issue of power because they interpret the Constitution as having severely limited the power of the monarch and traditional institutions in that they are now to be directed by and subject to the Constitution's provisions. However, in Masuku's view, it is encouraging that people do refer to the Constitution as the supreme law and are using it to protect their rights, as evidenced by the numerous court cases that have involved constitutional interpretation. Masuku also views as interesting that while attacking its legitimacy, those challenging the Constitution still refer to its contents in seeking to protect their rights and to move the democratisation agenda forward. In his view, as people continue to use the Constitution in this way, it will gradually come to be accepted.³⁹

Notwithstanding this optimism, another issue that is undoubtedly adding to the lack of confidence in the constitution is the extent to which its provisions have not been adhered to by the governing authorities since its adoption. Thus far, the record seems to give credence to the criticism that the making of the Constitution was not sincere. Some examples of this non-adherence – either by omission or commission – are the following:

³⁶ *Lawyers for Human Rights vs. Swaziland* (2005) AHRLR 66 (ACHPR 2005).

³⁷ *Swaziland Federation of Trade Unions and Others vs. Chairman, Constitutional Review Commission and Others*, Swaziland High Court, Civil Case No. 3367/2004.

³⁸ Swaziland High Court, Civil Case No. 2792/2006.

³⁹ Interview with Sabelo Masuku, Acting Chairperson of the Commission of Human Rights and Public Administration, Nkanini, September 2012.

- The absence of legal reform and the continued existence and operation of laws that are contrary to the Constitution's provisions – even though the Constitution renders these 'void to the extent of the inconsistency', which essentially renders those provisions meaningless.
- Specific non-compliance has occurred in the case of women's representation in Parliament wherein the provisions directing the appointment of women by the King to the House of Assembly and Senate have not been followed. The provision stipulating that if an election yields less than 30% women in Parliament, a process is to be undertaken by the EBC to elect an additional four women, was also not followed pursuant to the 2008 elections when the number of women in Parliament was far below the 30% mark.
- In the 2010 *Attorney General vs. Aphane* case,⁴⁰ the court confirmed the discriminatory nature of property-related legislation that did not allow a married woman to register title deed land in her name, giving Parliament 12 months to amend the legislation. The amendment, due in May 2011, was only effected in June 2012.
- Constitutionally established institutions such as the Human Rights Commission have practical barriers of access for groups such as women in mourning or wearing trousers,⁴¹ as well as those persons or groups perceived to be opposed to the current governance system.
- Socio-economic rights have been violated as people continue to be evicted from their homesteads.
- The Constitution provides that seven years after its adoption, a Swazi Chief Justice shall be appointed. This has not happened and in fact there has been a renewal of the contract of the current Chief Justice who was recruited from another country (as were his predecessors) as apparently, 'there are no qualified Swazis'.
- At community level, even though the Constitution gives women the choice whether to undergo cultural practices, that right is not enjoyed as women are still compelled to submit to these practices and there are no established mechanisms by which women can enforce their right to choose.
- In the case of the constitutional provision that free education would commence three years after the Constitution came into force, the ex-Miners Association had to take government to court to direct the implementation of the relevant clauses. Despite initially confirming government's obligation in this regard, the court's final decision was that this right could not be practically implemented by government as it was dependent on resources. The court directed that the constitutional provision should be read to mean that government would introduce free primary education incrementally, based on the availability of resources.⁴²

⁴⁰ Supreme Court, Civil Appeal Case No. 12/2012.

⁴¹ By virtue of traditional law and custom women in Swaziland are prohibited from wearing trousers in many instances and widows in mourning are confined to their homes.

⁴² See *Swaziland Ex-Miners National Workers Association and Another vs. Minister of Education and Others*, Swaziland High Court, Civil Case No. 335/09 and *Swaziland Ex-Miners National Workers Association vs. Minister of Education and Others*, Swaziland High Court, Civil Case No. 2168/09.

Given this record of active violations and omissions in the fulfilment of the Constitution, the real issue is the political will to progressively move the country forward. The consistent criticism that promulgation of the Constitution was simply a ‘window dressing’ exercise, to relieve international pressure without genuine commitment to its implementation, gains weight in the light of the authorities’ brazen violation of the Constitution.

A. The role of the courts and national human rights institutions

The Constitution establishes a number of institutions with the jurisdiction to uphold the rights associated with democracy and participation. These include the judiciary, comprised of the courts, to which the ultimate responsibility for interpreting the Constitution is given. The Constitution purports to guarantee the independence of the judiciary. The Constitution also establishes a Human Rights Commission, which is specifically charged with the promotion of the fundamental human rights and freedoms articulated in chapter III.

Issues of democracy and human rights continue to be somewhat contentious in Swaziland and despite the constitutional guarantees, it has been difficult for both the citizens and these newly established institutions to engage effectively in the protection of these rights. According to Musa Hlophe of the Swaziland Coalition of Concerned Civic Organisations:

What we see are institutions set up to placate the international community, in particular, donors. An independent judiciary, we have it in the Constitution; a Parliament, we also have it; different commissions, we have them. But the structures were never meant to deliver good to the actual citizen which is why they cannot be effective because the intention was never for them to operate properly.⁴³

One of the key challenges to the effective operation of these institutions has been the issue of their independence in view of the manner in which their members are appointed. The concern in this regard has been that, because the King appoints them, they are likely to be biased towards him, thus compromising their partiality.⁴⁴ Swaziland also has a history of severe crises in the rule of law and interference with the judiciary in seeking to influence court decisions. Such concerns are therefore not unfounded. In relation to the Human Rights Commission, the absence of legislation that defines the parameters of the commission’s work as well as the lack of resources required to undertake this work, further limits the effective functioning of this body. The commission was appointed in 2009 but it has not been allocated an adequate budget to enable it to function as it should. The commission is also not administratively independent as it is supported in this regard by the Ministry of Justice and Constitutional Affairs. Thus the commission has had limited impact in the political arena.⁴⁵ For instance, it seems that it has been difficult for the commission to issue statements condemning the violation of human rights abuses, in particular those related to freedom of expression, freedom of association

⁴³ Interview with Musa Hlophe, Coordinator, Swaziland Coalition of Concerned Civic Organisations (SCCCO), Manzini, September 2012.

⁴⁴ Interviews with Musa Hlophe (Coordinator, SCCC), Mario Masuku (President, PUDEMO) and Musa Nkambule (President, *Sive Siyinqaba*).

⁴⁵ Interview with Sabelo Masuku, Acting Chairperson of the Human Rights Commission, Nkanini, September 2012.

and assembly and the right to engage in political participation. Members of trade unions have reported submitting complaints of human rights abuses, but receiving no response from the commission.

B. Amendment of the Constitution

Chapter XVII of the Constitution deals with the amendment of the Constitution and provides that the amendment of the Constitution requires undertaking the following process:

1. Publication of the amendment bill in the *Government Gazette* for 30 days;
2. Introduction of the bill at a joint sitting of the two Chambers of Parliament;
3. Passing of the bill by the joint sitting:
 - Where the proposed amendments affect specially entrenched provisions, the bill must be approved by at least three-quarters of all the members of the two Chambers; or
 - Where the bill seeks to amend entrenched provisions, it must be passed by at least two-thirds of all the members of the two Chambers.
4. Referendum on the bill: after the bill has been passed, it must be subjected to a referendum and if it is passed on a simple majority of those who vote, it must be taken to the King for assent;
5. King's assent; and
6. On the assent of the King, the amendment is duly effected and approved for enactment.

Having been adopted in 2005, the Swaziland Constitution is relatively new and its amendment provisions have not yet been tested. However, these provisions have been widely criticised both by civil society as well as by some of the traditional authorities because they are so stringent. On the one hand, this stringency will allow this contentious Constitution to continue to protect the status quo. However, some view the difficulty in amending the Constitution as positive in that it 'prevents the abuse of power [to amend the constitution with bad intent] and hence protects the rights of the people'.⁴⁶

Others have expressed concern that the referendum provisions are too rigid and make the Constitution practically impossible to amend and that is a concern particularly because, as a new and foundational law, there should have been some flexibility included in relation to amendments that would allow its weaknesses to be addressed. The question of amendment will likely emerge as a key issue in view of the various calls for constitutional reform.

C. Conclusions and recommendations

The initiative to craft a written Constitution for the Kingdom of Swaziland was clearly a necessary development after the protracted period in which the 1973 Proclamation to the Nation, an instrument that was clearly undemocratic, governed the political affairs of the country. However, the manner in which the constitution-making exercise was carried out was not consistent with the statement in the Constitution's preamble that 'as a nation it has always been our desire to

⁴⁶ The respondent requested to remain anonymous.

achieve full freedom and independence under a Constitution created by ourselves for ourselves in complete liberty'. It has been said that constitution-making processes are consensus-building exercises where various shades of a society come together to negotiate and agree on a country's constitutional framework so that when it is cited as the 'supreme law', it indeed reflects the collective aspirations of that society. In the case of Swaziland, the process was clearly not inclusive and all 'sides' of the political spectrum have reservations about it. In that sense the Constitution falls into the same 'trap' as that of the 1963 Constitution in that its provisions 'in [the] effort to give something to everybody satisfied nobody'.⁴⁷

All the processes that civil society has engaged in that are seeking to plot a peaceful trajectory to Swaziland's democracy have pointed to the need to deal with the Constitution as the overarching legal instrument governing the country. The question now, though, is how to rectify the situation in a way that strengthens democracy. On the one hand, there are calls for a participatory review of the current document with a view to aligning it with Swaziland's regional and international obligations and democratic standards. This perspective acknowledges that, as problematic as it is, the current Constitution can provide a good basis for a working document going forward. Another point of view is that there needs to be a complete repeal of the current Constitution and the commencement of a completely new process of constitution-making because the current Constitution is illegitimate as a result of the flawed process that produced it. With respect to the latter view, a counter-argument has been that the process of making the current Constitution took a long time and used millions of Emalangeni⁴⁸ and that realistically, it may be difficult to start the process completely afresh because of these resource constraints.

Whatever the route that is chosen, it is also critical to acknowledge that constitutional reform is a necessary step. It must also be accepted that the governing authorities, as representing a certain sector of Swazi society, must also be part of the process. The reality in Swaziland is that a constitutional review process must be initiated at some authoritative level with the question being how those in authority can be convinced of its necessity.

Clearly, Swazis must appreciate the importance of the Constitution and its provisions to be able to participate meaningfully in any process of constitutional reform. Thus it is recommended that civic education that promotes constitutionalism and the tenets of democracy and good governance has to continue so that Swazis are involved and understand that participation in such a process is not only a right, but is also a part of their civic responsibilities in what would be a democratic nation-building project.

It is also recommended that civil society initiate a national consultative process and proactively make constitutional proposals and possible suggestions for the drafting of a Constitution that would gain more acceptance among the populace. Regardless of the form a new constitution-making process would take, these proposals and drafts could form a basis on which to establish a democratic dispensation.

Within the context of Swaziland where calls for such reform may take time to be acknowledged, let alone accepted, it is recommended that multifaceted advocacy is conducted to

⁴⁷ Kuper, *Sobhuza II: Ngwenyama and King of Swaziland*, Duckworth, p. 238.

⁴⁸ The Emalangeni is the official monetary currency of Swaziland.

complement national calls for change. The use of approaches such as strategic litigation in testing the current Constitution should be continued. Some positive developments have flowed from the constitutional cases that have gone to court, and the flaws of the Constitution in its current form should also continuously be put on the spot in court so that its interpretation, whether regressive or progressive, can be used to pursue democracy. Civil society should also continue putting the constitutional question as an issue in their advocacy with the diplomatic community and with regional and international bodies from civil society as well as intergovernmental organisations such as the Southern African Development Community, the AU, the Commonwealth, the UN and the European Union.

3

Equal citizenship

A. Citizenship criteria

Issues of Swazi citizenship are governed by chapter IV of the Constitution⁴⁹ which provides for acquisition of citizenship through:

- *Descent* – where a person is a descendant of a Swazi citizen (section 41);
- *Operation of law* – where a person is generally regarded as a Swazi citizen by descent and has been declared by law to have this status (section 42);
- *Birth* – where the father of the child is Swazi; and in certain exceptional circumstances where the mother is a Swazi citizen (section 43);
- *Marriage* – where a non-Swazi woman marries a Swazi man and lodges the appropriate declaration for acquiring citizenship (section 44); and
- *Registration* – where a person fulfils stipulated criteria relating to residence in the country, character, contribution to the development of the country or has the support of a chief and three other reputable citizens (section 45).

Section 53 of the Constitution establishes a Citizenship Board of not more than seven members whose functions include having the exclusive authority to grant or cancel citizenship by registration, and to investigate, and where appropriate revoke the citizenship of any person.

Swazi citizenship can also be revoked. Firstly, where a person is a citizen by registration, section 49 of the Constitution states that the Citizenship Board may issue an order of deprivation of citizenship on the occurrence of a number of circumstances, including:

⁴⁹ A Citizenship Bill that seeks to amend the Citizenship Act of 1992 has been tabled for debate in Parliament. The provisions of the Bill as well as those in the 1992 Citizenship Act are essentially the same as those in the Constitution with only slight modifications, hence the constitutional provisions are sufficient for examining the situation as regards citizenship in Swaziland.

- Pursuant to a court order declaring that the person acquired a citizenship certificate through fraudulent means or misrepresentation;
- Where the person takes any voluntary action (except marriage) to acquire another citizenship;
- Where, if the person is a non-Swazi woman who acquired citizenship through marriage, it is shown that the marriage was concluded solely for the purpose of acquiring Swazi citizenship;
- Where a person was required to renounce the citizenship of another country and has not done so;
- Where it is not in the public good that a person remains a Swazi citizen; and
- Where an adult Swazi citizen is about to marry a non-Swazi, and lodges a declaration of their desire to renounce Swazi citizenship with the Board.

B. Equality and discrimination

Section 20 of the Constitution – the equality clause – recognises equality before the law and equal protection of the law. It also prohibits discrimination, stating in section 20(2) that, ‘For the avoidance of any doubt, a person shall not be discriminated against on the grounds of gender, race, colour, ethnic origin, tribe, birth, creed or religion, social or economic standing, political opinion, age or disability.’ The clause also provides for a form of affirmative action. Section 20(5) provides that ‘Nothing in this section shall prevent Parliament from enacting laws that are necessary for implementing policies and programmes aimed at redressing social, economic, educational or other imbalances in society.’

The right to equality and non-discrimination, as with other rights contained in the Bill of Rights, apply both vertically and horizontally and are binding on government, private entities and individuals. Section 14(2) states that the rights enshrined in chapter III are to be ‘respected and upheld by the executive, the legislature and the judiciary and other organs or agencies of government and, where applicable to them, by all natural and legal persons in Swaziland, and shall be enforceable by the courts as provided in this Constitution’.

Table 2: Swaziland’s status of ratification of the key international instruments related to citizenship

Instrument	Signature, accession and ratification status
International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families	Not signed or ratified
Convention Relating to the Status of Stateless Persons	Acceded to on 16 November 1999
Convention on the Reduction of Statelessness	Acceded to on 16 November 1999
African Union Convention Governing Specific Aspects of Refugee Problems in Africa	Signed on 10 September 1969, ratified on 16 January 1969

Despite section 20, the citizenship provisions in the Constitution are clearly discriminatory in that the 'passing on' of Swazi citizenship is basically the sole preserve of men. A woman cannot pass on her Swazi citizenship to her children – the acquisition of citizenship by birth is conditional on the father of the child being a Swazi citizen. Only in exceptional cases can a Swazi woman pass on her citizenship to her child. Section 93(4) states, 'Where a child born outside of marriage is not adopted by its father or claimed by that father in accordance with Swazi law and custom and the mother of that child is a citizen of Swaziland, the child shall be a citizen of Swaziland by birth.'

With respect to spouses, non-Swazi men cannot acquire Swazi citizenship through their Swazi wives by virtue of marriage. Yet, a non-Swazi woman marrying a Swazi man automatically qualifies to acquire citizenship – all that is required is that she lodges a declaration accepting Swazi citizenship at any Swaziland Diplomatic Mission.

This discrimination against women is not only contrary to international human rights standards, it is also in conflict with section 20 on equality and non-discrimination as well as section 28, which specifically recognises and guarantees the rights and freedoms of women. That there is a bill pending before Parliament that seeks to reinforce this position is of additional concern, particularly as section 20(4) states that 'Parliament shall not be competent to enact a law that is discriminatory either of itself or in its effect.' Added to this, is the anomaly that the equality clause and the citizenship provisions are both constitutional and are therefore on par in terms of being part of the country's 'supreme law'. The issue of citizenship is clearly one in which the court will have to interpret the Constitution and provide guidance on the correct position.

Research and case records from women's rights and gender-equality advocacy organisations attest to the extent of the problems caused by discriminating against women on issues of citizenship and the adverse impact on women and their families. However, despite the common occurrence of the problem and its obvious injustice, there has not yet been any litigation to test the Constitution and challenge the courts to make a determination on this issue. The high cost of legal representation, the non-availability of legal aid, the stigma of human rights cases and the limited appreciation of social responsibility in the promotion of access to justice (such as with *pro bono* cases) are prohibitive barriers, especially for women, whose restricted access to and control of resources limits their ability to litigate.

Both general law (Roman-Dutch common law and statute) and Swazi customary law are recognised and confirmed as the laws of Swaziland. Thus, in addition to the legislation, customary values and norms also play a part in reinforcing the discrimination against women. In terms of Swazi law and custom, women hold a minority status within the family and Swazi customary law is unequivocal in its designation of men as defining identity and nationhood.

The stated supremacy of the Constitution means that whenever there is a conflict between its provisions and any of the two laws, the Constitution should prevail. However, the challenge of the duality created by conflicts between the two systems of law has been transposed into the Constitution. Swazi law and custom seems to have been removed from the purview of the Constitution by section 115, which stipulates that matters under Swazi law and custom will continue to be regulated by Swazi law and custom. This duality and the amorphous position of customary law results in the dilution of some of the protections contained in the Constitution, such as equality before the law and equal protection of the law.

Nonetheless, where there is an allegation that any of the rights have been violated, the aggrieved person can approach the courts for redress. The Constitution also establishes a Human Rights Commission whose functions include investigating complaints of violations and making efforts to resolve the issues raised by the complainant. However, a challenge faced by those wanting to enforce their rights is the accessibility of these justice delivery structures – the costs of litigation in the courts is prohibitive and the Human Rights Commission has not yet been sufficiently resourced to be able to effectively attend to complaints of human rights violations.

c. Immigrants and refugees

As the global village evolves, it is contributing to shaping societies in new ways. In the past Swazis were regarded as largely homogenous, comprising one ethnic group, the Swazi, with a common history, language, customs and traditions. However, colonialism, civil conflict and wars in neighbouring and regional states began to add new groups to the composition of the Swazi populace. Initially, Swaziland was regarded as a place of refuge from wars and civic strife in other countries, in particular from the apartheid system in South Africa and from the protracted civil war in Mozambique. Many refugees and asylum seekers from those countries as well as from countries such as Burundi, the Democratic Republic of Congo (DRC) and Rwanda have over the years sought refuge in Swaziland.

Further, with globalisation, increased mobility and new patterns of migration for purposes such as economic opportunity have emerged and recent years have seen an increased number of peoples of Middle Eastern and Asian origin settling in the country, with many taking advantage of the trade opportunities offered by instruments such as the African Growth and Opportunity Act. While still predominantly Swazi, the population landscape of Swaziland is changing and with it the diverse nature of interests that have to be balanced in the interests of a harmonious society. With respect to democracy and participation, the changes raise issues of inclusion and exclusion from national processes based on ‘belonging’ (usually through the status of citizenship), which is seen as a prerequisite for engagement with the governance issues in the society in which one lives. A democratic system is supposed to be inclusive and representative of the diversity in a society. The question, therefore, is whether the qualifications for citizenship in Swaziland are restrictive or whether they enable groups other than the indigenous Swazi to participate.

In addition to chapter IV of the Constitution, the legislation governing issues of immigration, including in relation to refugees and asylum seekers, is mainly the Immigration Act No. 17 of 1982 and the Refugees Control Order No. 5 of 1978. These laws collectively determine and regulate the status of migrants in Swaziland. In view of the latter law, a Refugee Bill was drafted with the aim of strengthening the recognition, protection of and assistance to refugees as the 1978 legislation is no longer suitable for the contemporary issues facing refugee management. The bill has, however, not yet been enacted.

According to the United Nations High Commission for Refugees, ‘the majority of the nearly 800 refugees are locally integrated and live in urban areas. They originate from Burundi, the DRC, Rwanda, Somalia and Zimbabwe. Education, health and other services are provided through Caritas as an implementing partner.’ Of these, about 287 are at the Malindza Refugee

Camp and this number consists mainly of women-headed households and small children.⁵⁰ Caritas Swaziland⁵¹ works in partnership with the Refugee Section at the Ministry of Home Affairs. The two work together in supporting refugees, providing support and services such as 'education, career guidance, psychosocial counselling, medical care, food and shelter. Over and above providing these services, Caritas is responsible for creating an enabling environment for refugees in the country, which is aimed at contributing to their socio-economic wellbeing.'⁵² In conducting its work, Caritas has 'tried not to create a preferential breed of people' and the approach to programming is using the recognised 'durable solutions' approach for working with refugees and asylum seekers, including integration into Swazi society. They thus attend the same schools, hospitals and other public facilities in the communities in which they live. In some communities the chiefs and community authorities have encouraged them to *khonta* (acquire Swazi Nation Land through the traditional procedure of paying allegiance to the chief to signify the desire to settle within a community. The land allocated can be used to establish a homestead with a family residence and fields for cultivation).⁵³

In terms of non-Swazi groups seeking to acquire citizenship, one of the major constraints is the time taken for the processing of applications and the Citizenship Board has a substantial backlog of applicants waiting for years for a response and in the process facing issues such as the loss of documentation. The situation has been worsened by the fact that the operation of the Citizenship Board, which was appointed in terms of the Constitution in 2006, was suspended in March 2010.⁵⁴ The Minister of Justice and Constitutional Affairs is reported to have stated that the suspension was temporary pending the resolution of certain issues such as the amendment of the Citizenship Act of 1992 and the setting out of clear procedures and criteria for the application and acquisition of Swazi citizenship.⁵⁵ This should mean that no one has been granted citizenship during this period, but there have been allegations that there are some persons who are being granted citizenship by corrupt means.⁵⁶

The concern about corruption was also raised by a refugee respondent⁵⁷ who has tried to apply for Swazi citizenship several times. He stated that his observation, as part of the non-indigenous Swazi population that is seeking to acquire citizenship, is that 'if you have cash, you can buy your freedom – citizenship is given to people who can afford it'. In addition the criteria that a person must be able to show that they can contribute to the development of the country are somewhat onerous and difficult for some people to prove. The respondent stated that some people tried to curry favour with officials by giving away blankets and food to the elderly. Another

⁵⁰ Interview with Reggie Magagula, Caritas Officer, Manzini, September 2012.

⁵¹ Caritas Internationalis is a confederation of over 164 Roman Catholic relief, development and social service NGO organisations operating in over 200 countries and territories worldwide. Collectively and individually their mission is to work to build a better world, especially for the poor and oppressed.

⁵² Gumedze, S., *Refugee Protection in Swaziland*.

⁵³ Interview with Reggie Magagula, Caritas Officer, Manzini, September 2012.

⁵⁴ A new Citizenship Board was constituted at the beginning of 2013, but it is not yet clear whether it has begun operating.

⁵⁵ *Times of Swaziland*, 'Citizenship Board Operations Suspended', 8 March 2010.

⁵⁶ *Swazi Observer*, 'Big Shots Selling Citizenship – Gcokoma', 11 October 2012.

⁵⁷ Interview with a refugee who has been in Swaziland for over a decade and is applying for Swazi citizenship, September 2012. This respondent requested that his identity be kept confidential.

issue raised by this respondent was that foreigners in Swaziland do not know their rights and this also curtails the degree to which they can insist on certain entitlements such as the right to participate in politics.

Democracy as a rule presupposes agreement on who constitutes 'the people'. Such agreement must necessarily distinguish between those who enjoy the rights of citizenship and aliens. For the most part this distinction is made on the basis of the borders of the state in which people live and agreement on those borders. As a result basic decisions on citizenship necessarily contain elements of exclusivity. At the same time, democratic principles require that citizenship should be internally inclusive. That is, there should be mutual respect between the different communities or identities that make up the nation, and all citizens must enjoy equal rights under the law. How a country manages the potential tensions between the requirements of equal citizenship and the distinctiveness of its different communities, and between internal inclusiveness and external exclusivity, is an important indicator of the quality of its democracy. This is especially so in its immigration procedures, rules governing asylum and the processes of acquiring citizenship.⁵⁸

According to the Coordinating Assembly of Non-Governmental Organisations, the:

distinction [between citizenship and nationality] and its implications are relevant in a country such as Swaziland, in which issues of identity and belonging are deeply tied to culture and tradition which may be associated with nationality more than citizenship. While legal definitions may be sufficient to *categorise* persons claiming Swazi citizenship and nationality, the aspect of a common heritage, language and culture create a sense of additional legitimacy in terms of being a 'real' or 'true' Swazi.⁵⁹

When linked to issues of democracy and political participation in the context of Swaziland, where there is sensitivity regarding dissenting political voices, the issues of citizenship, belonging and identity have been used to intimidate pro-democracy and political activists. There are a number of examples of this type of intimidation dating back to the 1972 elections and the government's attempts to weaken the Ngwane National Liberatory Congress (NNLC) presence in Parliament by attacking the citizenship status of Bhekindlela Thomas Ngwenya. In more recent times, Jan Sithole, then Secretary-General of the Swaziland Federation of Trade Unions – during the height of trade-union activism in the mid-1990s (which was calling for a national mass stay away) – was questioned about his citizenship. It was alleged that he was actually Mozambican because although his mother is Swazi, women cannot pass on citizenship to their children by non-Swazi fathers. Sithole was instructed to appear before the Citizenship Board for the determination of his citizenship, but eventually the case was not pursued.

⁵⁸ *Democratic Audit: Framework for Democracy Assessment; Citizenship, Law and Rights*, cited in CANGO, *Citizenship Audit Swaziland*, March 2007.

