

Human rights and the rule of law in Swaziland

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Summary

The article begins by discussing the political landscape of Swaziland and explains the tensions between traditional and modern forms of government in the country. It proceeds to look at the involvement of the monarchy in entrenching its authority and the impact that this has had on the doctrine of separation of powers in the country. The article investigates the fact that the ratification of numerous international human rights instruments has not had much impact on human rights adherence Swaziland. It also assesses the impact of the absolute power of the Swazi King on other organs of state responsible for upholding human rights, such as the judiciary. A discussion of constitutional developments in Swaziland follows. Finally, the author addresses the principle of the 'rule of law' and how this applies to Swaziland.

1 Introduction

Africans have long dreamt of a just and prosperous continent governed by the rule of law . . . Democratic roots are becoming firmer, and the rule of law is now understood as the *sine qua non* for stability and development. Just as the quest for justice motivated many past African causes, so let it govern the continent's future.¹

Among those Africans who have long dreamt of a just and prosperous continent governed by the rule of law are the people of Swaziland. The

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¹ Statement by the UN Secretary-General Kofi Annan to the All-Africa Conference on Law, Justice and Development, delivered by Hans Corell, United Nations Legal Counsel and Under Secretary-General for Legal Affairs, in Abuja, Nigeria, 4-7 February 2003. See UN Press Release SG/SM/8597 <http://www.un.org/News/Press/docs/2003/sgsm8597.doc.htm> (accessed 27 February 2003).

Swazi people are arguably still far from realising this dream. As Swaziland remains the last absolute monarchy in sub-Saharan Africa, serious concerns regarding respect for human rights and the rule of law remain an unfortunate reality. This is so, regardless of the promulgation of the new Swaziland Constitution (Constitution).² Pressure from the international community³ has, among other things, forced Swaziland to set up a new constitutional dispensation which is, however, critiqued in this article. The Swaziland Constitution is viewed as a smokescreen that is used by Swazi authorities solely to dispel the perception that not all is well in Swaziland. This article maintains throughout that not all is well in the tiny Kingdom.

A respect for human rights and the rule of law are necessary for peace and stability in any society, and Swaziland is certainly no exception. Thatcher argues that 'our abiding commitment to the rule of law is the very bedrock of our civilization'.⁴ Tracing the rule of law in the Universal Declaration of Human Rights (Universal Declaration) of 1948, Glendon argues that 'it is common place that long lists of rights are empty words in the absence of a legal and political order in which rights can be realised'.⁵ One might add that such a legal and political order should be one that embraces democratic principles in order to ensure that the principles of human rights and the rule of law are protected.

This contribution seeks to explore the relationship between human rights and the rule of law and to discover ways in which the latter may be realised by invoking the former. In this regard, Swaziland shall be used as a case study. Firstly, the political landscape of Swaziland is mapped. Secondly, Swaziland's King's Proclamation to the Nation of 1973 is discussed as laying the foundation as the initial source of blatant disregard for human rights and the rule of law. Thirdly, the human rights question as it pertains to Swaziland is elaborated upon. Fourthly, the interconnectedness between human rights and the rule of law is discussed. Fifthly, the relevance of the African human rights system to Swaziland is discussed, and finally a conclusion is drawn.

² The Constitution of the Kingdom of Swaziland Act 1 of 2005.

³ See eg the following Amnesty International Reports: Human rights at risk in a climate of political and legal uncertainty (AI Index: AFR 55/004/2004) <http://web.amnesty.org/library/index/engaf550042004>; Swaziland: Constitution Bill and rule of law 'deal' fail to protect human rights (AI Index: AFR 55/008/2004) <http://web.amnesty.org/library/index/engaf550082004>; Swaziland: Judges' stand supports human rights (AI Index: AFR 55/009/2004) <http://web.amnesty.org/library/index/engaf550092004> (accessed 29 August 2005).

⁴ M Thatcher 'Follow the leader' (Spring 2000) *American Outlook* 23.