⁵⁹ *Ibid.*

The late Paul Shilubane (whose mother was a Swazi), then a senior lawyer, president of the Swaziland Law Society and the founding trustee of Lawyers for Human Rights Swaziland and the Swaziland Coalition of Concerned Civic Organisations, was very outspoken on issues of human rights and democracy. Shilubane had represented many political activists in the trade unions as well as from banned political parties. In 2003 Shilubane was confronted with threats from the then Attorney General, Phesheya Dlamini, to deport him, ostensibly for holding dual citizenship. Another senior lawyer, Lindiwe Khumalo-Matse (a South African married to a Swazi man), who had been a respected student leader at the University of Swaziland in the 1980s at the time of intense political turbulence in the country following the death of King Sobhuza II, was also similarly threatened by the Attorney General. Using the issue of identity and the definition of who is an authentic Swazi, authorities have essentially tried to discredit those with political opinions that are divergent from their own by labelling them 'unSwazi'. This labelling has, in the past, contributed to the reluctance of some members of the populace participating in political affairs because of the danger of their identity being questioned. If indigenous Swazis are vulnerable to this kind of intimidation and pressure when they participate in politics, the situation is likely to be worse for non-Swazi immigrants, who may be reluctant to involve themselves in the political and governance issues of the country because of their tenuous migrant status.

In the case of expatriate workers, particularly those from certain multinational corporations, there is 'the omni-present threat of withdrawal of work permits'⁶⁰ if they are perceived as troublesome politically. The Media Institute of Southern Africa Swaziland Chapter (MISA-Swaziland), which issues alerts on assaults on freedom of expression and the media, has on many occasions noted such threats against the owners of the country's only 'independent' daily newspaper, *The Times of Swaziland*. In the case of Asian immigrants, the view has been expressed that these migrants are simply in Swaziland to take advantage of economic opportunities and that they do not perceive themselves as part of Swazi society. They are therefore not interested in participating at the political level, especially since they have the resources to engage with the country's leadership in a way that assures their interests are taken care of.⁶¹

In the case of refugees, as they await the determination of a clear status through the relevant structures (the Political Asylum Committee and the Status Determination Committee), even if the question of how they view the political situation in the country is asked, they do not want to compromise their chances of acquiring the necessary protective status. It is also suggested that even when they attain this status, they may be reluctant to express their political opinions openly and participate in political activity because they may be misinterpreted and do not want to find themselves accused of political offences such as sedition and/or subversive activities in view of how sensitive government is about political issues.⁶²

⁶⁰ Ibid.

⁶¹ Interview with Musa Hlophe, SCCCOC Coordinator, Manzini, September 2012.

⁶² Interview with Reggie Magagula.

1: James James

James James⁶³ is a refugee who has been in the country for over 15 years, but still has no certainty about the status of his application for citizenship. He states that he has applied for citizenship three times and that he had also found a chief who had agreed that he would allow him to *khonta*. His applications were not processed twice because of the loss of some of the file documentation by officials. With the third application, the Citizenship Board's operations were suspended before he received their response. After several enquiries about his application, James James was eventually informed that the Minister of Home Affairs was not going to issue any more *khonta* certificates until the board resumed its work. But he is concerned because he fears that if his file is lost or misplaced, he will have to start the process all over again and it is a very slow process in any event. Although section 53(7) provides, 'All matters submitted for consideration by the board shall be finalised within a period of six months,' James James states that he has been waiting for finalisation of his citizenship for many years. He believes on average such an application should take two years, but in Swaziland it takes longer and you can do nothing but wait. He notes that citizenship brings some benefits:

You can buy property, you can get a passport and you can settle down and make a living. Those are the small but important benefits. At least you will get not get harassed at the border, you will be able travel to other countries and you can access services such as banks. I can get a piece of land in my name. It will be better than having to keep this refugee number given to me by the Ministry of Home Affairs that is not recognised by any system and is a constant reminder that you don't belong anywhere. I have to renew my permit every year. Imagine, you don't know if it will be renewed and I have been doing it every year since I came You can use citizenship as a tool to live a better life, but at the end of the day you remain a foreigner.

Refugees do not get involved in politics. Many of us come from countries in conflict so we understand the situation in Swaziland and that there are some things that need to change. But you must understand that if you are at the mercy of the government, you cannot afford to antagonise them, especially if you have applied for citizenship. Also, because if you are seen as a troublemaker, you can be deported. At least if you have citizenship they cannot deport you. Join politics and you are doomed. I would also like to participate in some of the activities but I cannot risk it. You have never seen a refugee *toyi-toying* [protesting in public]. I am just waiting for the day when I get my citizenship. I will wait until just after I get my citizenship papers to ask the Citizenship Board some very critical questions, because if I ask before I get it, I may put my application in jeopardy. I want to ask them whether, now that I am a citizen, I will be able to stand for elections; will I be able to campaign in the communities and in the *tinkhundla* because I would also like to go to Parliament. To be able to do that would show that I am a real Swazi. But not everyone wants to do that. Many of my friends who have got their citizenship are just satisfied that the citizenship status will give them the opportunities to access means of supporting themselves and their families and as long as they can do that, they see no reason to make noise.

⁶³ Interview with 'James James', who requested that his real identity be withheld, Mbabane, September 2012.

James James states that you cannot demand service as a right in Swaziland, and if you try to, you will struggle because you are in a weak position as a refugee. It is better just to keep quiet so you can have a chance to make a life for yourself. At the time of the interview James James was worried that there was still no Citizenship Board and expressed the hope that the King would appoint new people soon so that his citizenship application could be processed. He does stress however, that despite all the problems of being a refugee in Swaziland, he is not ungrateful. He says that Swaziland compares favourably to other countries that he has lived in when it comes to the treatment of refugees. He explained that some people come from far away and end up in Swaziland because it is well known as a peaceful country: 'Swazis do not know war – sometimes I think Swazis do not appreciate that this peace that the country has is a blessing, things can change very quickly.'

D. Conclusions and recommendations

Issues of citizenship are complex and the complexities are compounded when the issues of citizenship intersect with those of political participation. In Swaziland, the legal and institutional framework for dealing with citizenship issues – regardless of whether it is with respect to women, economic migrants or refugees and asylum seekers – is inadequate. The present legislation is out-dated and discriminatory. The processes aimed at dealing with citizenship issues are currently not clear. Despite the reconstitution of the Citizenship Board, a backlog of citizenship applications and unconstitutional citizenship legislation will continue to complicate immigration procedures.

With respect to political participation, it is clear that within the growing diversity of Swazi society, issues of migration are not really well understood. This is in particular in relation to the rights of immigrants, regardless of origin, to be part and parcel of every aspect of life in the country and to benefit from the rights of 'belonging', while undertaking their responsibilities to contribute to development in the political sphere. Representation at the levels of political leadership and governance are not reflective of this diversity and the reasons for this need to be further investigated. There is also a need to address the 'self-exclusion' that might be occurring among migrants because of the fear that they may be targeted or victimised if they support political opinions and activities that differ with those of the status quo. Any recommendations, therefore, must seek to address this interrelatedness between the diversity in society and broad-based inclusion in political participation.

There is a need to conduct in-depth research into this issue in order to understand the manner in which the growing diversity in Swaziland's populace is impacting on the political stage.

There are many subtle dynamics relating to, among other issues, race, religion and economic considerations that need to be further interrogated and understood if the current momentum towards democratisation is to be true to democratic values and principles and inclusive of all sectors of Swazi society. This would also assist in obtaining more empirical evidence about the nature of emerging trends, if any, that are accompanying these developments.

The need for ongoing civic education on human rights, democracy and good governance cannot be overemphasised, because these forms of education will empower the populace

to understand their rights and responsibilities in relation to politics and governance. They would be able to engage effectively in respecting and promoting political tolerance and the need to strengthen the governance infrastructure in terms of respect for the key democratic tenets, including the separation of powers, rule of law, transparency and accountability, respect for human rights and fundamental freedoms. Civic education and mobilisation, based on promoting understanding and action among the various groups in Swazi society, is critical to the creation of a critical mass whose collective engagement with political issues can contribute to enhancing the democratisation process.

Advocacy for law reform must be undertaken. It is necessary to conduct an in-depth analysis of the areas where the current constitutional and legal framework is unsuitable. There are glaring examples, such as in the case of gender-based discrimination, but there are also other areas that need to be assessed.

Strategic and test case litigation are also other areas that can lead to changes in issues of discrimination around matters of citizenship. For instance, litigation challenging the prevalence and magnitude of challenges faced by women who cannot pass on their Swazi citizenship to their children and/or spouses, could produce a pronouncement from the courts on the contradictory statements in the Constitution's provisions on equality and citizenship. Another issue could be the current Citizenship Bill that is before Parliament. The Constitution states that Parliament is not empowered to enact discriminatory legislation. If the legislature were to pass the bill in its current form it would violate this provision of the Constitution. Legal action could be taken to prevent this from happening or, after the fact, to challenge the constitutionality of the final legislation.

4

Participation in the policy process

Participation in policy-making is a critical component of democracy in the sense that it allows the populace to engage and influence policy- and decision-makers on the issues that affect them. It is therefore important that the rights and freedoms that support this engagement, being mainly the freedoms of expression (which includes the right to access information) and freedom of association and assembly, are respected and protected.

A. Freedom of expression

With respect to the freedom of expression, section 24 of the Constitution provides the following:

A person has a right of freedom of expression and opinion.

A person shall not except with the free consent of that person be hindered in the enjoyment of the freedom of expression, which includes the freedom of the press and other media, that is to say

- Freedom to hold opinions without interference;
- Freedom to receive ideas and information without interference;
- Freedom to communicate ideas and information without interference (whether the communication be to the public generally or to any person or class of persons); and
- Freedom from interference with the correspondence of that person.

Constitutional limitations on this right include that which is:

reasonably required: in the interests of defence, public safety, public order, public morality or public health; or that is reasonably required for the purpose of protecting the reputations, rights and freedoms of other persons or the private lives of persons

concerned in legal proceedings; preventing the disclosure of information received in confidence; regulating the technical administration or the technical operation of telephony, telegraphy, posts, wireless broadcasting or television or any other medium of communication; or that imposes reasonable restrictions upon public officers.

Supporting the constitutional provisions is the relatively recent Information and Media and Policy, which, among other things, provides for the right to access information, a dimension that is omitted in the Constitution. Section 7 of the Policy provides that the:

freedom to acquire, hold, impart and to share ideas is a fundamental human right, which is enshrined in the Constitution of the Kingdom of Swaziland. This right to access information in the hands of public or private entities or individuals is not the preserve of mass media practitioners, but they inherit it as members of society.

The policy also enjoins ‘government to continually endeavour to use mechanisms and resources at its disposal, or coopt other innovative means or enabling technologies, in order to effectively communicate its intentions and policies and to provide appropriate information’.

However, despite some of the relatively positive provisions in the Constitution and Policy, there is no additional subordinate legislation that actualises these articulated principles. In fact, there exist a plethora of laws that restrict media freedom and punish free expression.⁶⁴ In addition to restrictive legislation, the state has used a variety of non-legal means to ensure control over the media. Even proposed legislation, which should take the country forward, is regressive. For instance, the 2007 Freedom of Information Bill contains major flaws in that some of its provisions actually have the effect of restricting access to information rather than promoting and facilitating it. The bill does not contain a requirement that government proactively disclose information as a matter of routine. Instead, it requires people who seek information to jump through a number of bureaucratic hoops before the information will be released. This is not only time consuming, it is also costly, as potentially prohibitive fees attach to most of the information that can purportedly be accessed. The effect of the bill in theory, if it becomes law, will be to make information available. In practice, however, it will make very little difference since people would find it nearly impossible to obtain the information because of the huge bureaucratic wall that will have been built to stop them.⁶⁵

The media landscape in Swaziland comprises of print and electronic media and includes local media as well as media from South Africa. The internet is also increasingly becoming a popular form of media. The Swaziland print media consists of two daily newspapers, the *Times of Swaziland*, which is privately owned, and the *Swazi Observer*, which is essentially owned by the traditional authorities and government through Tibiyo takaNgwane, a royal investment company. Both the *Times* and the *Observer* have weekend publications, being the *Swazi News*, *Times Sunday* and *Weekend Observer*. The *Nation Magazine*, published monthly, is privately owned. These publications attempt to raise critical national issues such as corruption and other

⁶⁴ MISA–Swaziland conducted a study that identified over 32 pieces of media-restrictive legislation.

⁶⁵ Rooney, R, *Voices Unheard: Media Freedom and Censorship in Swaziland*, Excelsior, 2011.

forms of bad governance, but they do so within the context of tight state control over the media. In the view of a former managing editor of the *Times of Swaziland*, Mbongeni Mbingo, the restraint and self-censorship exercised by the media is simply a reflection of the dynamics of Swazi society. Mbingo states that:

In Swaziland media is as free as the people. As long as people do not want to talk about the things that affect them, the media cannot force them to do so. Democracy is about popular rule, not what pleases a few, but a majority. The media is manipulated and its independence interfered with by government. For example, recently a jet landed at the country's only airport and it has been claimed it is a 'gift' from a development partner. This issue is obviously newsworthy yet the media was barred from taking pictures of the airbus.⁶⁶

There have been instances where the media has attempted to push the boundaries in being critical of government, exposing corruption and calling for accountability, but eventually there seems to be an understanding that it can only go so far. This is particularly because the authorities have demonstrated how punitive they can be. In the 1990s the *Swazi Observer* offices were closed and employees retrenched when it published articles that offended the authorities. Mbingo is of the view that:

this type of establishment is abnormal. Under normal circumstances journalists have an obligation to both respect those in authority and also to report without any fear or favour. For the independent media houses it is additionally difficult because of the size of the economy. The government has a hold on the economy and has used the withholding of advertising as a weapon for punishing media houses. Since the government is in a financial crisis it affects almost everyone and any further aggravation of government risks making a difficult situation even worse for the media.

The challenges faced by the media are confirmed by former Media Institute of Southern Africa Swaziland (MISA-Swaziland) National Director, Comfort Mabuza, who states that 'the print media is subject to tight control and manipulation. It is not only self-censorship that is killing access to information, advertising revenue is withheld to remind the media that they may find themselves out of business if they persist in pursuing the "so-called" freedom of the press.' In his view:

There is not enough robust debate on national issues and people are deprived of crucial information. There is no in-depth analysis of issues and challenges faced by the nation as even investigative journalists are unable to live up to their calling. At the end of the day you have information-deprived citizens because the media is under siege and under the control of the status quo. In the absence of free political activity where citizens can freely enjoy their fundamental freedoms, we can conclude that debates are censored and forever curtailed by the status quo.

⁶⁶ Interview with Mbongeni Mbingo, then managing editor of the *Times of Swaziland*, Mbabane.

In relation to the impact of state control of the media on political participation, Mabuza states that:

Citizens who are deprived of information cannot call those who lead to account for decisions taken. Only organised formations are able to evaluate government programmes based on available information and in this way democracy is strengthened. When one compares the coverage of salient issues in the print media by comparing them with what is being reported in the neighbouring South African papers, you begin to realise that there is so much fear and self-censorship in Swaziland's media. Big stories are written in the South African media about the socio-political developments in Swaziland that expose corruption, but local media is unable to do the same. The local print media is also under siege in that the more it exposes corruption, those in positions of power threaten it with the withdrawal of advertising. If the media in Swaziland was free and uncensored, a robust debate should have followed the Salgaocar exposé in the South African media.⁶⁷ The following week should have been filled with features, commentaries and opinion pieces on the salient issues raised in the article, i.e. the road levy, contamination of the water supply of Mbabane from Hawane dam and other issues such as the impact of granting a mining licence for work on an old mine that has been declared a World Heritage site. The discussion of these issues will likely have unearthed much more in terms of corruption at the various levels of government. It is therefore not surprising that some crucial stories do not see the light of the day.

In terms of Swaziland's electronic media, the Swaziland Broadcasting and Information Service (SBIS), a radio service that provides a siSwati and an English channel, and the Swaziland Television Broadcasting Corporation are both completely state-controlled. A second television station – Channel S – is privately owned, and has operated intermittently over the past few years. The Voice of the Church is an additional private Christian radio station whose programming essentially consists of religious content. The dominance of the state in the electronic media industry has been the subject of criticism because the state imposes limitations on what information can be disseminated and whose voices can have access to the radio. According to Mbongeni Mbingo:

Media houses such as the SBIS, which are 100% state-owned, are faced with increasing challenges. Lack of independence makes it hard to work. Media houses under the government depend on government subventions and they operate within a range of limited finances. If they were not state-owned they would enjoy freedom of expression in the manner enshrined in the Constitution. As it is, currently [the] SBIS is paralysed by the fact that it is a 100% government department and the fact that even the journalists have taken an oath of secrecy [as civil servants]. They also want to assure themselves of job security and they understand that if they are critical of government in their reports, then that would result in sanctions against them and the station. Due to this kind of influence on the electronic media, there have been calls from media

⁶⁷ For more information on Salgaocar Swaziland, see *The Mail and Guardian*, 31 August 2012.

advocacy organisations for the transformation of the state broadcasters, in particular the radio, into editorially independent public broadcasters.

There have also been calls for ‘opening up of the airwaves’ so as to enable greater diversity in the electronic media and attempts have been made by groups such as Lubombo Radio and communities such as Matsajeni to acquire community radio licences. However, the legal and regulatory framework is in the hands of government through the statute that establishes the Swaziland Post and Telecommunications Corporation. Mabuza again notes that:

The absence of broadcasting legislation in Swaziland is detrimental to progress, as the government of the day continues to exercise a monopoly over the broadcast media. Recent developments within the media sector in Swaziland expose a regime that is desperate and therefore needs to control content in the electronic media. This unfortunate development has seen the rise of attempts by the government of the day to craft, among other, oppressive instruments and policies such as the Guidelines for the Electronic Media. Presently, there is no freedom of the airwaves as the electronic media is in the high-handed control of government. Both television and radio are under strict control by the Ministry of Information, Communications and Technology. The same ministry that has introduced stringent controls to prevent people (politicians and civil society groups in particular) from using the electronic media to make announcements or disseminate any views. These guidelines were crafted with the 2013 elections in mind to curtail the freedom of the press and expression as the elections approach. In a rural-based country like Swaziland, where the majority of citizens are dependent on radio in particular, this is a worrying development for freedom of expression and of the media. We need regulation that will clearly spell out the role of government, the regulator and service providers in order to avoid this unnecessary control of the media. Electronic media should embrace the idea of ensuring that the rights and responsibilities of citizens in society are guaranteed and it should be promoting a democratic order and agenda, thereby encouraging good and accountable governance. It should further avail space for debates on constitutional issues and how citizens can utilise such documents to better their lives. Above all, it should be promoting the tenets of the human rights and entitlements so that people can live freely and enjoy their freedoms.⁶⁸

B. Freedom of association and assembly

Complementing freedom of expression in the context of participation in policy processes is the freedom to organise and form associations to advance the rights and interests of citizens. Freedom of association and assembly are cornerstone provisions in any constitutional and democratic society. In the case of Swaziland, it is provided for by section 25 of the national Constitution which states that:

- A person has the right to freedom of peaceful assembly and association; and
- A person shall not except with the free consent of that person be hindered in the

⁶⁸ Interview with Comfort Mabuza, former National Director, Media Institute of Southern Africa (MISA) – Swaziland Chapter, Mbabane, August 2012.

enjoyment of the freedom of peaceful assembly and association, that is to say, the right to assemble peacefully and associate freely with other persons for the promotion or protection of the interests of that person.

However, a number of factors militate against the full enjoyment by citizens of this right. Firstly, enabling legislation giving practical effect to this constitutional principle has not been enacted. For instance, a law on the legalisation and operation of political parties, to which government has remained resistant, is a glaring omission in view of the Constitution's adoption in 2005. Secondly, repressive draconian laws such as the Public Order Act of 1963 (which require police permission for meetings) and the Suppression of Terrorism Act of 2008 impede the enjoyment of the right to associate and assemble. The pro-democracy movement and political parties have had their meetings disrupted and their members harassed continuously over the past decade and more. Only the trade union sector, through the Industrial Relations Act of 2000, enjoys a narrowly defined measure of protection of its right to engage in strike and protest action. But in recent years, even this sector does not fully enjoy these rights and workers' activities have been violently disrupted by state security forces. The public order and terrorism Acts are clearly in conflict with the Constitution and should have been repealed.

c. Limited public participation mechanisms

Notwithstanding the restrictions on the rights of expression, association and assembly, some limited mechanisms through which consultation is conducted on national policy issues do exist, for which the executive is primarily responsible. Policies that emanate from government ministries are coordinated by the Public Policy Coordination Unit in the Prime Minister's Office. The guidelines for ministerial formulation of public policy includes consultation with stakeholders at both the early stage of the policy-making process to define the purpose of the policy and to set preliminary objectives, as well as later on. This includes ongoing dialogues with stakeholders in analysing possible policy options, during the drafting the policy as well as identifying the resource implications of the policy.⁶⁹ In practice, however, there is ad hoc and inconsistent implementation of consultation on government policy. The extent to which consultation occurs can depend on any number of factors, including whether the policy issue is controversial, or where the ministry in question either does not have the capacity or the will to engage stakeholders. For example, Swaziland has committed herself to the Millennium Development Goals, but consultation is usually sectorial and limited to provision of information when Swaziland is due to report on progress made. The Poverty Reduction Strategy and Action Plan of 2006 was the subject of some consultation. At times civil society is 'consulted' by the presentation of a drafted document and acts simply as a 'rubber stamp' on what is presented. At other times, there may be a sincere concerted effort to ensure participation. One such process was the development of the National Gender Policy, although the final policy adopted by Cabinet is a severely diluted form of what stakeholders had proposed.

⁶⁹ Government of the Kingdom of Swaziland, Public Policy Coordination Unit, Drafting Public Policy and Cabinet Papers: A Guide for Ministries (Draft), July 2005.

In keeping with the dual nature of Swaziland's system of governance, traditional policy-making structures are also recognised and used. Section 232 of the Constitution recognises the *Sibaya* as follows:

- The people through *Sibaya* constitute the highest policy and advisory council (*Libandla*) of the nation;
- The *Sibaya* is the Swazi National Council constituted by *Bantfwabenkhosi*, the *tikhulu* of the realm and all adult citizens gathered at the official residence of the *Ndlovukazi* under the chairmanship of *iNgwenyama* who may delegate this function to any official; and
- *Sibaya* functions as the annual general meeting of the nation but may be convened at any time to present the views of the nation on pressing and controversial national issues.

The most recent *Sibaya* was called in August 2012 and the King requested that the discussions focused on solutions to the economic crisis; Swaziland's capacity for self-sufficiency and sustainability; poverty reduction; ratification of regional and international charters, conventions and protocols; and the forthcoming 2013 elections. The *Sibaya* is the forum in which the authorities are supposed to obtain a mandate from the people on various pressing national issues. However, this forum has always been looked upon with suspicion by civil society. It is criticised for not being a genuine platform for meaningful engagement; that it is stage-managed to a certain extent and that nothing tangible emanates from its deliberations. There is wariness on the part of civil society to participate. However, the issues raised by 'ordinary' people and community members at the latest *Sibaya*, convened in the midst of a ground breaking strike by teachers, demonstrated that the mood of Swazis currently is that of serious dissatisfaction as they demand a transformation in the governance and leadership of the country.

Apart from the ministerial policy processes, there are other forums that government claims to have established for public participation in policy formulation. For instance, Swaziland has adopted the Smart Partnership Dialogue concept and on an annual basis regional and national Smart Partnership Dialogues are held which purportedly bring together a broad spectrum of representatives of Swazi society. There are also tripartite structures comprised of government, the private sector and labour on social dialogue. However, these mechanisms have been criticised for being mere 'talk shops' which are stage-managed in terms of circumscribing the thematic areas to be discussed, government's unilateral prescription on who should be invited and the absence of tangible outcomes from these processes.

D. Civil society advocacy

As there is no guarantee that specific civil society organisations will receive invitations to participate in such policy-making meetings, civil society organisations have occasionally proactively convened their own meetings to discuss and take up common positions regarding policy issues. For example, some non-governmental organisations (NGOs) have been able to influence the passage of bills and gather international support to place pressure on government. The Coordinating Assembly of Non-Governmental Organisations (CANGO), through its

Economic Justice Network, has in the past been able to engage its members in discussions on the national budget and produce issue papers for use in advocacy with Members of Parliament and government. Swaziland is currently in a financial crisis and government has produced a Fiscal Adjustment Road Map as its policy guide to turn the situation around. To provide another perspective on the issue of Swaziland's recovery and prudent fiscal management of resources, CANGO brought together representation from various shades of society with the aim of formulating the position of civil society on the country's economic position and recovery. This will also be an advocacy tool in promoting dialogue with government on policy alternatives that have been discussed by a broad section of Swazi society. Ultimately, however, it will be government that makes the final decision as to what is included in the policy.

The potential benefit from promoting participation is vast, in that civil society in Swaziland is diverse and much value would be added to the processes and policies of such involvement. In Swaziland the notion of civil society has been the subject of some debate due to the political environment of the country. In development circles, civil society has been deemed to comprise of any non-state actor inclusive of groupings such as the Church, trade unions, NGOs, the private sector as well as the individual citizen. These various structures, which organise citizens according to their various interests, are traditionally vehicles through which citizens engage the state on issues pertaining to governance. The status of political parties as civil society organisations are not entirely fixed, with one school of thought excluding political parties from the definition because of the inherent nature of political parties competing for power to run the state. However, this presupposes the existence of a dispensation that accepts plurality in its political system. Conditions in Swaziland support the second school of thought because of the 40-year ban on political parties in the country, and because no enabling legislation has been enacted to facilitate their registration and operation, despite the promulgation of a new Constitution. Consequently, political parties in Swaziland, while remaining true to their quest for power, find themselves falling within the ambit of civil society as a broader concept.

Civil society has been a strong voice – whether officially invited or not – in raising and discussing critical national issues. NGOs, for instance, have been able to engage in respect of almost any issue, from income generation, food security and healthcare to gender equality and human rights; and to conduct advocacy or service provision due to the diverse mandates, expertise and technical skills of their members. The Church has been a critical force in raising social justice issues. Workers' organisations, with the support of the International Labour Organisation, have had a significant presence in economic issues and have used their relative freedom to engage with political and governance issues. Political parties, though legally and practically constrained, have supported the interventions of the pro-democracy movement and have engaged their own advocacy using their regional and international networks to draw attention to the challenges in Swaziland.

However, civil society has increasingly been affected by depleted capacity as a result of diminishing funding sources, changing donor priorities, the global economic crisis and Swaziland's position both as a middle-income country that does not qualify for some forms of development aid, but also by the political situation in that some potential development partners are repelled by the absence of democracy and abuse of human rights. Consequently, many NGOs

have been severely weakened by the loss of skilled human resources and the inability to sustain their operations. In turn, their need to deal with the survival issues of their organisations has diverted their attention and focus away from policy issues and engagement. Accordingly, some commentators are of the view that ‘civil society [is] also constrained by the lack of a common agenda, limited capacity to engage the state and its institutions, by not being proactive but reactive, by fielding competing agendas that impair their capacity to mobilise citizens more broadly and their weak capacity to create or open spaces for policy influence’.⁷⁰

E. Conclusions and recommendations

A contradictory situation exists in Swaziland in which the legal framework both promotes as well as restricts participation in policy processes. The Constitution recognises and protects the critical rights associated with effective participation in policy processes. But the articulation of these rights at the level of principle in the Constitution is not being translated into an enabling environment in terms of the passage of facilitating legislation and a political climate that is consistent with the Constitution. Additionally, the authorities, in clamping down on these rights, have subdued any voices that reflect dissent. On issues of consultation there is no consistency, but what is evident is that the governing authorities are more comfortable engaging in ‘consultation’ on issues that are not contentious, but as soon as the issues touch on the political, the space to engage shrinks significantly. This was vividly demonstrated in an incident in which representatives of the Swaziland Young Women’s Network and Swaziland Positive Living were guests in a live radio programme to discuss issues of reproductive health and rights. During the discussion, issues of the deterioration of the healthcare system were raised, in particular with reference to HIV/Aids and when reference was made between the linkage of the drug shortages to government’s management of resources, the programme was immediately taken off the air.

Within this context of legal and political uncertainty it is difficult to guarantee public participation in policy processes. For this reason advocacy in this area must necessarily be multidimensional and multilayered. This would include the use of platforms on issues where consultation and discussion are officially encouraged, for instance in relation to food distribution, income generation, gender-based violence, education, children’s rights and HIV/Aids. Through discussion of such socio-economic issues it is inevitable that some of the ‘higher’ political issues will come into focus as well, because most socio-economic issues are political in one way or another.

The monitoring of policy formulation and development of law, as well as implementation, and calling for accountability in this regard could also be an effective intervention.

Another possibility is strategic litigation on access to the state-controlled media to challenge the fact that members of the public, who may be organised in certain groups such as trade unions, do not receive any coverage on radio and are prevented from expressing their views. Additional legal action could challenge the disruption of meetings of civil society and political parties by forces of the state.

⁷⁰ EISA, *Consolidating Democratic Governance in the SADC Region: Swaziland*, 2008, p. xvii.

Civil society has to look beyond the officially sanctioned forums for consultation and create its own spaces to develop 'shadow' policies, which can then be used for advocacy on policy alternatives. Examples of such processes could be the annual *Sidla Inhloko*⁷¹ (People's Parliament) held by the Swaziland Coalition of Concerned Civic Organisations in which members of society, in particular from community areas, articulate issues of concern and make recommendations on what should be done to address them. The substance of these deliberations can form a basis for the development of policy guidelines or model policy instruments on which to base policy advocacy.

Most importantly, civil society requires capacity-building and support to be able to identify, use and widen existing opportunities for engagement.

⁷¹ *Sidla inhloko* literally means 'we are eating the head' and refers to a customary practice in which men gather together after a ceremony in which cattle were slaughtered to eat the head of the beast and engage in serious discussion on issues. The concept has been adopted by different members of civil society for various programmes such as getting men to engage in discussion on HIV/Aids. The SCCCO uses this practice to convene a 'People's Parliament' every year, which includes women and men from all walks of life to engage with national issues. The resolutions taken are recorded, disseminated and used for advocacy.

5

Elections

The last national elections held in 2008 were the first to take place under the 2005 Constitution and as such provide a good basis on which to examine Swaziland's compliance with relevant regional and international instruments on democracy and participation. According to section 79 of the Constitution 'the system of government for the government of Swaziland is a democratic participatory *tinkhundla*-based system which emphasises devolution of state power from central government to *tinkhundla* areas and individual merit as a basis for the election or appointment to public office'. Section 80(1) additionally provides that 'for purposes of political organisation and popular representation of the people in Parliament, Swaziland is divided into several areas called *tinkhundla*'.⁷²

An *inkhundla* is essentially a constituency area, comprising of a number of chiefdoms. For purposes of national elections, the chiefdoms are used as primary areas for the election of candidates for Members of Parliament. The candidates nominated at chiefdom level then contest the position of Member of Parliament (MP) at *tinkhundla* level during secondary elections. Section 95(1)(a) of the Constitution provides that a maximum of 60 *tinkhundla* may be established for the purposes of electing members of the House of Assembly. Currently, there are 55 *tinkhundla*, each comprising 3–14 chiefdoms.

Swaziland's national elections take place on a five-yearly basis and are governed by the Constitution, the Elections Order of 1992 and the Voter Registration Order of 1992. The elections are for the following positions:

- Members of Parliament, who will be *inkhundla* constituency representatives in the House of Assembly;

⁷² Plural of '*inkhundla*'.

- *Bucopho*, the ‘*Inkhundla* Committee’, which comprises representatives (also called *Bucopho*) from each of the chiefdoms within an *inkhundla*; and
- *iNdvuna yeNkhundla*, the chairperson of *Bucopho*, who convenes and presides over meetings of the *inkhundla* and supervises the activities of the *inkhundla*.

It has been said that the operation of the *inkhundla* system of governance has been an effort to combine both the ‘modern’ and ‘traditional’ systems of government in that the elections, using traditional structures, are for the establishment of a ‘modern’ bicameral Parliament, consisting of the House of Assembly (Lower House) and Senate (Upper House). The current composition of Parliament is 55 elected members in the House of Assembly, ten members appointed by the King, and the Speaker, who was elected from outside of Parliament. The Senate consists of 30 members – ten elected by the House, and 20 King’s appointees. Currently therefore, there are 97 Members of Parliament with the Attorney General being an additional ex officio member.

A. Compliance with international standards

The international and regional instruments to which Swaziland is a party pertaining to elections collectively promote the establishment and maintenance of a culture of democracy among and within state parties. The standards therein address fostering an environment – both legal and institutional – within and through which participation in democratic processes can be facilitated. The standards further provide for the management of the electoral process and for the mode of participation available to the populace. The following discussion aims to examine the extent to which the elections process in Swaziland complies with the country’s international and regional obligations with respect to these three aspects of elections. A few of the provisions of the instruments are reproduced hereunder as examples of the principles to which Swaziland’s elections are supposed to adhere.

Promotion of the culture of democracy

The international instruments cited in Box 2, in seeking to promote a culture of democracy, provide for both the substantive and procedural imperatives of the democratic process. Political tolerance, enshrining human rights and fundamental freedoms, and the establishment of adequately resourced and autonomous institutions to support democracy and accountability, are integral to the promotion of democracy. As the supreme law, the national Constitution sets out the country’s governance infrastructure and the principles according to which it operates.

The Preamble, which purports to articulate the journey that the country has taken towards the adoption of the Constitution and may be used as an interpretive aid to the Constitution’s provisions, acknowledges the need for democracy in the promotion of national development, stating, ‘Whereas it is necessary to blend the good institutions of traditional law and custom with those of an open and democratic society so as to promote transparency and the social, economic and cultural development of our nation.’⁷³ Section 1(1) of the Constitution declares that ‘Swaziland is a unitary, sovereign, democratic Kingdom.’ Among the political objectives in the Constitution’s Directive Principles of State Policy, is that ‘The state shall promote, among

⁷³ Constitution of the Kingdom of Swaziland Act of 2005, preambular paragraph 4.

the people of Swaziland, the culture of political tolerance and all organs of state and people of Swaziland shall work towards the promotion of national unity, peace and stability.⁷⁴ As part of the constitutionally enshrined ‘Duties of the Citizen’, section 63(e) enjoins Swazi citizens to ‘promote democracy and the rule of law’.

2: Principles and guidelines provided by international instruments to promote democracy

Southern African Development Community (SADC) Principles and Guidelines Governing Democratic Elections in Africa⁷⁵

2.1.3 Political tolerance (one of the ten principles)

African Charter on Democracy, Elections and Governance in Africa⁷⁶

Article 4: State parties shall commit themselves to promote democracy, the principle of the rule of law and human rights, and shall recognise popular participation through universal suffrage as the inalienable right of the people.

Article 11: The state parties undertake to develop the necessary legislative and policy frameworks to establish and strengthen a culture of democracy and peace.

Article 12: State parties undertake to implement programmes and carry out activities designed to promote democratic principles and practices.

Article 15: State parties shall establish public institutions that promote and support democracy and constitutional order.

Principle 1: Respect for human rights and democratic principles.

New Partnership for Africa’s Development (NEPAD) Declaration on Democracy, Political, Economic and Corporate Governance⁷⁷

Ensure that our respective national constitutions reflect the democratic ethos and provide for demonstrably accountable governance.

Further, in chapter III of the Constitution is the Bill of Rights, which outlines the human rights and fundamental freedoms that are to be promoted and protected. Among these are the rights to equality and non-discrimination as well as the freedoms of expression, assembly and association, which are central to exercising the political freedom that is underpinned by democratic values. In defining the system of governance, section 79 states ‘The system of government for Swaziland is a democratic, participatory, *tinkhundla*-based system.’

On the face of the Constitution’s provisions, Swaziland seems to operate a democratic system – albeit imperfect. However, the mere inclusion of the word ‘democracy’ and of provisions

⁷⁴ Ibid., section 58(6).

⁷⁵ <http://www.eisa.org.za/PDF/sadcguidelines.pdf>.

⁷⁶ http://www.ipu.org/jidd-E/afr_charter.pdf.

⁷⁷ http://www.eisa.org.za/aprm/pdf/APRM_Declaration_Governance.pdf.

that contain related concepts and values, do not necessarily make a system democratic. Shimbira is instructive in reiterating the utility of understanding democracy through its three-fold manifestation as a value, a process and as a practice.⁷⁸ It is through examining these three dimensions of the concept of democracy that an appreciation of the democratic situation of a society can be gained.

Democracy as a value

In the quest for better lives human beings are continuously seeking greater freedom and the expansion of space within which this freedom can be expressed in all spheres of life – socially, economically and politically. As a value therefore, democracy is a basic human need – it embraces pluralism and diversity as well as equality and non-discrimination. In turn, democracy fosters tolerance because there is an appreciation that a multiplicity of views and possibilities exist in any given society with ‘none [having a] monopoly over what is truth or right’.⁷⁹ Each must be equally acknowledged and respected by all.

Democracy as a social process

It has been said that democracy is not a destination but a continuous process of ‘becoming’. This refers to the ongoing interaction and engagement of the different members of a society as each seeks – whether as an individual or in a group – to exercise greater freedom. And as that freedom must not impinge on the freedoms of others, democracy as a social process refers to the dynamics of the continuous interactions of different perspectives, and the evolutionary process of enlarging and improving the spaces within which these freedoms are enjoyed.

Democracy as a political practice

According to Shimbira, ‘This is democracy’s best known feature. It refers to the specific manner of organising and exercising power in accordance with certain universal norms and principles. As political practice, democracy can be understood at two levels: [that of] principles and [that of] institutions.’⁸⁰ With respect to the former, the principles of legitimacy, rule of law, accountability and the rights of citizens to participate in the management of public affairs are among the key tenets of democracy and good governance. With respect to the latter

Democracy is unlikely to thrive and mature without the creation of certain institutions that promote its continued practice. Democratic institutions, therefore, are to ensure that the procedures of government are compatible with democratic principles. These include the de-centralisation of government structures, the notion of the separation of powers as well as the system of checks and balances in the operations of government. What is important to note is that institutions are unlikely to perform without an independent vibrant civil society and a free press, because it is through the vigilance of civil society that the democratic dream is kept alive.⁸¹

⁷⁸ Shimbira, T., presentation on ‘Democracy and Democratisation’ for the CSC–SACPN Conference on ‘Bridging the Political Divide’, 2002.

⁷⁹ Ibid.

⁸⁰ Ibid.

⁸¹ Ibid.

The following discussion examines the issue of the management of and participation in the electoral process, so as to determine to what extent the constitutional and legal framework, which in theory seem to provide for democracy, are actually promoting this multifaceted democratic culture and delivering democratic outcomes for Swazi society.

B. Participation in elections

In view of the protection afforded by the international instruments and constitutional provisions, it is worth examining whether these in fact enabled wide participation of the citizenry in the 2008 elections. According to the 2007 Population and Housing Census, Swaziland's population is 1 018 499 inhabitants, comprising 418 428 males and 537 021 females. In terms of the characteristics of the population, 39.6% are below the age of 15 years, 50% are below the age of 20 years and less than 2% are 65 years or older.⁸² The 2007 census data also reveal that the urban–rural distribution of the population is 22.1% and 78.9%, respectively, as illustrated in Table 3.

Table 4 shows the number of voters who registered for the 2008 election, while Table 5 lists the actual numbers of as those who voted in the secondary elections, based on the report of the Elections and Boundaries Commission (EBC) on these elections. This is an increase from the number of voters who registered for the 2003 elections, shown in Table 6.⁸³

However, as has been noted above, democracy and participation is complex and for a more accurate sense of the existence of democracy on the ground, it is important to look beyond the numerical data and examine whether the context within which the elections occur actually promotes effective participation. Included as critical in the promotion of participation by the standards cited in Box 3 are the following:

- Representation and the right to participate (either as a voter or as a candidate for election);
- Equality and non-discrimination in the election process;
- Political pluralism (particularly in the form of protecting the freedoms of expression, association and assembly, the existence of political parties and the operation of a multi-party dispensation); and
- Voter education.

Table 3: Population figures for 2007

Area	Sex		Total
	Male	Female	
Urban	108 071	117 222	225 293
Rural	373 357	419 799	793 156
Total	481 428	537 021	1 018 449

Source: Government of Swaziland, Central Statistics Office, 2007 *Population and Housing Census Information Brochure*, 2008.

⁸² Government of Swaziland, Central Statistics Office, 2007 *Population and Housing Census Information Brochure*, 2008.

⁸³ Elections Office, *Kingdom of Swaziland National Election Report*, 2003, p. 6.

Table 4: Voter registration figures for 2008

Region	Males	Females	Total
Hhohho	43 135	50 030	93 165
Manzini	47 718	57 703	105 421
Shiselweni	32 956	44 318	77 274
Lubombo	33 675	39 972	73 647
Total	157 484	192 023	349 507

Source: *Elections Boundaries Report*, 2008, p. 30.

Table 5: Voter turnout figures for secondary elections in 2008

Region	Eligible registered	Total voter	Voter turnout (%)
Hhohho	93 166	55 570	60
Manzini	105 421	56 964	55
Shiselweni	77 271	45 570	61
Lubombo	73 649	43 235	59
Total	349 507	201 339	58

Source: *Elections Boundaries Report*, 2008.

Table 6: Voter registration figures for 2003

Region	Total
Hhohho	62 163
Manzini	63 721
Shiselweni	58 715
Lubombo	45 074
Total	229 673

Source: Elections Office, *Kingdom of Swaziland National Election Report*, 2003, p. 6.

3: Principles and guidelines provided by international instruments on democratic elections

SADC Principles and Guidelines Governing Democratic Elections in Africa

- 2.1.1 Full participation of the citizens in the political process.
- 2.1.2 Freedom of association.
- 2.1.5 Equal opportunity for all political parties to access the state media.
- 2.1.6 Equal opportunity to exercise the right to vote and be voted for.
- 2.1.8 Voter education.
- 2.1.9 Acceptance and respect of the election results by political parties proclaimed to have been free and fair by the competent National Electoral Authorities in accordance with the law of the land.

African Charter on Democracy, Elections and Governance in Africa

Article 13. State parties shall take measures to ensure and maintain political and social dialogue, as well as public trust and transparency between political leaders and the people, in order to consolidate democracy and peace.

Article 17(3). Ensure fair and equitable access by contesting parties and candidates to state-controlled media during elections.

Article 3(11). Strengthening political pluralism and recognising the role, rights and responsibilities of legally constituted political parties, including opposition political parties, which should be given statuses under national law.

Article 3(7). Effective participation of citizens in democratic and development processes and in governance of public affairs.

Article 3(3). Promotion of a system of government that is representative.

Article 3(6). Promotion of gender equality in public and private institutions.

NEPAD Declaration on Democracy, Political, Economic and Corporate Governance

Article 13. Promote political representation, thus providing for all citizens to participate in the political process in a free and fair political environment.

African Union (AU) Declaration on the Principles Governing Democratic Elections in Africa⁸⁴

IV. Elections: Rights and obligations

2. Every citizen shall have the right to participate freely in the government of his or her country, either directly or through freely elected representatives in accordance with the provisions of the law.
3. Every citizen has the right to fully participate in the electoral processes of the country, including the right to vote or be voted for, according to the laws of the country and as guaranteed by the Constitution, without any kind of discrimination.
5. Every citizen shall have the freedom to establish or to be a member of a political party or organisation in accordance with the law.
7. Individuals or political parties shall have the right to freedom of movement, to campaign and to express political opinions with full access to the media and information within the limits of the laws of the land.
8. Candidates or political parties shall have the right to be represented at polling and counting stations by duly designated agents or representatives.
9. No individual or political party shall engage in any act that may lead to violence or deprive others of their constitutional rights and freedoms. Hence all stakeholders should refrain from, among others, using abusive language and/or incitement to hate or defamatory allegations and provocative language. These acts should be sanctioned by designated electoral authorities.

⁸⁴ http://www.au2002.gov.za/docs/summit_council/oaudec2.htm.

10. All stakeholders in electoral contests shall publicly renounce the practice of granting favours, to the voting public for the purpose of influencing the outcome of elections.

11. In covering the electoral process, the media should maintain impartiality and refrain from broadcasting and publishing abusive language, incitement to hate, and other forms of provocative language that may lead to violence.

12. Every candidate and political party shall respect the impartiality of the public media by undertaking to refrain from any act which might constrain or limit their electoral adversaries from using the facilities and resources of the public media to air their campaign messages.

13. Every individual and political party participating in elections shall recognise the authority of the Electoral Commission or any statutory body empowered to oversee the electoral process and accordingly render full cooperation to such a commission/body in order to facilitate their duties.

14. Every citizen and political party shall accept the results of elections proclaimed to have been free and fair by the competent national bodies as provided for in the Constitution and the electoral laws and accordingly respect the final decision of the competent Electoral Authorities or, challenge the result appropriately according to the law.

Conference on Security, Stability, Development and Cooperation in Africa⁸⁵

(23) Political parties

Adopt by 2004, where it does not exist, enabling legislations on the formation and operation of political parties to ensure that such parties are not formed and operated on the basis of ethnic, religious, sectarian, regional or racial extremism and establish a threshold of voter support as criteria for public funding, without compromising freedom of association and the principle of multi-party democracy.

c. Representation and the right to participate

The right to representation is enshrined in section 84 of the Constitution, which also specifically protects the rights of representation of women and marginalised groups as follows:

Subject to the provisions of this Constitution, the people of Swaziland have a right to be heard through and represented by their own freely chosen representatives in the government of the country.

Without derogating from the generality of the foregoing sub-section, the women of Swaziland and other marginalised groups have a right to equitable representation in Parliament and other public structures.

Section 88 of the Constitution stipulates the qualifications of a voter and provides that a person is so qualified if 'that person has attained the age of 18 years and is a citizen of or is ordinarily

⁸⁵ *Memorandum of Understanding on Security, Stability, Development and Cooperation in Africa*. Heads of State and Government First Standing Conference on Security, Stability, Development and Cooperation in Africa, 8–9 July 2002, Durban, South Africa, http://www.africa-union.org/Special_Programs/CSSDCA/cssdca-memorandumofunderstanding.pdf.

resident in Swaziland'.⁸⁶ Section 89 disqualifies certain persons from voting, including any person who has been legally certified 'insane' or of 'unsound mind', is serving life imprisonment or facing the death penalty for the commission of a criminal offence, or is disqualified under any law regarding criminal offences or offences connected with elections.

In terms of qualification for election or appointment as a senator or an MP, a person must be a Swazi citizen at least 18 years of age, a registered voter in the *inkhundla* in which that person is a candidate (in the case of elected members) and must have paid all taxes or made satisfactory arrangements to do so.

A person is disqualified from membership of Parliament where he or she:

- Is legally declared insolvent under any law and has not been rehabilitated;
- Is of unsound mind;
- Is under sentence of death or of imprisonment for more than six months for an act which is a criminal offence in Swaziland;
- Is a member of the armed forces of Swaziland or is holding or acting in any public office and has not been granted leave of absence for the duration of Parliament;
- Is not qualified to be a voter under any provision of this Constitution;
- Is otherwise disqualified by law in force in Swaziland relating to general elections;
- Has been found to be incompetent to hold public office under any law relating to tenure of public office whether elected or not;
- Is a party to, or is a partner in a firm, or a director or manager of a company, which is a party to any subsisting government contract and has not made the required disclosure; or
- Holds or is acting in any office the functions of which involve any responsibility for or in connection with the conduct of any election or the compilation or a revision of any electoral register.

The accessibility of the system to all of those who qualify to participate has been lauded as one of the strengths of the system as there is purportedly no discrimination against any aspiring voter or candidate. However, in reality, the experience on the ground is different from what the law suggests.

D. Equality and non-discrimination in the election process

Section 20 of the Constitution provides for equality before the law 'in all spheres of political, economic, social and cultural life and in every other respect ... and equal protection of the law'. The equality of women and men is further emphasised in section 28, which deals with the rights, freedoms and equality of women in the political, economic and social spheres of life, the provision of resources for women's advancement and that, 'A woman shall not be compelled to undergo or uphold any custom to which she is in conscience opposed.'

⁸⁶ According to section 88(3) of the Constitution, 'A person is "ordinarily resident" in Swaziland where that person has lived in, or has been associated with, that *inkhundla* for a period of not less than five years or is permanently resident in Swaziland and has relevant documents to that effect.'

In the House's election of ten senators, section 94(2) stipulates that at least five of those elected should be women. Sections 94(4) and 95(2), in stipulating the manner in which the King should appoint his quota of senators and MPs, respectively, states that the King should make the appointments taking into account factors such as gender, knowledge or practical experience to represent economic, social, cultural/traditional or marginalised interests not already adequately represented in Parliament. Additionally, with respect to women's participation, the Constitution provides for a special procedure to be conducted at the first meeting of Parliament after an election where women are less than 30% of the members of Parliament. In terms of this procedure, one woman from each of the country's four regions is elected to add four more women to Parliament.

Objectively, the standards for qualification and disqualification for participation in elections, either as a voter or as a candidate, are general in nature and no additional qualifications exist that discriminate against any particular group by virtue, for instance, of their 'gender, race, colour, ethnic origin, tribe, birth, creed or religion, or social or economic standing, political opinion, age or disability.'⁸⁷ Thus, Swaziland has a constitutional and legal framework that recognises the right to representation on an equal basis. Additionally, there is implied recognition of the challenges of participation faced by women and other marginalised groups and provision is made for a measure of 'affirmative action' to ensure the inclusion of these groups in key national processes such as elections. However, the rights so enshrined do not lead to their practical enjoyment by all intended beneficiaries. There are a number of environmental and practical concerns that circumscribe the extent of participation of these groups.

For instance, though women comprise 53% of the population and as a part of the electorate constitute a higher percentage of voters than men, the outcomes of the elections do not reflect this reality. Instead, there is a glaring disproportionality between the numbers of women who participate in the election and the number of women who are ultimately elected. This raises the question of how equal the playing field of elections is for women in light of the seemingly gender-neutral provisions of the Constitution.

Swazi society is deeply unequal in terms of gender as women continue to be discriminated against in all spheres of life. The legal framework, together with customary norms and traditions, as well as religion, have created and sustained an environment where women have been relegated to the status of a minority and historically placed on the periphery of issues of decision-making, leadership and political participation, which are regarded as a male domain. While there have been ongoing efforts over the years in various sectors aimed at promoting women's rights and gender equality, and the 2005 Swaziland Constitution recognises equality of women and men in the social, economic and political arenas, little tangible change has occurred in balancing the gender scales in these areas and in women's lived realities. The absence of significant progress is most acute in the area of politics and governance at all levels.

⁸⁷ The constitutionally recognised grounds on which discrimination is prohibited.

4: Women's participation in the 2008 elections

In 2008, a campaign entitled 'Vote for a Woman' was conducted by a partnership of various civil society organisations including NGOs such as Women and Law in Southern Africa (WLSA), Council of Swaziland Churches and other members of the Coordinating Assembly of Non-Governmental Organisations (CANGO) Gender Consortium, in partnership with the Gender Unit and supported by the United Nations Development Programme. The campaign, inspired by a similar campaign that had been run during the 2003 elections, aimed, in view of the historical discrimination against women and absence in positions of decision-making, to encourage the participation of women in elections, both as voters and as candidates. The aim was also to create awareness on gender equality and encourage communities – both women and men – to appreciate women's leadership capacities and to vote for women candidates.

The Swaziland Constitution provides for equality between women and men in all spheres of life, including in the political sphere. In a deliberate attempt to increase the number of women in Parliament, it also specifically provides for gender equality and women's representation in positions of decision-making, including in Parliament. The Constitution also specifically stipulates that in the House of Assembly's election of ten members of Senate, five candidates must be women and that the King in appointing members of the House of Assembly and Senate, should appoint at least five and seven women respectively. The Constitution also provides that where, after an election, there are less than 30% women in Parliament, the Elections and Boundaries Commission (EBC) should conduct an election for an additional four women members – one from each of the four regions of the country.

However, notwithstanding these provisions, there has only been a small change in women's representation in Parliament. As part of the 'Vote for a Woman' campaign, the WLSA conducted a study of women's experiences in participation in the elections. The findings revealed that despite the legislated equality, at a practical level the ground was not level and that there were other factors that impeded women's participation in elections.

The patriarchal social and cultural norms that position women as minors impact on the extent to which women can take advantage of the legislated equality. According to the WLSA study, these manifested as follows in the collective election experience of women in 2008:

- Many women in all four regions who expressed interest in participating in the elections as candidates were frequently questioned on their cultural and domestic roles, the concern being who would perform their women's duties while they were away in Parliament.
- Women had to ask for permission from their husbands and in-laws if they wanted to stand for election for any of the positions.
- Due to patri-locality, married women who move to their husband's communities after marriage are at a disadvantage because as daughters-in-law they are regarded as 'newcomers' to the community. They are expected to defer to their in-laws and also face the challenge of not fully 'belonging' to the community in the same way as their male competitors, who are well known in the community since birth.
- Some cultural practices also had a negative impact on women's participation in the election. Women stated that the observance of *kuzila* (mourning rites) was a disadvantage in that

women in mourning could not stand for public office. In one of the communities, women voters in black mourning gowns were separated from other voters and were required to do their voting at the local shop rather than at the *umphakatsi* (chief's homestead) because of the belief that women in black mourning attire represent bad omens. Women wearing trousers were also not allowed in the *umphakatsi*. 'Appropriate' and 'respectful' dress code, including covering the head, was a necessity for women interested in being elected if they wanted the community's support.