⁵ MA Glendon 'The rule of law in the Universal Declaration of Human Rights' (2004) 2 *Northwestern Journal of International Human Rights* 67 <http://www.law.northwestern.edu/journals/JIHR/v2/5> (accessed 12 June 2005).

2 Swaziland's political landscape in a nutshell

Swaziland remains trapped between a traditional and modern form of government. This has resulted in a conflict between the application of democratic principles and the preservation of Swazi law and custom. These include traditional norms and values that have informed the Swazi way of life since time immemorial. The Kingdom has a non-party system and has electoral procedures based on Swazi custom. The political system is based on the *Tinkhundla* system of government, which is a system of local government organisation that allows for local representatives nominated at centres known as *tinkhundlas*, to be local spokespersons in the national parliament.⁶

Consequently, Swaziland is faced with the ever-increasing pace of globalisation, which advocates a multi-party democracy, a notion which remains remote to Swaziland's political and constitutional dispensation. The *tinkhundla* system of government does not accommodate political parties, presenting an inroad in so far as the enjoyment of the freedom of political association is concerned. Unfortunately, the Constitution clandestinely endorses this three decade-long hostility towards multi-party democracy. Section 79 of the Swaziland Constitution provides as follows:

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.

The use of the words 'democratic, participatory . . . system' is illusory, as the system does not allow the participation of political parties, one of the foundations of democracy. The absence of effective participation of political parties in the political field indicates that political parties in Swaziland remain outsiders in so far as governing of the country is concerned. Esterhuysen maintains that, with a population of one million, it is a powerful elite with a staunch traditional-oriented outlook which dominates Swazi society.⁷ The Constitution does not change this. Section 5(1) of the Constitution provides that the succession of King and *Ingwenyama* (Majesty) is hereditary and governed by the Constitution and Swazi law and custom. Most of what is referred to as 'Swazi law and custom' remains unwritten and dictates that the King rules the country in council, which forms part of the so-called 'power elite'. This is not to mention the many princes and princesses, who are

⁶ SB Gumede 'Swaziland' in C Heyns (ed) *Human rights law in Africa* (2004) 1580.

⁷ P Esterhuysen (ed) *Africa A-Z: Continental and Country Profiles* (1998) 332. The current Swazi monarch, King Mswati 111, boasts of the highest number of wives, one of which was referred to by a former *Sunday Times* editor, Bheki Makhubu, as a 'high school dropout'. See *BBC News* 7 August 2000 <http://news.bbc.co.uk/1/hi/world/africa/870231.stm> (accessed 13 August 2004).

very influential in governing the country. In addition to this, section 233(1) of the Constitution provides that the 'chiefs are the footstool of *iNgwenyama* and *iNgwenyama* rules through the chiefs'. Chiefs also form part of the so-called 'power elite', prone to abuse in the name of the King. Thus, Swaziland has been described by Fabricius as 'a very different political experiment, a medieval absolute monarch trying to survive along a modern democracy'.⁸

3 The Swaziland's King's Proclamation to the Nation of 1973

The main cause of the disrespect for human rights and the rule of law in Swaziland dates back to 12 April 1973, when King Sobhuza II,⁹ the father of the current monarch, issued the King's Proclamation to the Nation No 12 of 1973 (Proclamation), declaring that he had assumed supreme power in the Kingdom of Swaziland and that all legislative, executive and judicial power vested in him. The Proclamation was to become the supreme law of Swaziland until 2005.¹⁰

This position was, together with other laws, affirmed through Decree No 1 of 1981 and Decree No 1 of 1987. The latter decree was an endorsement by the current monarch, King Mswati III, immediately after he took the throne. With the advent of the new Constitution, this position was modified in that the Constitution is now the 'supreme law of Swaziland and if any other law is inconsistent with this Constitution, that other law shall, to the extent of the inconsistency, be void'.¹¹

The Proclamation killed the sacred doctrine of the separation of powers within the Kingdom. More importantly, from its inception, the Proclamation proved to be a gross violation of the Swazi people's right to determine how they wanted to be governed and this affected the smooth functioning of the judiciary, which was no longer independent as the Monarchy had assumed judicial powers as well. On the latter, it is important to note that a respect for the rule of law flourishes where the judiciary is independent. Where the judiciary's independence is interfered with, the opposite is true.