- Lack of access to and control of resources are also important factors. Engaging in political competition requires financial and other resources for successful campaigning. Again, women are at a disadvantage because as minors in the home, the availability of resources for use in elections is not a decision within a woman's control. Male candidates, as head of their households, do not require permission from anyone else on the use of domestic resources.
- Women in general have limited mobility, which posed further barriers when it came to interaction with other chiefdoms within the *inkhundla* and having to deal with gender stereotypes in these other chiefdoms where the women concerned were perhaps less known. All these factors weigh against the suitability of women as candidates for election in the eyes of the community.
- Age and marital status were also factors in that many of the women who participated in the elections were married. The social perception that women leave their natal homes for marriage disadvantaged younger women who, because of their potential to leave the community, are also regarded as not sufficiently 'belonging to the community' to be given long-term leadership responsibility.
- Some women also reported receiving threats of (gender-based) violence which discouraged their participation.

Currently, only 21 of 97 parliamentarians are women. In the House of Assembly seven were elected from *tinkhundla* constituencies and two were appointed by the King. In the Senate five were elected by members of the House of Assembly and seven were appointed by the King. Even though there were less than 30% women in Parliament at the conclusion of the election, the EBC did not conduct an election for four additional women candidates as stipulated by the Constitution. This non-compliance with the Constitution has not been addressed to date. The challenge for women's participation in Swaziland, therefore, is to elevate equality from a merely legal concept to a concrete practise in society by addressing the non-legal elements that inhibit women's participation. These could include sustained civic and voter education on women's rights, gender equality and the importance and potential of women's participation in politics and decision-making. Another dimension would be ongoing leadership capacity-building and development for women and the provision of support for women in Parliament.

While Swazi society is largely homogenous in that the majority of the population is indigenous Swazi, there are growing numbers of non-indigenous Swazis, some of whom have settled in the country, becoming permanent residents or even citizens. As part of the populace they have an interest in how the political affairs of the country are conducted. As part of their own civic responsibility it would be reasonable to expect them to participate in shaping the direction of the

country and using their right to vote to influence decision-making and governance. However, this does not seem to be happening despite the fact that there are no legal barriers to their participation.

Commenting on an observation that the non-indigenous Swazi citizens of all races do not seem to participate in national issues of governance generally, let alone the elections, and that the current Parliament is not representative in this regard, Mzwandile Fakudze, the Deputy Chairperson of the EBC, emphasised that one of the strengths of Swaziland's system is that it 'sees everyone as being the same, placing all on an equal basis as long as they meet the legally stipulated criteria of eligibility to participate. There is nothing in the electoral process that provides for discrimination on the basis of race, colour, etc.' He explained that none of the electoral documentation or reporting is based on race, ethnicity, religion and other such factors as all Swazi are regarded as Swazi regardless of these characteristics. In addition, voter education and the dissemination of other information related to the elections are targeted at the general public and accessible to all. Fakudze is therefore of the view that people who do not participate in elections are simply exercising their right to choose and it is not for the EBC or any other group to coerce them into participation.⁸⁸

Among the views expressed on this issue was that the engagement of non-indigenous Swazis with the system is predominantly within the economic sphere and they will participate only insofar as their economic interests intersect with political issues. Also relevant is the legacy of colonialism and apartheid where racial and ethnic identities implied separateness and determined one's exclusion or inclusion in the social, economic and political life of a country. Those who are non-indigenous Swazis may not perceive themselves as sufficiently belonging to Swazi society to legitimately and credibly be involved in the country's politics. The issue of 'belonging' was raised by another respondent who stated that, 'while living amongst Swazis, non-indigenous Swazis do not perceive themselves and are not perceived [by other Swazis] as fully part of Swazi society, so they feel no duty or civic responsibility to participate in processes such as elections'.⁸⁹ It was also pointed out that the electoral processes are not inclusive for non-indigenous Swazis. For instance, it was asserted that the voter education campaigns preceding elections were conducted in the SiSwati language and were not accessible to this group. It was noted that most of the material on electoral processes had a rural focus whereas non-indigenous Swazis were more urban-based. Another factor was the traditional element in some of the processes involved, for example, the initial nominations and voting take place at chiefdom level, and in certain instances chiefs or community leaders may be called on to confirm a person's membership of the community. Not having any linkages to these communities and traditional structures can result in exclusion. Some non-indigenous Swazis see no benefit in participation, as regardless of opinions expressed, government continues to do as it pleases. As general members of society they are not oblivious to the political conflicts in the country or the negative repercussions of speaking out and as such they also fear potential sanction should they be perceived to be engaging in politics.

⁸⁸ Interview with Mzwandile Fakudze, Deputy Chairperson, Elections and Boundaries Commission (EBC), September 2012.

⁸⁹ The respondent, a non-indigenous Swazi, requested that his/her identity be kept confidential.

With respect to persons with disabilities, despite the fact that the Constitution prohibits discrimination based on disability, negative socio-cultural beliefs and attitudes persist and have affected the participation of persons with disabilities in all spheres of life. The current Parliament is the first to include a disabled person as a member. Senator Tom Mndzebele, who is visually impaired, was one of the ten senators elected by the House of Assembly. His election and participation in parliamentary affairs has broken the ice in the discussion of the importance of inclusion at this level, which in turn must be replicated in other sectors of society. In September 2012, government ratified the Convention on the Rights of Persons with Disability and this could provide a basis on which to strengthen the participation of the disabled at all levels.

E. Political pluralism

One of the most contested issues that have haunted the governance arena in Swaziland has been that of political parties – their existence, recognition and role. Having contested the 1964 and 1967 pre-independence elections on a multi-party platform, political parties were banned in 1973. From that time until the adoption of the Constitution in 2005, their illegality made it practically impossible for them to operate and participate in issues of governance, let alone contest the elections. Those who support the *tinkhundla* system of governance assert that the exclusion of political parties has proven to work well for Swaziland. They claim that:

- It empowers the ordinary Swazi by ensuring that constituencies are used as engines of development.
- It is non-discriminatory and enhances the right to equality in that all Swazis, regardless of educational background, social status or political persuasion can be elected into public office.
- Individual merit is the basis for election into public office. This causes the elected person to be continuously accountable to the people who have voted him or her into office. If the person refuses to be held accountable, the voters will disown them and will not return them to Parliament.
- It causes the elected person to deliver what he or she promised the voters during the time of the campaign. He or she cannot claim that what they promised is not in line with the policy of the party they represent. Elected representatives remain strictly accountable to the constituency alone (and not to any political parties).
- It causes the elected person to remain a true agent and a voice of the people who have mandated him or her or in accordance with the system of direct representation, in that once you are voted into Parliament, you become a direct representative of the people who have voted for you.
- It is home-grown. It therefore accords with the norms and values of the Swazis. Other African and developing countries are using colonial systems of government, which are not compatible with the way of life of the Swazi people. These ‘foreign’ systems cause political unrest because they are foreign to the norms and values of the people they are meant to regulate.
- It emphasises that development and democracy are key to the welfare of the citizens. You cannot enjoy democracy in a poverty-stricken environment. The system

emphasises that constituencies must be used as engines for economic development and also as polling centres.

- It is democratic and participatory in that everybody participates in the decision-making process. It is also user friendly because it is easily understood by the Swazis at all levels.
- It emphasises that change must be people driven and not driven by a few individuals. It emphasises that when time to change has come, it must be engineered by the people after carefully weighing the advantages and disadvantages of such change.
- It has brought unity, peace and stability to the Swazis. It has made Swaziland a family within a nation.
- The social structures in place are used as control valves for one to enjoy his or her freedom of expression on any subject matter. They are also used as conflict resolution mechanisms.⁹⁰

The current Constitution, with its recognition of the freedoms of expression, association and assembly, has effectively unbanned political parties. Nonetheless, there remain a number of significant impediments to political parties' effective participation in national politics. Despite the recognition of the above-cited rights, elections, according to section 79 of the Constitution, are based upon 'individual merit'. This in effect means that although political parties are permitted to exist, they are not permitted to perform the very function for which they exist – which is to provide a vehicle for the expression and attainment of the aggregated/collective interest of members. Denying political parties the opportunity to participate in elections also denies the electorate a choice. According to Vincent Ncongwane, Secretary-General of the Trade Union Congress of Swaziland, 'political parties are not social clubs. Political parties exist to contest for power in order to govern'. The 2008 Commonwealth Election Observer Mission noted that:

In our wide-ranging discussions we were struck by the concern expressed in many quarters about the lack of a direct relationship in the current Constitution between the protection of human rights and the electoral process. Indeed, the government of Swaziland is party to a number of instruments to this effect. It is widely accepted internationally that democracy includes the rights of the individuals to associate with and support the political party of their will. Yet in practice this right does not exist.⁹¹

In the prevailing situation it has been argued that while the general illegality of political parties has been lifted by the Constitution, in order to enable political parties to play their proper role, there is a need to enact legislation that will outline the details of their operation and participation in politics. In order to become properly active, political parties require enabling laws that provide for their registration, ground rules for the conduct of their activities and funding, as well as their regulation and the manner in which they would participate in politics and governance through the electoral process. In spite of the coming into force of the Constitution in 2005, no laws have yet been passed in this regard. To date, apart from the general provisions of the Constitution,

⁹⁰ Elections and Boundaries Commission, *Conduct of Elections in Swaziland*, 2008; Interview with Mzwandile Fakudze, Deputy Chairperson, Elections and Boundaries Commission (EBC), September 2012.

⁹¹ *Report of the Commonwealth Expert Team: Swaziland National Elections*, 2008, p. 11.

none of the electoral legislation has been amended in order to be aligned with the Constitution. In the absence of enabling legislation, there is no framework for the operation of political parties and no mechanism for their effective participation.

As Swaziland looks forward to the holding of national elections in 2013, the question of addressing political parties' participation has gained increasing urgency. The Minister of Justice and Constitutional Affairs, Chief Mgwagwa Gamedze, has reiterated that these elections will continue to be contested on the basis of individual merit, because after consultation with the populace it has become clear that the Swazi people are not yet ready for political parties and multi-party politics. He has made this statement on a number of occasions, most notably during March 2012 at Swaziland's Universal Periodic Review (UPR) sessions at the United Nations Human Rights Council (UNHRC). The pro-democracy movement and political parties view their continued exclusion from the electoral process as a demonstration of the absence of political will on the part of the governing authorities to truly transform Swaziland's political landscape by the introduction of a multi-party dispensation.

The issue of the readiness of the Swazi nation for a multi-party electoral system is highly contested with the authorities asserting Swazis' satisfaction with the status quo and on the other hand, the pro-democracy movement claiming that the majority want change. There is no empirical evidence to conclusively indicate the nature of Swazis' preference in this regard. The view that Swazi people are happy with the status quo has been amplified artificially in view of the control that the governing authorities exert over national consultative processes. There is another view that seeks to understand political parties before making a final decision on their acceptability. During Prince Mahlalengangen's Tinkhundla Review Commission, Prince Mangaliso's Constitutional Review Commission, Prince David's Constitution Drafting Committee and at the most recent *Sibaya*, that view found expression in people's request for civic education on political parties and on multi-partyism so that they can understand what choices exist for Swaziland's system of governance.

The authorities' hostile stance on political parties has attracted attention from the international community, particularly as Swaziland is party to various instruments guaranteeing civil and political rights, and as such there is an expectation that measures be taken to open the space for political participation, rather than restrict it. At the UNHRC's UPR sessions in October 2011 and March 2012, Swaziland gave a progress report on the human rights situation in the country and on what is being done to implement the provisions of various international human rights instruments. During the sessions, various states raised numerous questions, concerns and recommendations on the freedoms of expression, association and assembly, particularly in relation to politics and the participation of political parties in national governance, through the electoral process.

At the October 2011 UPR session, Swaziland noted the recommendations from various countries⁹² listed in Table 7, and indicated the intention to examine and respond to them at the March 2012 session for the adoption of Swaziland's report.

⁹² UN Human Rights Council, *Report of the Working Group on the Universal Periodic Review: Swaziland*, 2011, p. 20. <http://www.ohchr.org/EN/HRBodies/UPR%5CPAGES%5CSZSession12.aspx>.

Table 7: Recommendations from the October 2011 Universal Periodic Review session

Country	Recommendations
France	77.48 Remove all impeding legislative and practical restrictions to freely exercise civil and political rights, in particular those related to freedom of association and expression, with a view to allow the creation of political parties and respect of trade freedoms.
Hungary	77.49 Align the national legislation with international standards to guarantee freedom of assembly and association, in particular as regards the notification of the organisation of peaceful assemblies.
Slovakia	77.50 Provide for an unhindered enjoyment of the right to the freedom of expression in accordance with country's international obligations. 77.51 Consider allowing the registration and operation of political parties, introducing greater political freedoms through free, fair, transparent democratic elections.
Switzerland	77.52 Enact legislative measures to facilitate the existence of political parties.
Norway	77.53 Create an enabling environment for civil society where citizens are free to exercise their full rights to freedom of peaceful assembly and association in accordance with the principles of democracy and in line with international obligations under the International Covenant on Civil and Political Rights, including revoking the Royal Decree of 1973.
Norway	77.54 Take immediate steps to repeal laws which criminalise and/or restrict freedom of expression and of the media, in particular the Sedition and Subversive Activities Act (1938), the Proscribed Publications Act (1968) and provisions of the Suppression of Terrorism Act (2008).
Australia	77.55 Take steps to further democratisation efforts, including by enacting laws that facilitate the registration of political parties.
South Africa	77.56 Strengthen the institutions established to protect democracy.
Sweden	77.57 Repeal or urgently amend the Suppression of Terrorism Act of 2008 and other pieces of security legislation to bring them in line with international human rights standards.

Not all the recommendations made by states to the UPR session were accepted for consideration by Swaziland, and in relation to the issues of freedom of association and assembly with regards to political participation and political parties, the recommendation by the United Kingdom that Swaziland, '[78.7] Clarify the status of all political parties and introduce multi-party democratic elections' did not enjoy the support of Swaziland. In fact, in the March 2012 UPR session where Swaziland's final report was to be delivered and adopted by the Human Rights Council, whilst stating that the country had accepted over 90% of the recommendations made, the Minister of Justice and Constitutional Affairs was unequivocal in stating the government position on political-party participation in the elections. Explaining this position, he reiterated that political parties are not banned in Swaziland, pointing to sections 25 and 32 of the Constitution, which protect the freedom of association and assembly, and the rights of workers and trade unions, respectively. He also added that the position of political-party participation is governed by the Constitution's section 79, which provides that election to public office is by 'individual merit'. According to the minister, the government's view therefore, is that 'political parties cannot field

candidates in the national elections'. He reiterated that the 'Constitution is the product of wide consultations and hence reflects the views of the majority of Swazis [and] for these reasons, Swaziland is not yet ready to accept the recommendations relating to permitting political parties to contest elections'.

Even at a continental level, concern has been expressed about Swaziland's violation of the freedoms of expression, association and assembly. At its 51st Ordinary Session in May 2012, on hearing numerous submissions on the state of human rights in Swaziland, the AU's African Commission on Human and Peoples' Rights took a resolution on Swaziland. In the resolution, the commission states that it is 'deeply concerned about allegations of the violation of the right to freedom of expression, freedom of assembly, and freedom of association which, if true, may affect the conduct of free, fair and credible elections in 2013'. The commission further 'calls on the government of the Kingdom of Swaziland to respect, protect and fulfil the rights to freedom of expression, freedom of association, and freedom of assembly as provided for in the African Charter, the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights and other international and regional instruments' and 'urges [the government of the Kingdom of Swaziland] to take all necessary measures to ensure the conduct of free, fair and credible elections in 2013'.⁹³

The declaration by the Minister of Justice and Constitutional Affairs, while confirming the government's intransigence on this issue, has at least clearly exposed the authorities' unwillingness to accommodate political parties in the country's system of governance. Previously government officials would evade the issue and try to give politically correct answers that sought to strike a balance between the impression that political parties are now free to operate and keeping them in check by placing barriers to their practical operation.

F. Voter education

Effective participation in politics and governance require the populace to understand the importance of elections as well as the procedural aspects of participation. Civic and voter education are therefore very important in the exercise of the right to vote.

One of the functions of the EBC is to facilitate this education and in its report of the 2008 elections, the EBC states that it conducted a voter education programme which included the development of a voter education campaign logo 'to effectively communicate a positive message about the 2008 elections' and worked with the electronic and print media to disseminate information about the electoral process. In addition, the EBC states that it conducted education visits at chiefdom level and also produced and distributed educational and promotional material for the campaign in the form of banners, brochures, pamphlets and T-shirts.

The Commonwealth Expert Team that observed the 2008 elections reported that 'The EBC has the primary responsibilities of facilitating civic or voter education. However on a national perspective, very little or no voter or civic education was implemented. The electorate was virtually ignorant of most of the processes of the elections.'⁹⁴ In its recommendations, the team

⁹³ African Commission on Human and Peoples' Rights, ACHPR/Res. 216 (LI) 2012: Resolution on the Human Rights Situation in the Kingdom of Swaziland, 2 May 2012.

⁹⁴ *Report of the Commonwealth Expert Team: Swaziland National Elections, 2008*, p. 17.

included that 'Nationwide voter education and sensitisation must be intensified to encompass all aspects of the electoral process.'⁹⁵

Stakeholders generally expressed dissatisfaction with the voter education conducted by the EBC in 2008, though many were aware of advertisements placed in the media and workshops conducted in the rural areas. Some attributed the inadequacy to lack of time, since the EBC had been constituted only six months before the secondary election. Others complained of a narrow focus on technical matters to the detriment of broader civic education. Many felt that more would have been achieved if civil society actors had been drawn into the process, and some expressed the view that the EBC and chiefs had actively hindered Central Statistical Office efforts:

Many mentioned that [the] WLSA had conducted civic education workshops to encourage people to vote for women candidates Several actors said that NGOs had conducted workshops, but could not say who these bodies were. A few professed no knowledge of any voter education effort by the EBC at all.⁹⁶

The Electoral Institute of Southern Africa (EISA) Election Observer Mission noted that:

Voter and civic education conducted by the EBC is inadequate, and too narrowly and too technically focused [and recommended that] the EBC approach one of the many NGOs that have expertise in the design of a nationally appropriate voter and civic education programme. The Team also recommends that additional resources be allocated to the execution of voter and civic education drives. The Team further recommends that the EBC invite NGOs to submit proposals for the conduct of voter and civic education programmes and accredit those that are appropriate, so reducing the burden it must bear in this regard.⁹⁷

The EBC, however, does not have the exclusive right to conduct civic and voter education. There are a number of NGOs such as CANGO, the Swaziland Coalition of Concerned Civic Organisations (SCCCO), the Council of Churches, the WLSA and other non-state actors that have been involved in conducting civic education at different levels, with a particular focus on communities at the 'grassroots' level. The issues addressed in civic education by these organisations include constitutionalism and the Swaziland Constitution, human rights, democracy and good governance, women's rights and gender equality. However, the fact that these organisations undertake civic education does not mean this is readily acceptable to the government or traditional authorities and there have been numerous incidents where permission to hold community civic education meetings has been denied or the meetings have been disrupted by the community authorities or the police.

In a legal action suit brought by the SCCCO against the EBC, one of the main issues that the court examined was whether civic education was the exclusive preserve of the EBC. The SCCCO had complained that the Chairperson of the EBC had publicly announced at a chief's meeting that only the EBC could conduct voter education and that the police had interfered with

⁹⁵ Ibid., p. 27.

⁹⁶ EISA, *EISA Election Observation Mission Report Swaziland: House of Assembly Election*, 19 September 2008, pp. 26, 27.

⁹⁷ Ibid., p. 46.

the SCCCO's community civic and voter education activities. The redress sought by the SCCCO in this regard was for the court to make a Declaration:

that the first respondent [the EBC] and its members have no legal right to exclude or preclude persons or groups such as the Swaziland Coalition of Concerned Civic Organisations Trust from providing voter education to members of the public and that the first respondent's lawful function in relation to voter education function is to facilitate the provision thereof and not to provide such voter education on an exclusive basis.⁹⁸

In response the EBC denied preventing the SCCCO from conducting its activities and claimed that the Chairperson's comments were personal opinion and that the police had not been sent by government to disrupt the SCCCO's voter education activities. In addition, the Attorney General, who was representing the EBC, challenged the SCCCO's 'Charitable Trust' status because it had civic education as one of its objects and one of the issues it had brought to court was a challenge to the appointment of the EBC's commissioners. In this regard, he alleged that the SCCCO was in nature a political entity 'masquerading as a charitable trust and thus not enforceable'.⁹⁹

In deciding this issue, the court stated that:

neither in our view, will a suit seeking interpretation or enforcement of the Constitution, by a body duly registered as a trust transform it into a political organisation, although it may be arguable whether such an adventure be within the scope of their objectives. The argument that this application ought to be dismissed because it was brought by and with the name of the first respondent a charitable trust, for being a political organisation is thus in our judgment, without merit and not to be countenanced Regarding the use of the word 'facilitate' in relation to voter education, we were singularly unmoved with the argument of the learned counsel for the respondents, that such meant supervision and oversight of such, that all persons wishing to conduct such, as an exercise ought to do so with the permission of the first respondent, that in our view does violence to that word which in its ordinary grammatical usage means: to make easy or easier. It seems to us any misconception whether on the part of the police or other government entities, or the first respondent, must be put to rest by making a declaration as contained in Prayer 5. Prayer 5 is accordingly granted.¹⁰⁰

Despite this ruling, SCCCO community civic-education facilitators have reported continued incidents of disruption to their activities and the organisation has decided that if these disruptions continue, it will approach the court for protection as the government will be in contempt of the declaration made by the court.

⁹⁸ *Swaziland Coalition of Concerned Civic Organisations Trust and Others vs. Elections and Boundaries Commission and Others*, High Court, Civil Case 2783/2008.

⁹⁹ *Ibid.*

¹⁰⁰ *Ibid.*

G. Management of the election process

Elections are an important component in the practice of democracy and as a vehicle for political participation in that, through the elected representatives, they provide a linkage between constituencies and the structures of government. The electoral process and its management are therefore critical to ensuring the effectiveness of citizens' participation in the political process. The international and regional instruments pertaining to elections include the following issues that are important for the delivery of free, fair and credible elections:

- Independent election management bodies;
- The electoral process; and
- Election observation.

Box 5 lists the standards set by international instruments in relation to these issues.

5: Principles and guidelines provided by international instruments for free, fair and credible elections

SADC Principles and Guidelines Governing Democratic Elections in Africa

2.1.4. Regular intervals for elections as provided for by the respective National Constitution.

2.1.7. Independence of the judiciary and impartiality of the electoral institutions.

2.1.10. Challenge of the election results as provided for in the law of the land.

African Charter on Democracy, Elections and Governance in Africa

Article 17.1. Establish and strengthen independent and impartial national electoral bodies responsible for the management of elections.

Article 17.4. Ensure that there is a binding code of conduct governing legally recognised political stakeholders, government and other political actors prior, during and after elections. The code shall include a commitment by political stakeholders to accept the results of the election or challenge them through exclusively legal channels.

Article 19. Each state party shall inform the commission of scheduled elections and invite it to send an electoral observer mission. Each state party shall guarantee conditions of security, free access to information, non-interference, freedom of movement and full cooperation with the electoral observer mission. Each state party shall guarantee conditions of security, free access to information, non-interference, freedom of movement and full cooperation with the electoral observer mission.

Article 3.2. Access to and exercise of state power in accordance with the Constitution of the state party and the principle of the rule of law.

Article 3.4. Holding of regular, transparent, free and fair elections.

NEPAD Declaration on Democracy, Political, Economic and Corporate Governance

Strengthen and, where necessary, establish appropriate electoral administration and oversight bodies in our respective countries and provide the necessary resources and capacity to conduct elections which are free, fair and credible;

Reassess and where necessary strengthen the AU and sub-regional election monitoring mechanisms and procedures.

AU Declaration on the Principles Governing Democratic Elections in Africa

Every citizen shall have the right to free association and assembly in accordance with the law.

Democratic elections should be conducted:

- Freely and fairly;
- Under democratic constitutions and in compliance with supportive legal instruments;
- Under a system of separation of powers that ensures in particular, the independence of the judiciary;
- At regular intervals, as provided for in National Constitutions;
- By impartial, all-inclusive competent accountable electoral institutions staffed by well-trained personnel and equipped with adequate logistics;
- Individual or political parties shall have the right to appeal and to obtain timely hearings against all proven electoral malpractices to the competent judicial authorities in accordance with the electoral laws of the country.

Swaziland's election management body

The adoption of the Constitution brought a change in the management of Swaziland's national elections. As of 2005, the body responsible for elections in Swaziland is the EBC, which is established by section 90 of the Constitution as an 'independent authority'. The EBC replaces the Office of *Umphatsi Lukhefo* (Chief Electoral Officer), which was previously charged with responsibility for elections and which was located as a department within the Ministry of Justice and Constitutional Affairs. The commission comprises of five members – a chairperson, deputy chairperson and three other members – appointed by 'the King on the advice of the Judicial Service Commission'. The secretariat for the EBC consists of members of the civil service that have been appointed by the Ministry of Justice and Constitutional Affairs. Among the professional positions in the secretariat are the head of the secretariat, legal advisor, principal elections officer, information and education officer, and four elections officers. The current commissioners¹⁰¹ were appointed in March 2008 and were tasked with preparing for the elections conducted later that year.

The functions of the EBC are set out by section 90(7) of the Constitution:

¹⁰¹ Chief Gija Dlamini (Chairperson), Mzwandile Fakudze (Deputy-Chairperson), Glory Mamba (deceased), Nkosungumenzi L. Dlamini and Ncumbi J. Maziya.

- To oversee and supervise the registration of voters and ensure fair and free elections at primary, secondary or other level;
- To facilitate civic or voter education as may be necessary in between elections;
- To review and determine the boundaries of *tinkhundla* areas for purposes of elections;
- To perform such other functions in connection with elections or boundaries as may be prescribed; and
- To produce periodic reports in respect of work done.

While acknowledging the need for an autonomous elections management body, civil society and pro-democracy groups have cast doubt on the independence of the current EBC. Among the issues of concern has been the manner of its appointment – by the King, as advised by the Judicial Service Commission (JSC) – because the JSC itself is appointed by the King. This arrangement is criticised as potentially having the effect of compromising the independent and impartial operation of the commissioners of both the JSC and the EBC in that they may be reluctant to discharge their duties in a manner that, while justified by their responsibility, might not be acceptable to the King, traditional authorities and government. In 2008, the SCCCO took a matter to court challenging the appointment of the EBC and raising the following issues for the court to consider:

- That the broadness of the provision relating to the duration of the commissioners' tenure is open to abuse and could be used to unduly influence a commissioner to act in a certain manner in order to secure his/her incumbency;
- That there was a lack of adherence to the constitutionally defined process for the appointment of the commission in that the King did not follow the advice given to him by the JSC, as evidenced by the lapse of time between the time the advice was given and [the time] the appointments were made;
- That the chairperson of the commission could not be independent as he is a chief and thus a 'footstool of the King' and that he had already demonstrated a lack of respect for democratic institutions by barring media from a meeting and criticising the protection of human rights;
- That the commissioners were not eligible for appointment either because of lacking certain qualifications, or being disqualified by position and lacking the relevant experience; and
- That the executive had already interfered with the work of the commission by deciding that the commission would not undertake a delimitation of *tinkhundla* areas.

The court did not decide on the merits of these issues and decided the matter on the issue of *locus standi*, namely that the SCCCO as a charitable trust did not have the legal standing to bring the action.

H. Swaziland's 2008 elections

Swaziland conducts elections every five years and has done so consistently in the past few elections. In fact the prevailing view among civil society and pro-democracy groups is that the

holding of regular elections is the only electoral standard to which Swaziland adheres.¹⁰²

The 2008 elections were conducted according to the following timetable:¹⁰³

- Nominations: Saturday and Sunday, 2–3 August 2008, at each chiefdom/*umphakatsi* or recognised hall or school;
- Primary Elections: Saturday, 23 August 2008 at each chiefdom/*umphakatsi* or recognised Community hall or school;
- Counting and announcement of results: Sunday, 25 August 2008;
- Campaigning of candidates standing for secondary election: Monday, 25 August, to Thursday, 18 September 2008;
- Secondary elections: Monday, 19 September 2008; and
- Announcement of results at each centre: Saturday, 20 September 2008.

The EBC began the process by calling for voter registration and established 346 registration centres for this purpose. According to Mzwandile Fakudze, the Deputy Chairperson of the EBC, in response to recommendations by international observer missions in the past elections, the EBC opted to use Optical Mark Recognition, which ‘ties the registrant to the voter’s card that was issued upon registration’. This was followed by the compilation of a preliminary voters’ roll which was published for comment by the public on 2 August 2008, and a corrected version released ‘just after the primary elections and before the secondary elections’. Following registration, nomination processes occurred in the various primary election constituencies, followed by the primary elections. Voting processes for the secondary elections then followed these events.

According to Fakudze all those who qualified to register and vote according to the law were allowed to do so. The law requires that a person vote in the same area in which (s)he is registered. Fakudze pointed this out as the only limitation that causes some people who qualify to vote eventually not participating in the vote. However, he pointed out that where justifiable circumstances arise and a person notifies the EBC in time, it is possible to issue transfer documentation that will enable the voter to vote in another area. He also pointed out that special voting was arranged for persons who could not comply with this requirement because of national duty such as polling personnel, security personnel, members of the foreign service and Swazis living outside of the country. With respect to the voting of prisoners, he stated that that matter was not within the jurisdiction of the EBC as prisoners would not be able to present themselves at polling stations because of the law relating to imprisonment. He was of the view that it would be for His Majesty’s Correctional Services to address this matter through a policy change and the amendment of its governing laws. However, in his view, with the changes in how prisons are now seen – as rehabilitative rather than being punitive – a change permitting those serving custodial sentences to vote could be possible in the future.

Counting of votes in the 2008 primary elections was conducted the following day at the polling stations at which the voting had taken place. In the secondary elections, the count was conducted at the *tinkhundla* centres the day after the election.

¹⁰² Interviews with Mario Masuku (President, PUDEMO), Musa Nkambule (*Sive Siyinqaba*) and Musa Hlophe (SCCCO).

¹⁰³ Legal Notice of 2008, *Elections and Boundaries Commission 2008 National Elections Report*, p. 57.

According to the EBC, a total of 48 elections cases were filed at the High Court as follows:

- Three pre-election cases – one by a member of the diplomatic service based abroad who applied to register so that he could take part in the election;
- Six cases alleging the contravention of electoral legislation that prohibits bribery and irregularities such as voters not belonging to a polling area being allowed to register and vote, ineligible persons acting as polling officers and some polling officers not being impartial in facilitating the voting process;
- Five cases that were eventually withdrawn; and
- Thirty cases that were dismissed as the court found no merit in the allegations submitted by the complainants.

Out of these cases, ‘there were five applications in respect of which the court issued an order confirming that there were some irregularities, and the elections process had to start afresh in those polling stations’. The Deputy Chairperson of the EBC was of the view that one of the gaps in the current legal framework is the competency of the EBC to deal with election disputes as these are out of the commission’s jurisdiction and any case must be heard in the High Court. His observation was that it was a challenge for candidates to access justice in this regard as legal process is expensive and takes a long time. In his view, there is a need to establish a structure for alternative dispute resolution that would be able to deal promptly and inexpensively with complaints.

I. Election observation

Swaziland does comply with the expectation of inviting election observers to its national elections. According to the EBC, in the 2008 elections:

There were five groups of international observers: the Commonwealth Expert Team, a group from the South African NGO EISA and national groups from Botswana, Zimbabwe and Zambia. There were also 102 domestic observers for the first time at a national election. These were organised by the Coordinating Assembly of NGOs.¹⁰⁴

In its report, the Commonwealth expert team confirmed the presence of domestic and international observers and stated that ‘This conformed to prescribed international procedures governing the conduct of elections’ and recommending ‘further training for the capacity-building of domestic observers’.¹⁰⁵

The observer missions arrived in the country just prior to the elections to appraise themselves of the situation in the country and preparations for the election. The EBC had prepared reference materials for the observers that included the Constitution, information on polling centres and procedures, as well as a code of conduct (for the international observers). Some observers were also able to attend briefing sessions conducted by the EBC. In addition to meeting with the EBC, observers also conducted other meetings for a better understanding of the local context. In this regard, EISA reported having met with ‘representatives of political parties and civil society

¹⁰⁴ *Kingdom of Swaziland National Election Report*, 2003, p. 10.

¹⁰⁵ Commonwealth Secretariat, *Swaziland National Elections 19 September 2008: Report of the Commonwealth Expert Team*, p. 23.

organisations such as faith-based and women's organisations, the media, NGOs, labour and business. The team also consulted with other international and national observer teams.¹⁰⁶ The Commonwealth team 'held a series of meetings with a wide range of political and civic organisations to assess the overall environment in which the elections were being held'.¹⁰⁷ In terms of observation on the actual day of elections, observer mission teams were deployed to various constituencies and polling stations around the country. Election observers attended the counting of the votes the following day at different counting stations.

Generally the observers of the 2008 elections appreciated that the EBC had only had a short time to prepare for the elections, having been appointed just a few months before the elections were to take place. They commended the effort that had been made by the EBC in view of the many constraints it faced. Nonetheless, observers made a number of recommendations on how the management of elections in Swaziland could be improved. These included:

- Review and amendment of the legal framework for conducting elections in the country's electoral legislation;
- Review of the *tinkhundla* boundaries to so as to ensure the equitable distribution of voters and a review in order to increase the number of polling stations in certain areas;¹⁰⁸
- Timely release of information on the processes to be followed, requirements for voter registration and the election timetable;
- Strengthening of voter education by the EBC and the involvement of civil society organisations in conducting this education;
- Preparation of a national voters' roll that is periodically updated rather than the preparation of constituency specific rolls in the short period preceding the election;
- Securing the integrity of the vote by, inter alia, removing anything that may compromise the secrecy of the ballot, the acquisition of transparent ballot boxes, implementation of standard procedures for sealing and locking the ballot boxes, that counting be done directly after the close of polling and the results posted outside the polling stations; and
- Speedy resolution of electoral disputes.

According to the Deputy Chairperson of the EBC, Mzwandile Fakudze,¹⁰⁹ the commission has welcomed the presence of election observers in the country as they contribute by not only identifying the level of compliance with international elections standards, but also by making practical recommendations on how the commission can achieve these. This is important advice for Swaziland as the commission is relatively new and lacks experience. He stated that the commission had already implemented some of the recommendations from past elections, such as changing the voter-registration system, which previously could have been used to link

¹⁰⁶ EISA, *EISA Election Observer Mission Report: Swaziland House of Assembly Election*, 19 September 2008.

¹⁰⁷ Commonwealth Secretariat, *Swaziland National Elections 19 September 2008: Report of the Commonwealth Expert Team*, p. 2.

¹⁰⁸ The EISA team also recommended that the role of *tinkhundla* and chiefdoms in the electoral process be reviewed as these are traditional structures best suited for their social role rather than a political function as they could exercise a coercive influence on community members' participation in the election.

¹⁰⁹ Interview with Mzwandile Fakudze, Deputy Chairperson of the EBC.

a voter to their vote and thus undermine the secrecy of the ballot. Fakudze also specifically acknowledged the need to enhance voter education as well as the necessity of reviewing the current laws so as to enact appropriate electoral legislation. In this regard he stated that there is currently an Elections Bill that addresses many of the concerns that have been raised regarding the electoral process. He also stated that the EBC expects the new legislation to be passed in time to govern the 2013 elections. According to Fakudze, the commission is committed to ensuring that these elections incorporate as many of the recommendations as possible so as to ensure greater efficiency in the process.

J. Conclusions and recommendations

While acknowledging all the efforts that have been made to improve the elections machinery, the real issue in considering whether Swaziland is adhering to internationally accepted standards of participation in elections, is whether there is effective and meaningful participation of the populace in determining a government of their choice. Limitations exist as enumerated above: the legal framework is deficient and inadequate for conducting elections; the EBC is under-resourced and there are questions about its independence; the boundaries of constituencies require review; voter registration does not currently meet the requisite standards; civic and voter education is not as widespread as it should be and non-legal restrictions affect the participation of, among others, women, youth, non-indigenous Swazis, and persons with disabilities.

Given the context of elections in Swaziland, improving the quality of participation is more than just making the electoral process more efficient. There is no value added to democracy and political participation if an undemocratic system is merely made more effective. Some recommendations on addressing issues of elections and participation in Swaziland are as set out below:

- An inclusive and genuine political dialogue, involving all institutions, bodies and organisations along the political spectrum and aimed at establishing the appropriate substantive and procedural political and governance infrastructure to ensure the sustained practice of a democratic culture.
- Civil society has already undertaken research and dialogue and other processes aimed at envisaging the scenarios that might be part of the democratisation process. Meetings have been held both in and out of the country with documents spelling out an envisaged 'way forward'. These processes and the plans they have produced should be analysed and harmonised to underpin civil society advocacy on democracy and political participation. The critical issues that a harmonised plan would have to address include concrete proposals for the position of the monarchy in politics and the operationalisation of political parties through relevant electoral and political-party legislation.
- The ongoing debate about boycotting elections versus participation in elections as strategies for bringing about change is a divisive issue. Even though the political parties acknowledge that they all have the goal of a multi-party democracy in common, their difference in approach to the issue of elections has created ongoing tension between them. This has exacerbated difficulties in getting different parties to work together in

achievement of their common goal. The inability to move beyond this difference has and continues to weaken pro-democracy efforts. However, there has been no forum in which each position has been presented and rigorously debated. It is therefore recommended that a thorough and independent analysis be made of the advantages and disadvantages of boycotting or participating in the elections. This analysis could form the basis for political parties to further sharpen their own strategies and appreciate the possibilities presented by each strategy without necessarily compromising their ideological positions.

- Some discussion needs to occur regarding the electoral model that Swaziland should adopt in the advent of multi-party democracy. While Swaziland has been using the first-past-the-post model, it has been suggested that the mixed-member proportional system (used in Lesotho) might enable a middle ground on the issues of both political-party representation as well as independent candidates who would want to contest the election based on an 'individual merit' platform.
- The draft Elections Bill should be widely disseminated and become the product of genuine inclusive consultation and the engagement of all stakeholders.
- Promoting gender equality and the role of women in politics has to be an integral part of strengthening the practice of democracy. There needs to be genuine investment in awareness-raising programmes on this matter at all levels as well as reform of discriminatory laws and leadership capacity-building and support of women in leadership at all levels.
- There is need for additional research on the participation of marginalised and minority groups in governance issues in general and the elections in particular in order to inform appropriate programming to promote the greater participation of these groups.
- There is no doubt that in any discussions about strengthening political participation that political freedom of expression, both in relation to individuals and the media, should be promoted and protected. Legal reform of the relevant legislation has begun by the drafting of six media-related bills, but this has not yet been concluded. However, some of the bills contain provisions that could restrict rather than expand the enjoyment of this freedom. Civil society and media organisations should intensify advocacy for enabling media and freedom of expression legislation to be in place. It is also recommended that the media be trained on the issues of democracy and elections so that it can play an informed and professional role in reporting and commenting on these issues.

6

Political parties

The importance of political parties and their effective functioning as part of democratic practice is universally recognised and accepted. According to the Electoral Institute of Southern Africa (EISA):

A political party is an organised group that is formed with the sole purpose of articulating and aggregating the interests of the group, contesting control over state power and government, and directing a country's development process in line with its own ideological orientations and policy frameworks, as defined in its party manifesto.¹¹⁰

The National Democratic Institute of International Affairs' articulation of the functions of political parties mirrors this view:

There are four central functions of political parties in modern representative democracies:

1. To develop consistent policies and government functions (the interest articulation function);
2. To pick up demands from society and bundle them (the interest aggregation function);
3. To recruit, select and train people for positions in government;
4. To oversee and control government.¹¹¹

¹¹⁰ EISA, *Political Parties and Democratisation in the Southern African Development Community: The Weakest Link?*, 2005, p. 2.

¹¹¹ International Institute for Democracy and Electoral Assistance, *Effective Party Assistance: Stronger Parties for Better Democracy*, International IDEA, 2007, p. 7.

Swaziland's first political party was formed in 1960 and the country operated a constitutional multi-party dispensation from 1964 with the elections of that year as well as those of 1967 and the elections of 1972 being contested along political-party lines. However, the repealing of the 1968 Independence Constitution and banning of political parties in 1973 removed the officially recognised opposition role of political parties. The effect of the banning decree and its enforcement, which included the prohibition of political meetings with long periods of arrest and detention without trial for offenders, was to suppress political activism and to evoke fear in the populace. As a result over time most of the political parties formed at the time of and just after independence became inactive.

According to EISA, as at 2008, the following political parties existed historically in Swaziland:

- African United Democratic Party (AUDP);
- Imbokodvo National Movement (INM);
- Inhlava Forum;
- Ngwane National Liberatory Congress (NNLC);
- People's United Democratic Movement (PUDEMO);
- *Sive Siyinqaba Sibahle Sinje*;
- Swaziland Democratic Party (SWADEPA);
- Swaziland Independent Front (SIF);
- Swaziland National Front (SWANAFRO);
- Swaziland Progressive Party (SPP);
- Swaziland United Front (SUF);
- Swaziland Youth Congress (SWAYOCO); and
- United Swaziland Association (USA).

Additional parties have been formed in recent years, for example, the Swazi Democratic Party led by former trade unionist Jan Sithole, the Communist Party of Swaziland (CPS) and the National Congress for Democratic Change (NACODEC).

The political parties that are currently visibly active on Swaziland's political stage are the NNLC, PUDEMO, SWADEPA and *Sive Siyinqaba Sibahle Sinje*. Other parties that exist but have not necessarily demonstrated the same level of engagement as the first group, are the AUDP and the CPS. There has been some debate about the existence and operation of the INM. Prior to the 2008 elections there was widespread speculation that the INM was being revived in a similar vein to its formation in 1964 under pressure of the first post-Constitution elections in 2008, and the possibility that political parties, made legal by the Constitution, would abandon the boycott stance and participate. Ultimately the boycott continued and the INM revival project seemed to have been abandoned until the King's private secretary, Samuel Mkhombe, was relieved of his duties in January 2011, ostensibly because he had been trying to revive the INM using the King's name, but without the knowledge or consent of the King. Former Minister of Foreign Affairs Mathendele Dlamini, then a member of one of the royal advisory committees, was also relieved of his duties, apparently under suspicion of being implicated in this exercise.

Currently, as discussed in previous sections, the position of political parties remains such that despite their implied unbanning and legalisation by section 25 of the Constitution, which

recognises the freedoms of association and assembly, they remain unable to operate as political parties. Most fundamentally they are unable to function in relation to their most basic purpose – pursuing the power to govern. The key impediments faced by political parties in Swaziland include, firstly, that despite section 25, no supporting legislation has been enacted that establishes the legal framework within which political parties would be able to carry out their mandates. In fact, on the contrary, in terms of the current legal framework, some political organisations have been proscribed. Their current ‘illegality’ is not due to the infamous and notorious 1973 Decree, but is based on the 2008 Suppression of Terrorism Act. The Act was enacted ostensibly as part of Swaziland’s commitment to contributing to the ‘global war on terror’ and the state was simply adhering to the agreements made by the international community and following in the footsteps of many other countries that were also enacting similar legislation. ‘On 26 September the King commented during an address to the United Nations General Assembly that “Swaziland joins the rest of the world in condemning all forms and acts of terrorism. We support efforts for the full implementation of the global counter-terrorism strategy in order to send out a clear message to all perpetrators of terrorism.”’¹¹² However, the legislation has been widely criticised by experts and international human rights groups for, among other things, its overbreadth in defining terrorist acts and potential for abuse. The Act is widely seen as a thinly veiled attack on some political parties under the guise of dealing with terrorism.

Secondly, the general hostility of Swaziland’s authorities to political pluralism, demonstrated by several decades of resisting internal and external pressure to democratise, has created a repressive environment that seeks to subdue the views of political-party and civil-society advocacy for the transformation of the system of governance. The political environment is characterised by a multiplicity of restrictions on and violations of the freedoms of expression, association and assembly, sometimes with fatal consequences.

Thus the issues of political parties’ effective organisational operation and participation in national governance do not play themselves out in the same manner as may be the case in countries where political parties are at least legally recognised and are able to register and contest elections. All the active parties have manifestoes articulating their policy positions, but these are difficult to disseminate and promote in the current political climate. None of the political parties are registered with the exception of *Sive Siyinqaba Sibahle Sinje*, whose registration is not as a political party, but as a cultural organisation. The limitations on freedom of expression affect the political parties’ holding of meetings, rallies and other party activities. In terms of funding, in the current context, it goes without saying that political parties do not receive any state funding. Some business sector actors privately fund them from membership subscriptions and private donations. In addition, political parties have established numerous networks and partnerships regionally and internationally. For instance, PUDEMO has been supported for many years by Danish organisations. Recently, SWADEPA also announced that it had entered into a partnership with a Danish grouping that would significantly assist with funding of the party’s programmes. In terms of membership, there are obvious difficulties in recruitment and

¹¹² Cited in Amnesty International and International Bar Association, *Suppression of Terrorism Act Undermines Human Rights in Swaziland*, Amnesty International Publications, 2009, p. 5.

the prevailing situation means that many members of political parties do not publicly declare their affiliation. As a result, it is difficult to estimate accurate membership statistics. Nonetheless, even within this context, parties assert that they try to uphold democratic processes as much as possible in their internal affairs using their various branch or other de-centralised structures. Thus far, all of them have been seen to be holding conferences on key policy issues and regularly conduct elections for their leadership and different structures.

Concerns were raised at a recent Indaba (conference) on the political alternatives available to Swaziland, where political parties had an opportunity to share their visions and policy goals for a democratic Swaziland with a diverse group of stakeholders. These included members of the Swazi diaspora living in South Africa, the media, trade unions, civic groups and diplomats. Concerns were raised regarding the general performance of the political parties at this forum and questions arose about whether they were sufficiently developed and well-functioning to be considered as 'governments-in-waiting' and offering viable alternatives to the current dispensation.

A. The 2013 elections question: Boycott or participate?

Swaziland will hold its next national elections in 2013. Every five years just prior to the elections, the usual debate of whether to participate in them or not arises for the pro-democracy movement, in particular political parties, as they have a greater interest in the question of contesting for power to govern.

The NNLC, which was formed in 1963, contested the elections in 1964, 1967 and 1972, going underground after the 1973 Decree, but publicly relaunched in 1997. The party has adopted the position of boycotting the 2013 elections. The NNLC issued a statement from their recent policy conference on a number of issues related to the democratisation of the country, including on the issue of political parties and the 2013 elections. In part, the statement says the following:

The NNLC shall boycott the upcoming election of 2013 as reaffirmed by our National Policy Conference. For we are a political party that must be recognised as a legitimate party with the right to contest state power through a multi-party electoral system that shall provide free and fair elections.

Reasons for boycotting are as follows:

- a. On 12 April 1973 the NNLC was banned as a party that was mandated by the electorate as the official opposition in Parliament unconstitutionally.
- b. During the constitution-making process, the NNLC wrote to the Prime Minister to unban political parties and provide a level political playing field that will ensure that citizens are free to express themselves but we were ignored.
- c. As the NNLC we do not accept the 2005 Constitution as a people's supreme law but a framework to maintain power to the exclusion of political parties. We advocate for a Constitution that will guarantee political pluralism, separation of power and transparency, etc. That is by giving the power to the people as citizens to elect their Parliament and Prime Minister in a free and fair election.
- d. *Tinkhundla* election is organised on individual merit that prohibits candidates standing on their political party's name and its manifesto for it is structured on a selection of citizens on a stand-alone position. *Tinkhundla* as an electoral system

fails the SADC [Southern African Development Community] protocol that set standards on the holding of elections in the region.

In all the independent observers that have attended these elections they have said that these elections are not democratic and do not give power to the electorate to freely choose their candidates and elect parliamentarians who have authority in Parliament.¹¹³

PUDEMO has also consistently called for the boycott of elections. According to PUDEMO's president, Mario Masuku, the argument that despite section 79's specific stipulation of individual merit as a basis for election, that political parties should nevertheless participate in the elections as they are legal in terms of section 25, does not hold water. 'Political parties are entities with a specific role that they want to play in the politics of a country and they must be expressly enabled to do so with specific provisions whether in the Constitution or in other legislation.' He is of the view that the use of section 25 to justify political-party participation in the election in the face of the direct contradiction of section 79 is artificial, stating that:

if we are really serious about political-party participation, why is this not specifically provided for with all the legal instruments that will support this. As PUDEMO we do not believe in participating through the back door. We have a right to contest elections openly based on our policies that the electorate would support. In the current system, we are not at liberty to do that.

Masuku also notes that the situation of PUDEMO is slightly different to that of other parties in the sense that PUDEMO is also a proscribed organisation in terms of the Suppression of Terrorism Act. He is of the view 'that perhaps the participation option is more attractive for other political parties because perhaps they do not face the same repression from the current system'.

However, Masuku does acknowledge that the difference in opinion among the parties and civil society on the elections is weakening the broader democratisation agenda. In this regard, he states the following:

What would assist is for us to one day discuss where we think the problem is in civil society. I think an independent research would assist us as political parties so we can identify our differences and then we can objectively discuss our different perspectives. Maybe the same things that people usually complain about will be said and maybe some issues are irreconcilable, but maybe it would be useful to have these discussions based on objective enquiry with individual parties. Perhaps then we can move out of this position where we cannot progress and craft a way forward.¹¹⁴

Sive Siyinqaba is a political party which was formed as a cultural organisation in 1996 and has participated in past elections and intends to participate again in 2013. According to the president, Musa Nkambule, '*Sive Siyinqaba*'s position is that if we were to get into government through the election, we would have the instruments of governance and would have the possibility of

¹¹³ <http://www.times.co.sz/index.php?news=80859&vote=5&aid=80859&Vote=Vote>.

¹¹⁴ Interview with Mario Masuku.

governing better using the policy direction contained in our manifestoes.’ However, he also acknowledges that participation is not without its own challenges in the sense that even though the party supports candidates during the elections, due to the need to conceal the party identity in the current environment, it becomes difficult for the party to then reconvene to strategise on asserting and monitoring their members for pursuit of the party’s interests. The major problem, he states, is that even if political parties participate in the election, in Parliament you go in as an individual and so when decisions are taken, you are individually responsible and this introduces vulnerability for Members of Parliament – if they are seen to be vocal, they will be individually targeted. *Sive Siyinqaba* has a number of members in Parliament but few of them are courageous enough to be identified as belonging to a political party. However, Nkambule’s view is that the party has learnt important lessons from their continued participation and are trying to strengthen their impact by addressing the gaps that exist.

In his view the more political parties participate the more an opportunity exists for collective action inside Parliament as the continued absence from Parliament allows the current governing authorities to have the upper hand and the division caused by the different positions weakens the democratic movement.

We need to take a collective position as the pro-democracy movement on the issue of boycotting or participating in the election. If we could engage as political parties and discuss what it is that we need to achieve and what it is that we will achieve. We do not necessarily need to agree on one position, but we have not had a forum to present, debate and discuss our stand that will at least assist us to understand each other better. We are different but the kind of labelling and accusations that happens amongst us weakens us.¹¹⁵

According to Jan Sithole, president of SWADEPA, the party ‘has taken a resolution not to boycott the 2013 elections and has already started mobilising and putting up structures across the country.’ In Sithole’s view the boycott of previous elections – with the exception of the 1993 boycott – has not had any impact in terms of advancing democracy in Swaziland:

[The] boycotts of 2003 and 2008 did not yield any positive results for the boycotters, and for the regime, it became business as usual. Having been called to state our position as SWADEPA and having agreed to do so, regarding the contentious forthcoming elections in 2013, we are now humbled to present our declaration. This declaration is a product of over three months of extensive research, workshops, robust debates, consultations and meetings with all our structures within SWADEPA and the Swazi community at large.¹¹⁶

¹¹⁵ Interview with Musa Nkambule (President, *Sive Siyinqaba Sibahle Sirje*), September 2012.

¹¹⁶ *Times of Swaziland*, ‘SWADEPA gets Danish sponsor. Post-’98 boycotts had little impact’, 12 September 2012.

B. Conclusions and recommendations

The legal and political environment in Swaziland does not provide the space for political parties to operate freely. Over the years, however, political activism has increased. The various civil society and political entities have continuously agreed on the need to work together to attain democracy. Meeting after meeting has given coordinating organisations the mandate to coordinate their different constituencies for collective action in the mobilisation of a mass democratic movement in Swaziland.

There is growing dissatisfaction with the status quo but the pro-democracy movement also seems to be stuck and is currently not taking maximum advantage of the situation and using the opportunity to mobilise effectively.

This difficulty of civil society not working together is a recurrent problem in Swaziland's pro-democracy movement. Commenting on the political situation in the 1960s where the INM won all parliamentary seats in 1964 and 1967 in the face of a clear demand for change from some sectors of the populace, the issues raised by Potholm 40 years ago have an eerie resemblance to the issues that confront political parties in present day Swaziland:

Why did the politicians fail to take advantage of the opportunity to form a true national political organisation? It is not ... enough to set out the advantages enjoyed by the Swazi traditional authorities and their allies in the European community, although they were considerable Certainly the *Ngwenyama* had very important advantages, but the political leaders seemed to do everything possible to help the monarchy utilise them.¹¹⁷

Potholm then identifies some of the challenges faced by political parties at the time:

- i. The extent to which many politicians had inaccurate perceptions of their own efficiency;
- ii. Misjudgement – because political events turned out in a certain fashion elsewhere in Africa, they would eventually be duplicated in Swaziland;
- iii. Wishful thinking was substituted for political realism and organisation;
- iv. The personality conflicts and petty feuds that dominated the interactions of the new political elite;
- v. No willingness to work together for the goals they all professed to want;
- vi. [They] gave no indication to the average person in Swaziland that they presented a viable alternative to the existing power structure.

Their political ineptness and seemingly endless repetition of tactical and strategic mistakes undoubtedly gave their opponents every opportunity to maximise [the] advantages.¹¹⁸

It is understandable that political parties hold strong positions in terms of how they choose to engage or not engage with the current system on the issue of the democratisation of the country in general and on the specific aspect of elections. However, the issues raised above suggest that

¹¹⁷ Potholm, C.P., *The Dynamics of Political Modernization*, 1972.

¹¹⁸ *Ibid.* pp. 71, 72.

regardless of the power imbalance between the governing authorities and the pro-democracy movement and regardless of the draconian laws and repressive environment, political parties can still do more. It is submitted that in doing so, political parties will not only have to deal with external challenges, but also face their own organisational and civil society ‘demons’, including the role that each may be playing in compromising the country’s democratisation through their petty disagreements. This introspection would help in minimising the sometimes unnecessary conflict that weakens civil society.

- It is therefore recommended that civil society and political parties are assisted, through an independent process, to focus on common goals. This could include a harmonisation of the findings of the various processes civil society and political parties have gone through to strategise on strengthening the mass democratic movement and advocacy towards democratisation of the country. It is inevitable that there will be differences among civil society actors, but these should not compromise the collective agenda.
- Capacity-building for political parties will be crucial, particularly in the areas of policy development, leadership, communication, mobilisation and advocacy among others. Political parties would benefit from exposure to and networking with political parties from other countries, in the SADC region and beyond, including exchange visits to functioning democracies to better understand the expectations and practicalities of being a political party, including issues of internal democracy and discipline.
- Technical capacity should also be availed to political parties to assist them to structure and organise themselves more effectively, for example, to establish ‘shadow’ structures that mirror those of government and shadow policy positions and/or commentary on national developments.
- In view of Swaziland’s preoccupation with its international image rather than internal opinion, the scaling up and sustained implementation of regional and international advocacy through intergovernmental bodies of which Swaziland is a member, such as the SADC, the African Union (AU), the Commonwealth and the United Nations (UN), and in human rights monitoring bodies such as the AU’s African Commission for Human and Peoples’ Rights and the UN Human Rights Council, would greatly complement the other democratisation initiatives.
- It may also be useful to conduct a study on the Swazi public’s views on political parties – this could give empirical evidence on which to base and strengthen programming in this area.

7

The legislature

The legislature is a key institution for ensuring participation in politics and governance. Swaziland's legislature comprises a bicameral Parliament consisting of the House of Assembly (Lower House) and Senate (Upper House)¹¹⁹ whose members are either elected or appointed following national elections which take place every five years. The composition, powers and functions of Parliament are set out in the national Constitution as well as the Standing Orders of each Chamber.

With respect to the House of Assembly, section 95(1) of the Constitution provides that

The House of Assembly shall consist of not more than 76 members composed as follows:

- a. Not more than 60 members elected from *tinkhundla* areas serving as constituencies;
- b. Not more than ten members nominated by the King acting in his discretion after consultation with such bodies as the King may deem appropriate;
- c. Four female members specially elected from the four regions subject to sub-section (3);
- d. The Attorney General who shall be an ex officio member.

In terms of the Senate, section 94 provides as follows:

- a. The Senate shall consist of not more than 31 members (... referred to as senators) who shall be elected or appointed in accordance with this section.
- b. Ten senators, at least half of whom shall be female, shall be elected by the members of the House [of Assembly] in such manner as may be prescribed by or under any law at their first meeting so as to represent a cross-section of the Swazi society.

¹¹⁹ Constitution of the Kingdom of Swaziland, 2005, section 93.

- c. Twenty senators, at least eight of whom shall be female, shall be appointed by the King acting in his discretion after consultation with such bodies as the King may deem appropriate.

The term of office for all legislators is five years, but the King may prorogue or dissolve Parliament at any time in terms of section 134(1) of the Constitution.

As discussed previously, according to Swaziland's system of governance, 'individual merit' is used as the basis for election or appointment to public office, including Parliament. Eligibility criteria for membership of Parliament are set out by section 96 of the Constitution as being Swazi citizenship; attainment of the age of 18 years; and payment or satisfactory arrangements for the payment of all taxes. Registration as a voter in the *inkhundla* in which that person is a candidate, is an additional requirement in the case of elected members of Parliament.

There are currently 97 members of Parliament. The House of Assembly has 66 members, being elected members from the 55 *tinkhundla* constituencies, ten King's appointees and the Speaker of the House, who is elected from outside the House. The Senate has 30 members, ten having being elected by the Lower House and 20 appointed by the King. The Attorney General is an ex officio member of Parliament. This number includes 21 women, seven of whom were elected at *tinkhundla* level into the House of Assembly while the King appointed two. In the Senate, of the ten members that were nominated by members of the House of Assembly, five are women in accordance with section 94(2) of the Constitution, and of the King's 20 appointees, seven are women.

A. Parliamentary committees

Section 129 of the Constitution provides that each Chamber of Parliament shall appoint sessional committees and other committees as may be necessary for the effective discharge of the functions of that chamber. The standing committees shall be charged with such functions, including the investigation and inquiry into the activities and administration of ministries and departments as Parliament may determine, and the investigations and enquiries may extend to proposals for legislation. In general, the functions of parliamentary committees include:

- Studying bills referred to committees;
- Recommending changes to bills referred to committee;
- Studying policy documents and statements from government offices, ministries and agencies relevant to the committee's work;
- Consulting with representatives of government offices, ministries and agencies on their work;
- Receiving information from the public about the work of government bodies;
- Organising meetings between the public, Members of Parliament (MPs) and government officials to discuss the work of government bodies and the effects on communities and groups in society;
- Holding hearings on bills or other matters relevant to the committee's work; and
- Recommending to government bodies ways to improve their work.

In order to facilitate and regulate the work of the legislature, section 121 authorises each Chamber of Parliament to make Standing Orders on its own procedures about the passing of bills; the chairing of proceedings in either Chamber; conduct of debates or other proceedings in that Chamber in one or both official languages; affording reasonable assistance to a member of that Chamber in moving a private member's bill by the department of government affected by the bill; the Office of the Attorney General or Parliamentary Counsel affording professional assistance in the drafting of a private member's bill; the nomination or election of women in the House under section 95; and any matter in connection with which Standing Orders are required to be made under the Constitution. Pursuant to this section, the House of Assembly and the Senate adopted updated Standing Orders in 2006 and 2007, respectively.

Part XV of the Standing Orders of the House of Assembly deals with Sessional, Portfolio and Select committees. The House has an Assembly Sessional Committee comprising between five and seven members and which is the 'business committee of the House'. This committee is responsible for appointing the members of the various other committees:

- *Committee of Standing Orders* – between five and seven members, responsible for reviewing, drafting, amending and dealing with other issues related to the Standing Orders;
- *House Committee* – between four and eight members, a joint committee with the Senate and responsible for internal matters and advice on staffing and allowances;
- *Government Assurance Committee* – between seven and twelve members, 'considers, inquires into and/or follows up on House resolutions, undertakings made by government' and other issues that the Speaker may assign;
- *Finance Committee* – 12 members, considers and makes inputs into the drafting of the national budget in consultation with the Minister of Finance before the drafting of the Appropriation Bill and also deals with matters involving supplementary budgets; and
- *Public Accounts Committee* – 12 members, examines the accounts of government and reports to the House.

There are also Portfolio Committees for each government ministry consisting of between three and eight members that are responsible for issues related to the specific ministry and who may call for public submissions on any bills that are submitted for the committee's consideration. The Portfolio Committees also 'meet after the Budget Speech [and] consider and report to the House on the budgetary estimates of the respective ministries'.

Committees of Senate are similarly established in Part XVII of the Senate Standing Orders as:

- *Committee on Standing Orders* – between five and seven members;
- *Senate Sessional Committee* – appoints the following committees:
 - *House Committee* – a joint committee with the House of Assembly as described above;
 - *Government Assurance Committee* – between five and seven members, responsible for considering, inquiring into and following up on House resolutions, undertakings against government or matters referred to it by the President of the Senate;

- *Senate Committee of Privileges* – between five and seven members, responsible for the conduct of senators and ministers.
- Three *Portfolio Committees* in respect of all government ministries.

Other committees in Parliament are the:

- United Nations Country Team Committee;
- Women’s Caucus;
- Children’s Committee;
- HIV/Aids Committee;
- Swaziland–Taiwan Committee; and
- Gender Committee.

The Sessional Committees also deal with issues arising from the African Union’s New Partnership for Africa’s Development, the Southern African Development Community Parliamentary Forum, the Commonwealth Parliamentary Association and the representation of Swaziland in those structures.

Committees of Parliament are supposed, as much as possible, to reflect the different shades of opinion or interest in Parliament. In carrying out their functions the committees have ‘the powers, rights and privileges of the High Court or a Justice of the High Court at a trial for purposes of enforcing the attendance of witnesses and examining them on oath, affirmation or otherwise compelling the production of documents and issuing a commission or request to examine witnesses abroad’.

In terms of support, Parliament has an administrative department headed by the Clerk of Parliament, who is responsible for a wide range of matters relating to the administration of Parliament, the orderly functioning of Parliament and parliamentary service. The Clerk is also responsible for the swearing-in ceremony for new members of Parliament. (S)he chairs the election of the Speaker of Parliament and the President of the Senate on their first day after the general elections and when a vacancy in the House occurs. (S)he is also the controlling officer of Parliament and is responsible for preparing and running the budget of Parliament. (S)he prepares the periodic and annual reports on the performance of Parliament. For members’ research purposes, there is a library in Parliament that has been equipped with basic computer and internet facilities. There is also Parliamentary Counsel from the Attorney General’s Chambers that is supposed to support MPs in terms of giving them relevant legal advice and support to enable them to undertake their work.

The sessions of both Chambers are open to the public and each Chamber has a public gallery where visitors can sit and observe parliamentary proceedings. Parliamentary proceedings are also recorded verbatim in the Hansard. Members of the public can also freely interact with MPs in the public areas of the parliamentary buildings, such as the canteen.

Civil society engagement with Parliament has been ad hoc in nature, usually determined by issues arising in the mandate of that particular organisation. For instance, during the constitution-making process, civil society, under the leadership of the SCCCO, made a concerted effort to attend the parliamentary debates on the same and during breaks, engage parliamentarians in

discussions, making recommendations on some of the issues raised. The Media Institute of Southern Africa (MISA) Swaziland Chapter has engaged extensively with Parliament, through the Portfolio Committees responsible for information, presenting to them policy and legislative proposals and recommendations on issues relating to freedom of expression and the media. Among the successes of MISA's engagements was the prevention of the passing of the Media Council Bill that sought statutory regulation of the media, while best practice in the sector promotes the operation of self-regulatory mechanisms. After more than ten years of undertaking advocacy on the issue of media self-regulation, a voluntary Media Complaints Commission has finally been established to regulate the media.

The Ministry of Justice and Constitutional Affairs has invited non-governmental organisations such as the Swaziland Action Group Against Abuse (SWAGAA) and Women and Law in Southern Africa (WLSA) to make presentations at workshops for parliamentarians on the Sexual Offences and Domestic Violence Bill together with the Domestic Violence and Child Protection and Sexual Violence Unit of the Directorate of Public Prosecutions and Attorney General's Chambers. SWAGAA also led a process of civil society engagement with the Portfolio Committee on Justice and Constitutional Affairs, which had to present the bill to the House. Civil society was invited by the committee to make submissions on the bill; during the debate representatives of SWAGAA and the WLSA, who were observing the debate from the public gallery, were invited to join the technical team advising the committee and Minister of Justice. Save the Children Swaziland has been in the forefront of advocacy on the recently passed Child Welfare and Protection Act and has coordinated civil society interaction through a technical working group comprised of various stakeholders with the portfolio committee on children.

However, there have also been instances where Parliament has not been accessible to civil society and members of the public. During the presentation and discussion of a select committee report on the issue of extra-judicial killings of suspected game poachers, civil society, led by Yonge Nawe and the Legal Assistance Centre, accompanied members of affected communities to Parliament to observe the proceedings. The community members were refused entry on the pretext that they were not appropriately dressed to attend Parliament. Members of the public wanting to petition Parliament on various issues have at times been prevented from entering the premises of Parliament. For instance, in 2011 the Swaziland National Network of People Living with HIV and Aids and the Swaziland National Association of Teachers led civil society in delivering a petition to Parliament on the deterioration of the healthcare system, and in particular the shortage of drugs and HIV/Aids-related treatment. The marchers were confined to just a few metres inside the gate surrounded by a heavy armed security presence. In another instance, during the seven-week teacher's strike, parents requested that civil society groups including the SCCC, the Civil Society Constituent Assembly and the Council of Swaziland Churches, lead them to Parliament to deliver a petition for parliamentarians to intervene in the impasse between government and the teachers. On this occasion too there was a heavy security force presence. The gathering was prevented from even approaching the gates of Parliament and forcefully confined to an area opposite Parliament near the Somhlolo national stadium, resulting in the failure to deliver the petition.

With respect to parliamentarians consulting and keeping their constituencies informed about developments in Parliament, after publication and tabling, bills are published for 30 days before debate. During this time, it is expected that parliamentarians present these bills to their constituencies to get their views for purposes of informing their position during the debates. Elected MPs are notorious for not meeting with their constituencies with sufficient frequency to inform them about developments in Parliament and obtain their views. Even when they do meet, these meetings are dominated by discussion of development issues in the constituency.

In terms of dissemination of information about discussions in Parliament, the media carry reports and programmes on television and the radio broadcasts some of the parliamentary proceedings. However, accessing information from all government structures is a challenge. Inasmuch as the *Government Gazette* publishes bills and other important government information, it is not easy to find out if a bill has been published and the cost of bills from the government printers is SZL 40 each (USD 4.40) which is prohibitive to many people who may have an interest in the legislative proposals, but have to prioritise the use of their limited resources. It is possible for a bill to go through the entire legislative process without the knowledge of members of the public who have an interest in the issue and who would have wanted to make submissions on the same.

B. Functions of the legislature

In order to be able to strengthen the practice of democracy, a legislature should be:

- *Representative* – that is, socially and politically representative of the diversity of the people, and ensuring equal opportunities and protections for all its members;
- *Transparent* – that is, being open to the nation through different media, and transparent in the conduct of its business;
- *Accessible* – this means involving the public, including the associations and movements of civil society, in the work of Parliament;
- *Accountable* – this involves members of Parliament being accountable to the electorate for their performance in office and integrity of conduct;
- *Effective* – this means the effective organisation of business in accordance with these democratic values, and the performance of Parliament's legislative and oversight functions in a manner that serves the needs of the whole population.¹²⁰

In terms of the constitutional and legal framework of the country the role of the legislature is mainly three-fold, namely law-making, oversight and representation.

Law-making

Section 106 of the Constitution states that 'the supreme legislative authority of Swaziland vests in the King-in-Parliament'. Thus, in making 'laws for the peace, order and good government of Swaziland', the King-in-Parliament may legislate on any matter.

Proposed legislation may be introduced by the minister responsible for the issue that is the subject of the bill, by an ordinary MP via a private member's bill, or by a proposal from a standing

¹²⁰ *Parliament and Democracy in the Twenty-First Century: A Guide to Good Practice*, Inter Parliamentary Union (IPU), 2006, p. 7.

committee. However, there has not yet been a private member's bill nor a bill from a standing committee and proposed legislation is usually tabled by the relevant members of the executive. Prior to a minister tabling a bill before Parliament, Cabinet must have approved the bill.

The legislative process provides for three readings of a bill, with the first being the introduction of the bill in either of the two Chambers. Section 110 of the Constitution places limitations on the introduction of bills in the two Chambers in that 'a money bill shall not be introduced in the Senate and a bill affecting matters [pertaining to Swazi law and custom] shall not be introduced in the House'. With respect to bills affecting Swazi law and custom, the Constitution states that such bills will only be introduced in the Senate and should not proceed to the Second Reading until they have been sent to the Council of Chiefs for consideration. At the Second Reading the motivation for the bill is presented and thereafter they enter into the committee stage of considering the clauses of the bill in greater depth. The Third Reading is the final stage at which the bill may or may not be passed. Once the bill has passed in the Chamber into which it was introduced, it will then go through the same process in the other Chamber. In order to come into force, a proposed piece of legislation must be passed by both Chambers of Parliament (either separately or at a joint sitting). Further, the bill must then be assented to by the King in accordance with section 108(1) of the Constitution, which states that 'A bill shall not become law unless the King has assented to it and signed it in token of that assent.' The King is not compelled to assent to any bill presented to him and he can refer the bill back to Parliament for further consideration.

The performance of Parliament in regard to its law-making function has been criticised in that very few pieces of legislation have been passed in the five-year life cycle of various Parliaments. This has usually been attributed to several issues, including that parliamentarians do not understand their legislative role, that they do not have the capacity to make law and that due to the system of governance, legislators are more concerned with developmental issues in their local constituencies and thus confuse their roles with those of the *iNdvunaye Nkhundla* (elected heads of the *inkhundla*) and *Bucopho* (local councillors).

The Prime Minister has also accused Parliament of not performing its law-making role effectively, stating that there were in 'excess of 40 bills that have been approved by Cabinet since 2009, submitted to Parliament, but not processed by both Houses'.¹²¹ In response to the Prime Minister's statement and the subsequent public discussion on the issue, the Speaker of Parliament, addressing Parliament in June 2012, stated, 'Records of Parliament show that it is unprecedented for a Parliament to have given birth to 27 pieces of legislation at this time of its five year term ... Other than the bills tabled in this session (2012), immediately after the Appropriation Bill 2012/2013 debates, there are no more than 12 outstanding bills.'

One of the other challenges facing Parliament is that ultimately the King must assent to a proposed law. Therefore, even if both Chambers pass a bill, unless the King assents, it cannot become law and there are no mechanisms such as time frames or parliamentary veto that can enable the enactment of the law without this assent. The delay that sometimes occurs at this level may be attributable to the fact that the King has wide discretion in terms of consultation with various persons and bodies, including his Advisory Council, the Queen Mother, chiefs and other

¹²¹ *Times of Swaziland*, 'Delayed Bills saga: Guduza's 27 aces', 25 June 2012.

traditional structures and these consultations may take place over a protracted period of time, given the different views of different structures.

Oversight

According to the Constitution ‘The Cabinet shall be collectively responsible to Parliament for any advice given to the King by or under the general authority of the Cabinet and for all things done by or under the authority of any minister in the execution of the office of the minister.’ The legislature’s oversight over the executive includes monitoring the activities of government ministries, departments and parastatals and is designed to ensure delivery of national policies and programmes. The executive, through each ministry, identifies annual and quarterly performance targets against which it reports to Parliament on a quarterly basis and where parliamentarians have an opportunity to assess government’s performance. There are many ways in which oversight may be performed in accordance with the Constitution and the respective Standing Orders of the House or Senate. These include using questions for oral answer, motions, notice paper, motions without notice, Select Committee reports, Portfolio Committee reports and debates, debates on quarterly reports for ministries, petitions, Government Assurance Committee reports and Public Accounts Committee reports.

In terms of providing oversight over financial matters, the Public Accounts Committee (PAC) works with the Office of the Auditor General. It is responsible for overseeing government expenditures to ensure they are effective and honest. The PAC is constituted by Parliament each year for examination of accounts showing the appropriation of sums granted by Parliament for expenditure of government, the annual Finance Accounts of government, and other accounts laid before Parliament. Additionally the committee can look into accounts of parastatals that receive a government subvention. The reports of both the Auditor General and the PAC are made available to the public. PAC meetings are held in Parliament and are open to public observation from the public gallery.

In submitting its report on the Auditor General’s report for the financial year ended 31 March 2011, the Senate Public Accounts Committee stated that it had conducted interviews with various government officials implicated in some of the issues of concern raised by the Auditor General. The PAC’s report read as follows:

Although informative, the committee found some interviews disturbing. It was sad to note that some ministries were rampaged with practices that led to large sums of unjustifiable expenditure. This was disturbing in that it occurred during a period when government is experiencing the worse [sic] financial period to be seen in recent past ... The committee also made recommendations such as implementing performance audits, referring matters to the Anti-corruption Commission and the Royal Swaziland Police and recommending that people never be responsible for public funds again ... Another recommendation was that the Ministry of Public Service in consultation with the ministries concerned must ensure that all cases of misappropriation of funds and corruption were reported to the Civil Service Commission for disciplinary action and that ... these cases should be forwarded to the Commissioner of Police for further investigation and possible prosecution.¹²²

¹²² *Times of Swaziland*, ‘PAC recovers over 30m “lost” money’, 14 August 2012.

As an example, according to a report in the *Swazi Observer* of 15 May 2012:

after hours of questioning of the librarians, storeman and the director of the company about payment for undelivered books, the accountant [of Gwamile Voctim under the Ministry of Education and Training] told the committee that she had processed payment for undelivered books which was against government accounting procedures. The [Voctim] Institute had placed an order with Galaxy Investments; a company dealing in stationery but the ordered books were never delivered. The few that were found by the PAC during a tour of the library last Friday were irrelevant to the courses offered by the institution. The payment made was worth SZL 500 000 [USD 54 230] while only 235 books were delivered.¹²³

There has been a view expressed by some parliamentarians that there is a need for Parliament to strengthen its operations and maintain its independence. Some parliamentarians are of the view that being advised by the Office of the Attorney General, whose functions include being government's chief legal officer, advisor and representative, compromises their independence in carrying out their duties.

Representation

Members of Parliament are supposed to act as a link between citizens and government and with various regional and international bodies. In responding to their constituencies' needs they act as their 'eyes and ears'. They are also supposed to provide mechanisms for constituents to influence government decisions. For instance, once a bill, whether from government or from a private member, has been published in the gazette in accordance with the Standing Orders, each MP must take it to his/her constituency for consultation, in order to get the views of the people on the particular bill. Such views will be the basis for his/her debates in Parliament. The same consultations can be employed when seeking for motions and questions for oral answers to be asked in Parliament.

A common complaint from community members is that they only see their representatives regularly just before elections. Once elected, MPs 'disappear' for the rest of their term of office until just before the next elections. In a rare confrontation on the issue between an MP and his constituency, the *Swazi Observer* reported that:

Residents of Hhukwini ... gave their Member of Parliament, Mkhululi a piece of their minds accusing him of neglecting them for the past four years. They mentioned that they last saw him when they elected him into Parliament and had never seen him since. Others made it clear that as far as they were concerned, they did not have any representation in Parliament, while pointing to a myriad of problems besetting the constituency which could have been attended to if they had had an active Member of Parliament, who was intent on working for them.¹²⁴

¹²³ *Swazi Observer*, 'VOCTIM accountant weeps as she confesses to SZL 500 000 fraud', 15 May 2012.

¹²⁴ *Swazi Observer*, 'You neglected us – Hhukwini residents', 9 July 2012.

According to the *Times of Swaziland*, ‘One woman said they were contemplating running a “lost and found” advert in the newspapers because they did not know where their MP has disappeared to.’¹²⁵

In addition to the above functions, Parliament is also responsible for debating and approving the Appropriation Bill (for the budget) and supplementary budgets. Parliament also approves ratification of international instruments and their domestication.

c. Conclusions and recommendations

Swaziland’s governance structures clearly include institutions that are associated with democratic practice. However, there are also systemic constraints that prevent Swaziland’s Parliament from being classified as democratic according to accepted standards. The fact that only individuals can become MPs and political parties are not allowed to participate as parties in governance, is a significant deficiency in the system, as are the restrictions on the freedoms of expression, association and assembly in political affairs. Apart from the issue of ‘individual merit’, the fact that the King is both *de jure* and *de facto* head of the executive and legislature, severely limits the degree to which Parliament can be independent in its work and critical of government.

Another critical limitation of Parliament is that it is not administratively independent and is administered by the Office of the Prime Minister. This creates a situation where the legislature is vulnerable to interference and pressure. The law-making function is also negatively affected by the fact that no law can come into force unless the King has signed it and there is no veto mechanism for the law to be passed without that assent. Another critical limitation in Parliament’s operations is the inadequate support given to MPs to enable them to effectively play their role. For instance, the reliance on the Attorney General’s Chambers for legal advice is problematic in that the impartiality of the advice given is questionable, a recent example being the reversal of a vote of no confidence by the legislature in the Prime Minister and government. As with the issues of elections and participation in the policy process, the underlying problem is the foundation on which Parliament is expected to do its work – it is a systemic problem that can only be genuinely addressed by addressing the system of governance and transforming it in a way that is reflective of democratic principles, including the separation of powers between the different branches of government. Also, in terms of people’s participation in the work of Parliament, there seems to be an imbalance in relation to the extent to which Parliament consults with the people depending on what issues are at stake. Parliament seems more comfortable in consulting and broadening discussions with stakeholders on ‘safe issues’ such as those dealing with children and HIV/Aids, but as soon as the issues become political, Parliament retreats from public consultation.

Notwithstanding these systemic constraints, Parliament has increasingly begun to play a more vigorous role in the country’s governance, albeit that vocal parliamentarians are still in the minority and that the executive is still able to exert significant and coercive pressure on them. In this regard, parliamentarians have been particularly active in their oversight role through the different parliamentary committees described above where their questioning has put ministers

¹²⁵ *Times of Swaziland*, ‘MP hasn’t been seen since 2008’, 9 July 2012.

in the position of having to be accountable, which is not an area that was as pronounced in past Parliaments. One such case was the irregular purchase of land to the amount of SZL 31 million (USD 3.36 million), which in reality had a commercial value of only SZL 7 million (USD 759 219). The land was meant to build an embassy for Kuwait in the area of eZulwini on the outskirts of the capital Mbabane. After wide publication of the irregularity of the transaction by the print media, Parliament vigorously challenged the purchase of the land and instructed government to cancel the sale and to obtain a refund for the purchase.

The role of the legislature and manner in which it undertakes its work pose a challenge for civil society in that there are clearly opportunities, albeit limited, to work with the legislature to achieve some of the gains that civil society advocates for. It is apparent that lack of knowledge among civil society actors of parliamentary procedure has also affected participation. Of course some entities justify this by reverting back to the argument that the current system is illegitimate and that the MPs, as a result of the *tinkhundla* system, cannot be regarded as representatives of their constituencies and are only accountable to the King.

Nonetheless, the fact that the system of government as a whole does not meet democratic standards does not mean that its various components cannot engage in some meaningful actions. It is therefore recommended that civil society engage with Parliament strategically to advance laws and policies that benefit Swazi society. Engagement with Parliament on sectorial issues can take place simultaneously with advocacy that addresses the larger questions of democratisation. This approach could entail a range of civil society activity and engagement with Parliament including observation and monitoring of Parliament and relevant committees, formulation of model policy and legislation, appearing before the Portfolio and other parliamentary committees to make presentations, drafting of questions, motions and issue papers for MPs and making recommendations that parliamentarians can use in debates in the House and Senate.

6: Vote of no confidence in the Cabinet

Swaziland currently faces yet another constitutional and political crisis again precipitated by the violation of the country's Constitution by national authorities. In a move that can be described as a culmination of an ongoing effort by Parliament to assert its authority as an independent branch of government with the power to demand accountability from the executive through its oversight function, the Swaziland legislature passed a vote of no confidence in the Cabinet on 3 October 2012.

There has been widespread criticism of the current Cabinet, appointed after the 2008 election, which has largely been perceived as failing the nation. This perception is based on the rapid deterioration of the country's socio-economic environment including a fiscal crisis and the exposure of numerous incidences of Cabinet acting in its own self-interest. In addition there has been a judicial crisis in which a High Court Judge was suspended and dismissed, strengthening the perception that the courts are expected to be partial to government and that the judiciary faces punishment for independent behaviour. In tandem with this development, the Chief Justice prohibited the citing of the King's name in legal process. These actions contributed to

a boycott of the court by lawyers as well as several instances of protest action by the labour movement, students and other civil society organisations, including a 7-week strike by teachers. Calls from various sectors in the country for Cabinet to resign or to be removed from office have been a recurrent feature in this term of office. This is not the first time that parliamentarians have attempted to remove a Cabinet, but it is the first time that the vote has been successful in this regard.

The vote was based on Cabinet's handling of a long-standing conflict between the state-owned Swaziland Post and Telecommunications Corporation (SPTC) and the privately owned MTN Swaziland, who had taken each other to court over a Joint Venture Agreement in 1998 in which MTN had been given a monopoly over the provision of mobile telephone services in the country. The SPTC had introduced products on the market that MTN alleged violated the agreement. The Swaziland Supreme Court, on appeal from MTN, ruled that the SPTC should switch off these services. The decision of the court was confirmed by the International Court of Arbitration. Pursuant to these decisions, Cabinet was instructed by Parliament to ensure that the SPTC services were not switched off as they enabled affordable access to communication services, including the internet. When Cabinet refused to do so and instead ordered the SPTC to switch off the services, Parliament viewed its behaviour as a failure of government to heed to the legislature's instructions to the detriment of the country and the populace.

Sections 68 and 134 of the Constitution deal with the issue of a vote of no confidence in Cabinet in the following manner:

- Section 68(5). Where a resolution of no confidence is passed on the Cabinet by a three fifths majority of all members of the House of Assembly the King shall dissolve the Cabinet.
- Section 134(5)(b). In the exercise of his power to dissolve Parliament in terms of this section, the King shall act on the recommendation of the Prime Minister save that where the House passes a resolution of no confidence in the government of Swaziland and the Prime Minister does not within three days after that resolution resign, the King may dissolve Parliament or the Cabinet.

The vote of no confidence was passed in the executive by a motion that received the support of 42 votes while six MPs opposed it. In view of the constitutional provisions, the expected outcome of the vote was that Cabinet would not be in office, either because it had resigned or because the King had dissolved it. However, despite the vote, Cabinet is still in office and is likely to continue to be so until the 2013 elections.

Following publication of the vote, the Prime Minister, Dr Sibusiso Barnabas Dlamini, issued the following statement:

Following the interview made by the Minister of Information, Communication and Technology, Senator Winnie Magagula, on 2 October 2012, in connection with the recent SPTC/Swazi MTN judgment on the switching off of the mobile telephony of the SPTC, the House of Assembly on 3 October 2012, moved and passed a motion without notice challenging the decision of the Cabinet to allow [the] SPTC to implement the judgments of the Supreme Court of Swaziland and the International Court of Arbitration, government wishes to state the following:

- Parliament is challenging the jurisdiction of the judiciary and executive. His Majesty's government respects and will continue to respect court decisions.
- His Majesty's government believes that the motion passed by the House of Assembly is null and void as it seeks to compel Cabinet to defy court orders.
- His Majesty's Cabinet is and will continue to be in full control of His Majesty's government and the nation should remain calm and continue with business as usual.

The refusal by government to step down and the King not dissolving Cabinet led to days of speculation about the situation and how it would be resolved. The Attorney General advised that the vote was null and void, but Parliament was adamant in maintaining its resolution. Various civil society organisations weighed in on the public discussion of the issue and the Law Society of Swaziland, for instance, backed the validity of the vote. The issue was also referred to the King's Advisory Council (*Liqoqo*) for it to advise the King on how to deal with the issue. A stand-off ensued with parliamentarians refusing to conduct business involving Cabinet ministers.

On 15 October 2012, in an about-turn, MPs voted to reverse the vote of no confidence. This vote, which was preceded by difficulty in establishing a quorum, was taken by the shouting of 'Aye' or 'Nay', instead of a headcount of the vote. The reversal has received criticism for a number of reasons including that there were only 32 members involved and this was an insufficient number for a vote on the reversal of the earlier motion. It is also alleged that the 32 parliamentarians who voted included some Cabinet ministers, who were not eligible to vote on the matter. There is also speculation that not using a headcount for the reversal of the vote was a manipulation of the process, in that the exact number of votes either way is unknown. In addition, there are allegations of bribery and coercion of individual MPs and the use of intimidation and threats.

As matters stand, there has been widespread rejection of the reversal with civil society members such as the Law Society seeking to approach the courts to interpret the Constitution and law and to make a declaration on this matter.

The ignoring of the vote of confidence by Cabinet and subsequent lack of action by the King as directed by the Constitution is yet another in a series of incidents in which constitutional provisions have not been adhered to and has once again raised the issue of political will to comply with its dictates as the 'supreme law' of the country.

8

Regional and local government

Swaziland is divided into four administrative regions – Hhohho, Lubombo, Manzini and Shiselweni – which encompass both rural and urban areas. Each is headed by a regional administrator (RA), the political head of the region, who has the status of a deputy minister. (S)he is appointed by the King and reports to him for any related traditional duties. The duties of the RA include overseeing the operations of the *tinkhundla* within the region and taking responsibility for chieftaincy matters and all other matters that are regulated by Swazi law and custom. In terms of the Constitution, the RA has the same status and has the same rights and privileges as a deputy minister. Under each RA, there is a regional secretary (RS), who is a civil servant and stands in the same relationship to the RA as a principal secretary stands to a departmental minister. ‘The RS is the most senior civil servant in the region, the region’s principal administrator and ... in theory he is responsible for monitoring and supervising the work of other civil servants.’ RSs are assisted by senior regional officers.

A. Legal framework

The current legal framework governing regional and local government in Swaziland is chapter XIII of the national Constitution, the 2005 De-centralisation Policy and the Urban Act of 1969. Local government in Swaziland operates differently in urban and rural areas and the Constitution and De-centralisation Policy are an attempt to harmonise the two. The Ministry of Housing and Urban Development is responsible for urban local government and the Ministry of Tinkhundla Administration is responsible for rural local government. The Tinkhundla Administration Bill has been tabled in Parliament to operationalise local government at this level. The duality of the law and governance in Swaziland means that the urban and rural structures of local governance, while separate, are also interlinked.

In pursuance of the goal of harmonisation, section 218 of the Constitution states that

- Parliament shall within five years of the commencement of this Constitution provide for the establishment of a single country-wide system of local government which is based on the *tinkhundla* system of government, hierarchically organised according to the volume or complexity of service rendered and integrated so as to avoid the urban/rural dichotomy.
- The primary objective of the *tinkhundla*-based system of government is to bring government closer to the people so that the people at sub-national or local community level progressively take control of their own affairs and govern themselves.
- Local government shall be organised and administered, as far as practicable, through democratically established regional and sub-regional councils or committees.

The Constitution additionally makes provision for the following:

- Defining the boundaries of local government areas by the Elections and Boundaries Commission, taking into account existing chiefdom areas and the need to integrate urban and rural areas where necessary, taking into consideration ‘the population, the physical size, the geographical features, the economic resources, the existing or planned infrastructure of each area and the possibilities of facilitating the most rational management and use of the resources and infrastructure of the area, with a view to ensuring that a local government area is, or has the potential for becoming, economically sustainable’.¹²⁶
- The administration of local government areas by elected or appointed, or partly elected and appointed, councils or committees as prescribed by Parliament.¹²⁷
- The duties of a local government authority including the efficient management and development of the area under its jurisdiction in consultation with local-traditional authority where applicable; maintaining and protecting life and public property, improving working and living conditions, promoting the social and cultural life of the people, raising the level of civic consciousness, preserving law and order within its area and generally preserving the rights of the people in that area; and depending on its level of development, determine, plan, initiate and execute policies, taking into account national policy or development plans. Further, the local-government authority is expected to organise and promote popular participation and cooperation in respect of the political, economic, cultural and social life of the area under its control.
- Power to raise revenue through levying and collecting taxes, rates, duties and fees as may be specified for the execution of its programmes and policies; and to formulate and execute plans, programmes and strategies for the effective mobilisation of the resources necessary for the overall benefit and welfare of the people within its area.
- Subvention of local governments according to which government is required to allocate funds and the necessary expertise for the assistance of local governments where necessary.

¹²⁶ Constitution of the Kingdom of Swaziland, section 219.

¹²⁷ *Ibid.*, section 220.

- Integration of development programmes in that the development programmes of a local government shall, where appropriate, be integrated into the national development plan to be mainly funded by the government.

In view of the fact that no legislative reform has occurred in relation to local government, Joubert et al. are of the view that:

The constitutional provisions are ‘about things to come’ in so far as matters of local government are concerned. The Constitution provides that the creation of a new structure of local government merging the urban and rural areas will only become effective five years from the commencement of the Constitution. The Constitution is revolutionary in matters of local governance. It provides that local government will be clothed with power to ‘raise the level of civic consciousness ... promote popular participation and cooperation in respect of political, economic, cultural and social life’ (Section 221 [4]). This is a far cry from what is happening at present where people do not feel free to discuss improvement issues on matters concerning their participation in public affairs. It is envisaged that once the ‘spaces’ are created by the Constitution and people are made aware of their entitlements in matters of local governance, this institution will be all the more democratic for all.¹²⁸

B. Decentralisation

In order to further guide governance at a local level, the De-centralisation Policy was adopted in 2005. The policy aims to:

provide an enabling environment for promoting and enhancing sustainable and participatory local and national economic, political and social development within a de-centralised governance framework and is based on the fundamental principles of subsidiarity, empowerment, responsibility, partnership, connectivity, accountability, transparency, equity, inclusiveness, responsiveness, effectiveness, participation, consensus, democratic representation and respect for the rule of law.¹²⁹

Its five main objectives are to:

- De-centralise governance praxis at all levels;
- Engender citizen engagement and popular participation in decision-making processes, programmes and activities;
- Ensure ‘bottom-up’ integrated development planning and implementation of basic infrastructure as well as timely and quality service delivery;
- Empower local-government institutions to manage community-development projects, programmes and activities; and
- Ensure improved and more accountability and transparency in public affairs and the use of public resources.

¹²⁸ EISA, *Consolidating Democratic Governance in the SADC Region: Swaziland*, 2008, p. 80.

¹²⁹ Government of the Kingdom of Swaziland (2005): Local Government Reform and Decentralisation Policy Document (draft), Swaziland: Office of the Deputy Prime Minister.

According to the World Bank:

Political de-centralisation aims to give citizens or their elected representatives more power in public decision-making. It is often associated with pluralistic politics and representative government, but it can also support democratisation by giving citizens, or their representatives, more influence in the formulation and implementation of policies. Advocates of political de-centralisation assume that decisions made with greater participation will be better informed and more relevant to diverse interests in society than those made only by national political authorities.

The de-centralisation process, which is being overseen by a multisectoral team comprising government departments, is a work in progress and much still needs to be done in terms of updating the existing legal framework and the relevant structures. In this regard, the World Bank is to support Swaziland in the period 2011–2017 in strengthening of local government at both rural and urban levels:

The Swaziland Local Government Project aims to address three areas, namely *tinkhundla* infrastructure and capacity-building support; urban infrastructure grants and capacity-building; and project management and technical assistance. Local governments also receive substantial direct and indirect support from government. This Budget provides nearly SZL 84 million (USD 9.1 million) for local authorities, of which 75% will come from rates payments on public property. To improve the efficiency of local urban and rural government, Swaziland has secured a USD 26.9 million loan from the World Bank to support the Swaziland Local Government Project. Implementation will begin in 2012/2013. The Mbabane City Council will also begin to restructure using an SZL 18 million (USD 1.9 million) allocation from 2011/2012.¹³⁰

According to the Ministry of Housing and Urban Development, Swaziland is ‘in transition’ in the sense that it is still at the initial stages of implementing the requirements of de-centralisation and local government as envisaged by the Constitution and De-centralisation Policy. In the meantime, therefore, the existing law and practice in term of governance in the urban and rural areas applies.

c. Urban local-government structures

The structures responsible for urban local government are municipal councils, which currently consist of the city councils of Mbabane and Manzini; the town councils of Ezulwini, Matsapha, Nhlanguano, Pigg’s Peak and Siteki; as well as town boards for Hlathikhulu, Vuvulane, Lavumisa, Ngwenya and Mankayane. Section 55 of the Urban Government Act enumerates the functions and duties of urban government structures as follows:

- To control, manage and administer the municipality;
- To maintain and cleanse all public streets and open spaces vested in the Council or committed to its management;

¹³⁰ Minister of Finance, Speech on the National Budget for the 2012/2013 fiscal year, 2012.

- To abate all public nuisances;
- To safeguard public health, and provide sanitary services for the removal and disposal of night soil, rubbish, carcasses of dead animals and all kinds of refuse;
- To establish or take over and maintain, subject to the extent of its resources, any public utility service which it is authorised or required to maintain under any law and which is required for the welfare, comfort or convenience of the public;
- To develop, control and manage any land vested in, owned or leased by the Council;
- To establish or take over and administer, subject to the extent of its resources, housing schemes for the inhabitants of the municipality; and
- To generally promote the public health, welfare and convenience, and the development, sanitation and amenities of the municipality.

The Act requires that for purposes of transacting its business, every Council hold an ordinary meeting at least once a month. In terms of participation, section 15(4) of the Urban Government Act states ‘Every meeting of the Council shall be open to the public and representatives of the press, but this sub-section shall not apply to any committee of the Council or to the Council when in committee.’ In carrying out their work, local-government authorities are legally subject to account for their actions and are expected to report on their programmes as well as their expenditures.

Urban local-government structures are presently populated through election according to wards that are regarded as the electoral constituencies for the local-government elections, and/or appointment by the Minister for Housing and Urban Development. The latest urban local-government elections took place in November 2012, while the positions in the rural-based local government – *Bucopho* and *tiNdvuna teTinkhundla* – will be elected as part of the 2013 national elections. As explained above, Swaziland currently operates a no-party system, and this means that even at the local level, persons stand for election as individuals, on a first-past-the-post basis.

In a bid to promote women’s participation in local-government processes, in 2012 a 50/50 campaign was led by GenderLinks Swaziland in partnership with the Deputy Prime Minister’s Gender and Family Issues Unit, the Ministry of Housing and Urban Development, the Swaziland Local Government Association and the Alliance of Mayors and Municipal Leaders on HIV/Aids in Africa.¹³¹

In addition to women, the Ministry of Housing and Urban Development also acknowledges the need for the greater participation of people living with disabilities.¹³²

D. Rural local-government structures

In terms of rural local government, the significant features of the traditional government are the 55 *tinkhundla* centres which King Sobhuza II stated were meant to ‘de-centralise administrative work thus bringing it within reach of everybody and provide the people with real service and

¹³¹ Ministry of Housing and Urban Development, *Urban Local Government and Urban Local Government Elections in Swaziland*, 2012.

¹³² *Ibid.*

lead to de-centralisation and a delegation of authority from the central body'.¹³³ Among their functions, the *tinkhundla* centres are therefore also supposed to serve as forums for development activity, and efficient delivery of government services at the 'grassroots' level. The Constitution provides for *Inkhundla* or *Bucopho* committees. These are 55 in number aligned to the different *tinkhundla*. Their regional distribution is as follows: in the Hhohho region there are 14, Manzini 16, Lubombo 11 and 14 in Shiselweni. An *inkhundla* is constituted by a number of chiefdoms with varying population capacities. Each chiefdom is represented on the *Inkhundla* Committee by an elected representative called *Bucopho* who serves for a period of five years. Heading the *Inkhundla* Committee is the *Indvuna Yenkundla*, who is also elected at *tinkhundla* level, meaning that each of the 55 *tinkhundla* has its own *Indvuna Yenkundla*, who also holds the position for a period of five years. The *Indvuna Yenkundla* and the *Bucopho* constitute the *Inkhundla* Committee, which is the executive council of the *inkhundla*. The local MP sits on the *Inkhundla* Committee in an ex officio capacity.

The *Indvuna Yenkundla* presides over all meetings of the *Inkhundla* Committee and other meetings of the *inkhundla* and liaises between the community, regional authorities and the Ministry of Tinkhundla Administration, and through the latter, with other government departments. The *Bucopho*, as representatives of their individual chiefdoms, are responsible for bringing to the *Inkhundla* Committee all matters of interest and concern to the chiefdom, in particular those issues pertaining to development, and in turn, they take back to the chiefdoms the decisions of the *Inkhundla* Committee. Since the *Bucopho* is the central link between the chiefdom and the *inkhundla*, he or she is required to report regularly to the chief-in-*Libandla* (the chief-sitting-in-council) on developments in the *Inkhundla* Committee.

The Constitution sets out the legal status of chiefs and defines their duties and responsibilities. According to section 233(3) of the Constitution, every *umphakatsi* (chiefdom) is headed by a chief who is appointed by the King. The chief administers the chiefdom with the assistance of the *Bandlancane* (Inner Council) and *Indvuna* (chief's headman), the *Indvuna* being the most senior member of the council.

While it is generally acknowledged that there are about 360 chiefdoms in Swaziland, it is not easy to say with precision how many chiefs there are in the country at any given time. This uncertainty is exacerbated by issues such as the lengthy periods of replacing or appointing chiefs in the event of vacancy and the often protracted and unresolved chieftaincy disputes in several parts of the country. The powers and competencies of chiefs are not the same as those of councillors in urban local government. The duties of chiefs include the administration of Swazi Nation Land on behalf of the King; adjudicating cases and facilitating conflict resolution and the prevention and suppression of crime in their respective jurisdictions. The jurisdiction of chiefs applies only in the rural areas in their respective chiefdoms and they have no say about anything that occurs in urban areas. However, if a chiefdom experiences two chiefs contesting for power, and this results in uncertainty as to whom is the rightful chief, this may negatively affect participation of members of one of these chiefdoms. Structures such as the *Bucopho* may make decisions at the *inkhundla* on behalf of the chiefdom they recognise as the rightful party without consulting the other chief and the subjects loyal to him.

¹³³ Government of the Kingdom of Swaziland, *Decentralisation Policy*, 2005.

E. Conclusions and recommendations

Following the adoption of the Constitution and the De-centralisation Policy in 2005, Swaziland's local-government system has begun a process of change that envisages a strengthening of the legislative and institutional infrastructure that governs this sector. In terms of participation, civil society organisations that work in the areas of human rights, democracy and governance have not really paid attention to local government, as the overriding concern has been that of the national system of governance and the manifest absence of democracy at that level. However, local government can also become a site of struggle in the sense that the same issues of representation, democracy and participation arise, albeit on a smaller scale. In rarely paying attention to local government, there are hardly any civil society programmes that seek to enhance participation at this level of government.

It is also clear that the preoccupation with the national political level has resulted in civil society not really understanding how local government works and what opportunities exist within it, not only for strengthening participation at the local level, but also for pursuing the national democratisation agenda. It is therefore recommended that the advocacy programmes that are implemented at a national level also be considered for adaptation to the local-government level. However, civil society must invest in capacity-building of its own members at this level of governance and assess how to make an impact that will interface with and complement other democratisation initiatives at the national level.

9

Traditional authorities

The duality of Swaziland's system of governance means that the 'traditional' system operates and co-exists simultaneously with the 'modern' structures of government – namely, the executive (through the Cabinet), the legislature (through Parliament) and the judiciary (through the courts).

While the traditional institutions are distinct from those of 'modern' governance, the duality of the system means that there is constant interaction between the two. In addition to the use of traditional structures such as chiefdoms and the *tinkhundla* as the constituency basis of Parliament, another feature of the traditional institutions and their operations is that they exist almost parallel to those of 'modern' government in that they too have executive, legislative, and judicial functions. Chapter XIV of the Constitution enumerates the recognised traditional institutions and their functions as set out below.

A. *iNgwenyama* (the King)

iNgwenyama is the traditional head of the Swazi state. He also holds the office of King to which he ascends after being installed as *iNgwenyama* according to Swazi law and custom. In terms of traditional power and authority, he is referred to as *umlomo longacali manga*, meaning 'the mouth that tells no lies'. It seems that the understanding of the idea behind this Swazi maxim has been distorted over time. Apparently the original meaning was linked to the idea that the *Ngwenyama* operates in consultation with his various councils and the Swazi people in general and that when he makes a pronouncement on any issue, that pronouncement's legitimacy is anchored by it being a reflection of the consensus view of the people. However, in the current context, even though the various consultative structures exist, the meaning seems to be that once the

Ngwenyama has spoken or decided on a matter, there can be no contrary view expressed, which contributes to the perception that the King wields ‘absolute power’.

iNgwenyama is also the final arbiter in any dispute that is referred to him on appeal. This ultimate judicial power has caused uncertainty and disruption of legal process in the general courts. For instance, in the eviction cases of Macetjeni and kaMkweli, where the then Court of Appeal ordered that evicted residents from these two communities be allowed to return to their homesteads, the traditional structure made a contrary decision and the court’s order could not be effected. The affected residents had been evicted for refusing to accept the imposition of the King’s brother as chief since these areas already had incumbent chiefs. Another example is the abduction case brought by the mother of a young girl who had been taken by the King’s emissaries, purportedly to become one of his wives. Arguments advanced in court by the then Attorney General sought to remove the matter from the High Court stating that the court had no jurisdiction to hear the matter as it related to custom and tradition.

B. *iNdllovukazi* (Queen Mother)

iNdllovukazi is traditionally the mother of the *Ngwenyama* and the symbolic grandmother of the nation. She is selected and appointed in accordance with Swazi law and custom, which also determines her powers and functions. Among these functions is that she ‘exercises a moderating advisory role on *iNgwenyama*’. In the event of the *Ngwenyama* being unable to undertake his functions through absence or any other circumstance, she assumes the role of Queen Regent, in which she is advised and assisted by the *Umntfwanenkhosi Lomkhulu-in-Libandla* (Senior Prince-in-Council). In addition, the official residence of the *Ndllovukazi* is the legislative and ceremonial capital of the nation and the arena of the *Incwala* (the Kingship ceremony) and *Umhlanga* (the Reed Dance ceremony).

C. *Ligunqa* (Princes of the Realm)

The *Ligunqa* are the princes of the realm. They are the paternal uncles and half-brothers of *iNgwenyama* and exercise the functions of a *sikhulu* (chief) over designated areas. But the functions of *Ligunqa* further include advising *iNgwenyama* and the *Ndllovukazi* as Queen Regent, where that advice is necessary in the national interest to ensure the stability and continuity of the monarchy. The *Ngwenyama*, from time to time, may also consult all or some of the members of the *Ligunqa* on important or sensitive matters or disputes including matters of succession connected with the monarchy.

D. *Liqoqo* (the King’s Advisory Council)

The *Liqoqo* is the *Ngwenyama*’s (as well as the King’s) Advisory Council. Its members are appointed by *iNgwenyama* from the membership of *Bantfwabenhosi (emalangeni)* (princes), *tikhulu* (chiefs) and persons who have ‘distinguished themselves in the service of the Nation’. The *Liqoqo* traditionally advises *iNgwenyama* on disputes in connection with the selection of *tikhulu* (chiefs), boundaries of chiefdoms and any other matter *iNgwenyama* may assign for their advice in confidence.

E. *Sibaya* (Swazi National Council)

The *Sibaya* is a meeting of the nation at the *Ndlovukazi*'s official residence for the purpose of deliberating or deciding on important national matters. It is constitutionally the highest policy and advisory council (*Libandla*) of the nation and is also referred to as the Swazi National Council.

According to section 232 of the Constitution

The people through *Sibaya* constitute the highest policy and advisory council (*Libandla*) of the nation. The *Sibaya* is the Swazi National Council constituted by *Bantfwabenhosi* [princes], the *tikhulu* [chiefs] of the realm and all adult citizens gathered at the official residence of the *Ndlovukazi* under the chairmanship of *iNgwenyama* who may delegate this function to any official. *Sibaya* functions as the annual general meeting of the nation but may be convened at any time to present the views of the nation on pressing and controversial national issues.

Sibaya is also referred to as a 'People's Parliament' where Swazis from all walks of life and all corners of the country converge – most of those from rural communities being transported by government trucks – at the Royal Kraal to air their views on these issues.

The *Sibaya* is also used for making key announcements to the nation. For instance the repeal of the 1968 Constitution and announcement that the King was taking over all executive, legislative and judicial power was made at a *Sibaya*. The Constitution of 2005, though passed by the legislature, was first subject to *Sibaya* discussions and then presented to a *Sibaya* by the King as a demonstration of the bestowal of the national 'blessing' on the document. The appointment of the Prime Minister is also announced at the *Sibaya*.

This traditional structure has been used to demonstrate that Swazis thrive on dialogue and that there are spaces, supported by tradition, in which this dialogue occurs and where all are free to express themselves. Indeed, *Sibaya* meetings have seen the majority of those making submissions using the opportunity to praise the King and government, complain, seek assistance for basic livelihood issues and/or to request employment – rather than making substantive contributions to whatever issue has been under discussion. For instance, during the *Sibaya* discussion of the draft Constitution, '80% of those who submitted spoke of "bread and butter issues" rather than addressing the issue of the draft Constitution'.¹³⁴

However, the tenor of the recently held *Sibaya* showed a different picture – one of an angry and dissatisfied populace who want change. For instance, the first speaker¹³⁵ raised the issues of the economy, fiscal mismanagement and corruption. She stated that it was clear that the economy was in crisis, not because there was no money in the country, but because it was not managed properly. She noted that it was difficult for the people to accept what the nation was told about the country having no money when it was also told that SZL 80 million (USD 8.67 million) is lost monthly through corruption, that expensive cars had been bought and that politicians had awarded themselves hefty benefits both for their term of office and when they

¹³⁴ Interview with Musa Hlophe (SCCCO).

¹³⁵ This speaker introduced herself as Gugu Mngometulu from New Haven, Velabantfu, under Chief Mtfongwa.

retire. She recommended that corrupt officials be removed and that action be taken against them so that the nation's economy could be revived. Her submission received loud applause and many other speakers also echoed these concerns. However, the question that always arises after *Sibaya* discussions or consultations is 'What next?' Among the many challenges of the *Sibaya* is that unless the King makes a particular decision or pronouncement on any of the issues discussed at the end of the forum, it is not clear whether anything will happen to address the concerns raised. As a result it has not been deemed as a credible forum by civil society for genuine engagement and participation.

F. Tikhulu (chiefs)

The *tikhulu* are perhaps one of the most critical traditional governance institutions in that chiefs are an extension of *iNgwenyama*. As local heads of one or more chiefdom areas, chiefs administer local community areas on the King's behalf.

According to section 233 of the Constitution, 'chiefs are the footstool of *iNgwenyama* and *iNgwenyama* rules through the chiefs'. The general rule is that every *umphakatsi* (chief's residence) is headed by a chief who is appointed by *iNgwenyama* after the chief has been selected by the *lusendvo* (family council) and who shall vacate office in like manner. In addition, the Constitution states that a chief, as a symbol of unity and a father of the community, does not take part in partisan politics.

The powers and functions of chiefs are in accordance with Swazi law and custom or conferred by Parliament or *iNgwenyama* from time to time. In the exercise of the functions and duties of his office, a chief is only supposed to enforce a custom, tradition, practice or usage that is just and non-discriminatory. The Constitution also provides for chiefs to be appointed to any public office for which the chief may be otherwise qualified. Therefore, in addition to their traditional functions, chiefs in the current government participate as ministers and as Members of Parliament (MPs) (senators and members of the House of Assembly). Chiefs are also appointed to various commissions, boards and other structures.

Section 251 additionally establishes 'a Council of Chiefs which shall be composed of twelve chiefs drawn from the four regions of the Kingdom appointed by *iNgwenyama* on a rotational basis' whose role is to advise the King on customary issues and any matter relating to or affecting chieftaincy including chieftaincy disputes. The Council also participates in the legislative process by scrutinising and giving advice on any bills that may have an impact on Swazi law and custom as envisaged by section 115 of the Constitution that deals with these matters.

G. Umntfwanenkhosi Lomkhulu (Senior Prince)

The *Umntfwanenkhosi Lomkhulu* is a paternal uncle of the King selected and appointed in accordance with Swazi law and custom. One of his roles is to chair the *Liqogo* (the King's Advisory Council). As stated above, when the Queen acts as regent in the absence of the King, the *Umntfwanenkhosi Lomkhulu* assists and advises her. In the event that she too cannot carry out her duties for any reason, the *Umntfwanenkhosi Lomkhulu* becomes responsible for carrying out those duties.

H. *Tindvuna* (Royal Governors)

Tindvuna are in charge of the regiments and the royal villages. This structure is replicated at the local-community level as chief's residences are also regarded as royal.

Apart from defining these institutions, the Constitution does not give additional guidance as to how traditional institutions are to perform their duties, except that this should be done 'in accordance with Swazi law and custom'. Because the specifics of Swazi law and custom are not detailed in the Constitution or in any other law or document, the phrase 'in accordance with Swazi law and custom' does not give any clarity as to the functioning and role of these institutions. This allows for a manipulation of custom and tradition, particularly by the traditional authorities themselves, as they are regarded as the custodians of culture.

As these structures, in particular chiefs, are responsible for enforcing custom, there is potential for tradition being invented simply to suit the structure at a particular time. Alternatively, an existing custom may be used to enforce action that was never envisaged by the custom. For instance, Swazis are traditionally supposed to offer tribute labour for different tasks at community level such as tending fields (ploughing, harvesting, etc.) as a demonstration of allegiance to a particular community and chief. In September 2012, it was reported that 'Chief Dambuzza Lukhele [had] barred residents of Ngobolweni from ploughing their fields because they allegedly defied his order to construct a house for his junior wife.'¹³⁶ In another incident, a chief was reported as having prohibited the wearing of trousers by women. According to the *Times of Swaziland*

Females who reside in Mgazini are not allowed to wear pants. This is an instruction that came from the newly appointed chief of the area Chief Sicunusa Dlamini. A female that is found to have broken this law is fined a chicken or SZL 25 [USD 2.70]. The community police have been tasked with ensuring that everyone in the area complies with the order. People of the area do not want to discuss the issue openly.¹³⁷

These examples illustrate the relationship between chiefs and community members – it is not one of genuine consultation or inclusivity. While meetings are held at the chieftom level and the community is able to discuss community issues, these are held at the discretion of the chiefs. Also, while participation is open to all the chief's 'subjects', there are some limitations for women, in that if they are wearing mourning gowns or trousers, they are not permitted to enter the homestead of the chief, which is the designated meeting place for the community. In this context, the question of the chief's accountability to the community does not arise – if a person has a grievance against a chief, their recourse lies with the King. The Acting Governor of the Ludzizini Royal Residence (the traditional capital), commenting on the above-cited case of women being barred for wearing trousers, stated that

At the moment we are not aware of that directive [banning trousers]. Are the people complaining about that? If they are not happy we can only act on it once they come to register their disapproval. If they feel that their chief is doing something wrong, they must come and report it here and we will then act on their complaints.¹³⁸

¹³⁶ *Times of Swaziland*, 'Chief Dambuzza bans residents from ploughing', 24 September 2012.

¹³⁷ *Times of Swaziland*, 'Chief bans trousers', 22 September 2012.

¹³⁸ *Ibid.*

Chiefs are very important to the issues of governance and participation and in addition to the role they play in terms of custom, they are also involved in national government. Inasmuch as chiefs are prohibited from participating in elections, the King has always ensured that among his appointees for Parliament, chiefs (and members of the royal family) are included. As a result the current Parliament includes a number of chiefs both in the House as well as the Senate. The Minister of Justice and Constitutional Affairs is a chief, as is the President of the Senate, who, as a woman, is an acting chief.

The chiefs that are within the structures of 'modern' government receive the salaries and other benefits that are attendant to the positions they occupy. Beyond that, chiefs do not receive funds or a stipend for their role of administering local communities. The issue of resources being allocated to chiefs has caused some tension within the chieftaincy. There is an imbalance between the chiefs who receive salaries (in public posts to which they have been appointed) and others who do not. Even though rotational appointment is provided for, the sheer number of chiefdoms would make it difficult to accommodate all the chiefs in various remunerative positions. This division based on resources seems to have been taken lightly by the authorities. Yet, with the key position chiefs occupy in Swazi society, the dissatisfaction of chiefs that view themselves as side-lined or excluded from benefiting could lead to a weakening of the institution and in turn weakened support for the institution of the monarchy.

Chiefs have also expressed a concern that their powers have been reduced by the dual system of governance and by the Constitution. Examples usually cited by chiefs include that a chief may summons a community member to answer a case that has been reported against her or him and to make a decision on the issues. However, if the person (or their lawyer) interdicts the chief to stop these proceedings using civil law, the chief might end up in court defending his role. Such challenges to a chief's authority is perceived as demeaning to the traditional structure as it expects its rules to be followed. The chiefs also complain that they have been made subordinate to the structures of the 'modern' government and that MPs and *Bucophos* regard them as inferior, yet these officials are temporarily in power while chiefs, ruling over the communities and their 'subjects', are regarded as the 'backbone' of Swazi society.

In terms of democratic participation, traditional institutions, though purportedly based on consultation and dialogue, are autocratic in nature in that they wield power without checks and balances. The Electoral Institute of Southern Africa states that

It would appear that traditional authorities in the context of Swaziland are the extension of the institution of the Monarchy. All the traditional institutions are replete with members of the royal institution or are wholly composed of members of the royal family. It is small wonder therefore that traditional institutions as envisaged in the Constitution would not serve to promote and cement democratic ideals as long as they remain an extension of the institution of the monarchy instead of being 'owned' by the Swazi nation. The *tinkhundla* system of government has succeeded in transforming the King of Swaziland from being a king who was accountable to the people to one who is now absolute and whose word may not be questioned.

Traditional institutions in Swaziland in the main ensure that democracy is stifled in large measure. The King in his capacity as *iNgwenyama* exercises unlimited power over the people and as a ‘mouth that tells no lies’ may not be opposed once he has taken a decision on any matter. He exercises a wide variety of powers over government and over the traditional institutions. The other institutions are largely there to buttress the will of the *Ngwenyama* and to ensure the perpetuity of the monarchy.

Cracks have however emerged within the ranks of traditional leaders. Inequitable treatment in terms of material benefits and a perceived loss of power are resulting in criticism being expressed about the current dispensation and that some practices constitute a misrepresentation of culture and tradition. Even though they may not express their frustrations publicly, some of the traditional authorities are also in favour of transformation of the system, albeit in a manner that ‘restores’ their power.

I. Conclusions and recommendations

Traditional authorities are an integral part of Swaziland’s governance. Chiefs in particular play an important role in ensuring adherence to Swazi law and custom. Chiefs are also gatekeepers and determine which issues will be discussed at the community level. The traditional system and its structures are set up primarily to service and protect the monarchy. While traditional structures may be difficult to penetrate, it is submitted that a greater understanding of how they work would be beneficial for civil society as it strategises about ways in which to hold traditional leaders accountable. In addition, advocacy with traditional leaders in the various structures of the traditional system is important – after all, they advise the King and could be a conduit for transmitting messages about people’s dissatisfaction and the need for transformation.

Poor and unfair governance in Swaziland thrives at community level because people are unaware of their human rights and because the system of governance has not been made accountable to the people. Empowerment of the populace should be scaled up through civic education and mobilisation that strengthens people’s understanding of their human rights and responsibility to participate in decision-making. This includes their right to collective action at community level to challenge injustices perpetrated by traditional authorities and to call for the accountability of these authorities.

10

Development assistance and foreign relations

Development assistance and foreign relations are coordinated by the Ministry of Economic Planning and Development and the Ministry of Foreign Affairs respectively. In terms of the former, an Aid Management and Coordination Section has been set up for this purpose. According to the African Development Bank's Country Strategy Paper for Swaziland, government receives development assistance from various partners for different national and sectorial purposes as is illustrated in Table 8.

The United States of America is also a development partner to Swaziland and contributes support to a number of areas, most notably in the areas of health, HIV/Aids as well as community empowerment. In addition, the Global Fund in HIV/Aids, Tuberculosis and Malaria also funds national efforts to address HIV/Aids.

In his budget speech of 2012/2013, the Minister of Finance, Majozi Sithole, expressed appreciation for the contributions of development partners:

Mr Speaker, I would like to take this opportunity to thank all our donor partners for their financial and technical support over the past year to make Swaziland a better place. Project grants included in the Budget will increase from SZL 207 million [USD 22.45 million] in 2011/2012 to SZL 376 million [USD 40.78 million] in 2012/2013 The Taiwanese government and the EU [European Union] have increased their assistance for the implementation of a number of projects. The EU funding is mainly supporting sector interventions including agriculture, water, governance, health, and education, while the Taiwanese government is supporting infrastructure projects. The UN [United Nations] is providing funds for health, gender programmes, statistics and

poverty reduction initiatives. PEPFAR [President's Emergency Plan For AIDS Relief] and Global Fund continue to be vital partners in the fight against HIV/Aids.

Government has acknowledged the importance of aligning and coordinating financial resources in national policy-planning and accountability systems. Swaziland's development aspirations are articulated at the sectorial, national and international levels. At the international level, the government is signatory to a number of different international and regional agreements on various thematic issues. These include the Millennium Development Goals and the Education for All initiative. At the national level they include the National Development Strategy – Vision 2022, according to which Swaziland aims 'to be in the top 10% of the medium human development group of countries founded on sustainable economic development, social justice and political stability'¹³⁹ and the Poverty Reduction Strategy and Action Plan. There are also multiple sectorial policies dealing in greater depth with a diversity of issues. Among these are the following:

- Food Security Policy;
- National Multisectoral HIV/Aids Policy;
- National Health Policy;
- Sexual and Reproductive Health Policy;
- National Youth Policy;
- National Children's Policy; and
- National Gender Policy.

Support to the promotion of democratic and developmental efforts is received by Swaziland through either specifically articulated programmes to be supported by the development partner in question or through conditions that may be placed upon government in respect of trade or loan agreements and support that is given to civil society programming in these areas.

For instance, the United Nations Development Assistance Framework (UNDAF) 2011–2015 currently governs the cooperation between Swaziland and the UN. The framework identifies four pillars on which UN assistance to Swaziland is to be based during this period, namely, HIV/Aids, Poverty and Sustainable Livelihoods, Human Development and Basic Social Services and Governance. Within the area of governance, the UNDAF notes the following challenges that the UN seeks to address:

- Protection of social, cultural and economic rights;
- Transparency and accountability in public sector management;
- Absence of clear coordination in institutions involved in the fight against corruption which compromises the effectiveness of the Anti-Corruption Commission; and
- Limitations in people's rights and freedoms to participation (in view of the no-party *tinkhundla*-based system of electing individuals to Parliament).

In this regard, the UN seeks to attain 'Strengthened national capacities for the promotion and protection of rights' through the following:

¹³⁹ Government of the Kingdom of Swaziland, *National Development Strategy: Vision 2022*, 1999.

- Support capacity improvements in the implementation of the Constitution and the facilitation of legal provisions, including assistance towards the ratification and domestication of instruments and follow-through, with comprehensive policy changes and the establishment of operational plans;
- Address Gender and Human rights, including the rights of women and children;
- Enhance capacity for securing transparency and accountability in public sector management including national efforts to reduced corruption in public offices through assistance to oversight institutions that include Parliament, civil society and the media;
- Strengthen national cooperation between the government and non-state actors in the national quest to collectively face developmental challenges; and
- Strengthen mechanisms for enhanced citizen participation in governance.

This agreement comprises the whole of the UN's support to Swaziland, whether to government or to civil society and envisages that the work in each of the thematic areas will involve all relevant stakeholders.

Swaziland receives support from the EU in terms of the Cotonou Agreement, in which the chapter 2 article 4 promotes participation as well as the inclusion of civil society:¹⁴⁰

The parties recognise the complementary role of and potential for contributions by non-state actors, ACP [African, Caribbean and Pacific Group of States] national parliaments and local de-centralised authorities to the development process, particularly at the national and regional levels. To this end, under the conditions laid down in this agreement, non-state actors, ACP national parliaments and local de-centralised authorities, shall, where appropriate:

- Be informed and involved in consultation on cooperation policies and strategies, on priorities for cooperation especially in areas that concern or directly affect them, and on the political dialogue;
- Be provided with financial resources, under the conditions laid out in this agreement in order to support local-development processes;
- Be involved in the implementation of cooperation projects and programmes in areas that concern them or where these actors have a comparative advantage.

In addition, articles 19 and 33 of the agreement respectively state, 'Governments and non-state actors in each ACP country shall initiate consultations on country development strategies and community support thereto' and 'cooperation shall span all areas and sectors of cooperation to foster the emergence of non-state actors and the development of their capacities; and to strengthen structures for information, dialogue and consultation between them and national authorities, including at regional level'. In relation to the promotion of non-state actor participation articles 8 and 10 specifically address the participation of non-state actors in the political sphere. In terms of article 8 on political dialogue with government, the agreement provides that 'representatives

¹⁴⁰ European Centre for Development Policy Management, *The Cotonou Agreement: A User's Guide for Non-State Actors*, 2003, p. 28.

of civil society organisations shall be associated with this dialogue and in this regard, non-state actors will be engaged by the EU delegation to Swaziland on key political and governance issues and developments in preparation for the dialogue with government'. Article 10 provides for the greater involvement of an active and organised civil society and the private sector, which are seen as contributing to the maintenance and consolidation of a stable and democratic political environment.

In terms of the United States' African Growth and Opportunity Act (AGOA):

The President may designate sub-Saharan African countries as eligible to receive the benefits of the Act if they are making progress in such areas as:

- Establishment of market-based economies;
- Development of political pluralism and the rule of law;
- Elimination of barriers to US trade and investment;
- Protection of intellectual property;
- Efforts to combat corruption;
- Policies to reduce poverty, increase availability of healthcare and educational opportunities; and
- Protection of human and workers' rights, and elimination of certain practices of child labour.¹⁴¹

Progress in each area is not a requirement; however:

The criteria are standards which the African countries themselves have espoused and most are striving to uphold. But Congress never intended AGOA to be a blank cheque for all African countries, without regard to performance. It was meant to offer tangible incentives for African countries to improve their political and economic governance, not to underwrite poor policies.¹⁴²

Swaziland's economic and fiscal crisis has seen it approach a number of financial institutions such as the International Monetary Fund and the African Development Bank for loan facilities. Countries such as South Africa have also been approached and in this regard a Memorandum of Understanding between the government of the Republic of South Africa and the Kingdom of Swaziland on Financial Assistance has been signed although the Swaziland government's discomfort with the conditionalities attached have meant the loan agreement has not been finalised and no funds have yet been disbursed to Swaziland. With respect to the promotion of participation the agreement states the following:

While South Africa recognises the ongoing efforts to implement the political and social-economic provisions of the 2005 Constitution of the Kingdom of Swaziland, the social dialogue process (jointly initiated with the assistance of the international labour organisations and the SMART Partnership Dialogue process), Swaziland agrees to give renewed impetus to these processes by:

¹⁴¹ <http://www.agoa.gov/faq/faq.html#q7>.

¹⁴² <http://www.agoa.gov/faq/faq.html#q9>.

- Broadening the Dialogue process to include all stakeholders and citizens of the Kingdom of Swaziland;
- Agreeing on milestones and times-frames;
- Allowing the parties to the Swazi Dialogue to determine appropriate reforms needed; and agreeing that the above processes take place in a conducive environment that is open and enjoys legitimacy among the people of Swaziland and the region.

Civil society has benefited from the support of development partners to the country as some of the country's cooperation agreements contain components that are allocated specifically to civil society action. The recognition of civil society by development partners is very important in the context of Swaziland, in that while civil society involvement and support in 'safe' or non-threatening issues like HIV/Aids, health, food security, education, and children, is accepted, and even welcomed by government, there are other issues, specifically those relating to advocacy on human rights, democracy and good governance that are deemed too 'political' for civil society engagement. In these instances, government shows less tolerance of civil society action.

There have been examples where civil society was either denied funding or subtly informed to 'behave' or risk losing funds. In the latter instance, civil society has had difficulty accessing EU funding for non-state actors. The principal secretary in the Ministry of Economic Planning is the designated National Authorising Officer for EU funds and under this office, non-state actors have had difficulty obtaining civil society support for their programmes. Research was undertaken by the ministry to identify non-state actors from which it was clear in the final list of non-state actors that were deemed eligible to receive funding, that certain vocal civil society organisations had been excluded. Another example is the Swaziland Positive Living (SWAPOL) organisation, which has been quite vocal about injustice, especially from the perspective of the linkages between HIV/Aids and governance. SWAPOL was warned that their office was in danger of being de-registered, as they had strayed from their mandate to talk about HIV/Aids and was engaging in political activities, simply because they were running a series of workshops for the youth that addressed some of these issues. Civil society also receives support – albeit limited – from various partners independent of development support to government. Such support has enabled civil society to articulate and advocate on the contentious issues that they may not be able to address with funding support from development partners who are in a primary relationship with government.

In view of some of the limitations placed on civil society's engagement with political issues, some non-state actors have advocated for specific conditions relating to the creation of a democratic dispensation in Swaziland before the country is given any money, or sanctions to be enforced against government for so long as the current system of governance obtains and the democratic space remains closed. However, development partners to whom this has been suggested have been reluctant to take those measures because the development aid assists the vulnerable and needy. In their view, any denial of the aid would do greater harm to the people who benefit from the assistance than the harm they are currently suffering from a lack of democracy in the country.

In terms of accountability, there are measures of ensuring that public and foreign funds allocated through the Appropriations Act (national budget) are appropriately spent. Each year

government publishes an Estimates Book, which contains a detailed line item summary of the revenue and expenditure of the past two financial years and of the current budget. The information presented indicates revenue by source, amount and budgeted expenditure, the economic sector it contributes to and the ministry to which it is allocated. The nature of income (loan or grant) is also indicated.

Government accounts are audited at the end of the financial year through the Office of the Auditor General, who works with the Public Accounts Committee (PAC) in Parliament. The PAC monitors government expenditures and is constituted by Parliament each year for examination of all accounts. The committee can additionally look into accounts of parastatals that receive a government subvention as well as development support. The reports of both the Attorney General and the PAC are made available to the public. PAC meetings are held in Parliament and are open to public observation from the public gallery.

References

- African Commission on Human and Peoples' Rights, *Report of the Promotional Mission to the Kingdom of Swaziland*, 21–25 August 2006.
- African Commission on Human and Peoples' Rights, ACHPR/Res. 216 (LI) 2012: *Resolution on the Human Rights Situation in the Kingdom of Swaziland*, 2 May 2012.
- African Development Bank, *Kingdom of Swaziland Country Strategy Paper, 2009–2013, Mid-term Review*, October 2011.
- Charter of the Civil Society Constituent Assembly, 2011.
- Commonwealth Secretariat, *Swaziland National Elections 19 September 2008: Report of the Commonwealth Expert Team*.
- Constitutional Review Commission Report, *The Current Constitutional Framework of Swaziland*, 2002.
- Council of Swaziland Churches, *Report of the CSC–SACPN Conference on 'Bridging the Political Divide'*, 2002.
- EISA, *EISA Election Observer Mission Report*, Swaziland House of Assembly Election 19 September 2008.
- EISA, *Electoral System Reform, Democracy and Stability in the SADC Region: A Comparative Analysis*, EISA, 2003.
- EISA, *Political Movements and the Challenges for Democracy in Swaziland*, EISA, 2005.
- EISA, *Consolidating Democratic Governance in the SADC Region: Swaziland*, EISA, 2008.
- EISA, *Election Observation Mission Report Swaziland: House of Assembly Election*, 19 September 2008.
- Elections and Boundaries Commission, *2008 National Elections Report*, 2008.
- Government of the Kingdom of Swaziland, Central Statistics Office, *2007 Population and Housing Census Information Brochure*, 2008.
- Government of the Kingdom of Swaziland, *Report of the Auditor General for the Financial Year Ended 31 March 2011*, 2011.
- Government of the Kingdom of Swaziland, Central Statistics Office, *Swaziland Household Income and Expenditure Survey: Poverty in a Decade of Slow Economic Growth: Swaziland in the 2000s*, February 2011.
- Government of the Kingdom of Swaziland, Ministry of Economic Planning and Development, *A Poverty Reduction Strategy and Action Plan, Volume 1*, 2006.
- Government of the Kingdom of Swaziland, *National Development Strategy Vision 2022*, August 1999.
- Gumedze, S., *Refugee Protection in Swaziland* (date unknown).
- International Bar Association, *Swaziland: Law, Custom and Politics: Constitutional Crisis and the Breakdown in the Rule of Law*, March 2003.
- International Bar Association, *Striving for Democratic Governance: An Analysis of the Draft Swaziland Constitution*, August 2003.

- International Monetary Fund, *IMF Country Report No. 11/25, Kingdom of Swaziland: 2010 Article IV Consultation*, January 2011.
- International Institute for Democracy and Electoral Assistance, *Effective Party Assistance: Stronger Parties for Better Democracy*, International IDEA, 2007.
- Inter Parliamentary Union (IPU), *Parliament and Democracy in the Twenty-First Century – a Guide to Good Practice*, 2006.
- Kingdom of Swaziland, *National Election Report*, 2003.
- Levin, R., *When the Sleeping Grass Awakens*, Witwatersrand University Press, 1997.
- Matsebula, J.S.M., *A History of Swaziland* (3rd edn.), Longman, 1988.
- Minnie, J. (ed.), *Outside the Ballot Box: Preconditions for Democratic Elections 2005/6*, MISA/OSISA/NiZA/HiVOS, 2006.
- National Democratic Institute for International Affairs (NDI), *Towards the Development of International Standards for Democratic Legislatures*, NDI, 2006.
- Okpaluba, C., Hlatshwayo N., Khumalo, B., *Human Rights in Swaziland: The Legal Response*, University of Swaziland, 1997.
- Potholm, C.P., *Swaziland: The Dynamics of Political Modernization*, University of California Press, 1972.
- Rooney, R., *Voice Unheard: Media Freedom and Censorship in Swaziland*, Excelsior, London, 2011.
- UN Human Rights Council, *Report of the Working Group on the Universal Periodic Review: Swaziland*, 2011.
- Swaziland – Monarchy in Crisis: Civil Society Indicative Transition Plan towards a Democratic Dispensation*, 2011.
- Swazi Observer*, 15 May 2012.
- Swazi Observer*, 9 July 2012.
- The Senate of the Kingdom of Swaziland Standing Orders, 2007.
- The Standing Orders of the House of Assembly, 2006.
- Times of Swaziland*, 25 June 2012.
- Times of Swaziland*, 9 July 2012.
- Times of Swaziland*, 14 August 2012.
- Women and Law in Southern Africa (WLSA), *Advocacy in Action: A Guide to Influencing Decision-making in Swaziland*, 2006.
- Women and Law in Southern Africa (WLSA), *Women and the 2008 Elections in Swaziland*, 2009.

Laws

- Constitution of the Kingdom of Swaziland, 2005.
- Constitution of Swaziland Act, No. 50 of 1968c.
- Elections Order, No. 2 of 1992.
- Review Commission Decree, No. 2 of 1996.
- Establishment of the Parliament of Swaziland Order, No. 23 of 1978.
- Establishment of the Parliament of Swaziland Order, No. 1 of 1992.
- Official Secrets Act, No. 30 of 1968.
- Public Order Act, No. 17 of 1963.

Sedition and Subversives Activities Act, No. 46 of 1938.

Suppression of Terrorism Act of 2008.

Swazi Courts Act, No. 80 of 1950.

Cases

Bhekindlela Thomas Ngwenya vs. the Deputy Prime Minister 1973 SLR 120 AC.

Jan Sithole N.O. and Others vs. The Prime Minister of the Kingdom of Swaziland, HC, Civil Case No. 2792/2006.

Sphasha Dlamini and Others vs. The Commissioner of His Majesty's Correctional Services and the Attorney General, HC, CASE NO. 4548/08.

Swaziland Coalition of Concerned Civic Organisations Trust and Others vs. Elections and Boundaries Commission and Others, High Court of the Kingdom of Swaziland, Civil Case 2783/2008, 2009.

Swaziland Ex-Miners National Workers Association and Another vs. Minister of Education and Others, Swaziland High Court, Civil Case No. 335/09.

Swaziland Ex-Miners National Workers Association vs. Minister of Education and Others, Swaziland High Court, Civil Case No. 2168/09.

Swaziland Federation of Trade Unions and Others vs. Chairman Constitutional Review Commission and Others, Civil Case No. 3367/2004.