While the coming into force of the new written Constitution is to be welcomed, whether this event will change the *status quo* for the better remains uncertain. It is premature to judge the effectiveness or other-

⁸ P Fabricius 'Is Africa shrugging off an imported democracy: Distressing signs of return to authoritarian roots' *The Star* 27 April 2001 8.

⁹ King Sobhuza II was succeeded by King Mswati III in 1986 following his death in 1982.

¹⁰ If any other law is inconsistent with the Proclamation, that other law shall, to the extent of the inconsistency, be null and void.

¹¹ See sec 2(2) of the Constitution.

wise of the new Constitution, especially in so far as human rights and the rule of law are concerned. One remains cynical for obvious reasons, one of which is the challenge presented by the blending of institutions of Swazi law and custom with those of an open and democratic society based upon human rights, freedoms and the rule of law.

4 The human rights question

Despite the existence of international human rights norms and standards, which most African countries acknowledge,¹² no other continent in the world lacks a respect for human rights in the way the African continent does. Of note is the fact that Swaziland is a state party to the African Charter on Human and Peoples' Rights (African Charter), having ratified it on 15 September 1995, just over two decades after the Independence Constitution was repealed. Ratifying the African Charter has not changed anything in so far as a respect for human rights is concerned.¹³ Swaziland is also a member of the African Union (AU), the Constitutive Act whereof provides, as one of its objectives, for the promotion and protection of human and peoples' rights in accordance with the African Charter and other relevant human rights instruments.¹⁴

Most recently, Swaziland became a state party to two key human rights treaties, namely, the International Covenant on Civil and Political Rights (CCPR) and the International Covenant on Economic, Social and Cultural Rights (CESCR), having ratified both on 26 June 2004. On 26 April 2004, Swaziland also became a state party to the United Nations (UN) Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) and the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT). These developments should be viewed, though critically, as positive steps in the right direction. It still remains to be seen how far Swaziland will go to effectively implement the provisions of these treaties.¹⁵ The Bill of Rights does not provide for any socio-economic rights. The wisdom of acceding to CESCR and giving emphasis only to civil and political rights in the Constitution is confusing, to say the least.

In terms of article 1 of the African Charter, state parties to the African Charter 'shall recognize the rights, duties and freedoms' enshrined therein and 'shall undertake to adopt legislation or any other measures

¹² This is done through ratifying and acceding to most international human rights instruments.

¹³ This point will be canvassed in greater detail and supported by the recent decision of the African Commission on Swaziland.

¹⁴ See art 3 Constitutive Act of the African Union.

¹⁵ Interestingly, Swaziland ratifies all these treaties without any reservation.

to give effect to them'. Hopkins argues that, as a consequence of ratifying the African Charter, it seems that states must do no more than give effect to the rights contained therein and they are totally free to decide for themselves on how they wish to do this.¹⁶ As a matter of fact, Swaziland is in no way near this path with its total disrespect of human rights and the rule of law.

The disrespect of both human rights and the rule of law is linked to Swaziland's failure to embrace modern democratic principles, which ensures the respect for both human rights and the rule of law. Jaichand argues that, in order to advance human rights, one needs to approach courts.¹⁷ The courts referred to by Jaichand are not just courts, but courts of justice. In terms of the Constitution, '[j]ustice shall be administered in the name of the Crown by the Judiciary which shall be independent and subject only to this Constitution'.¹⁸ The Constitution does not, however, insulate the judiciary from interference by the monarch or those acting on his behalf. It must be noted that the Constitution has not changed the King's status that much. In terms of the Constitution, the monarch has executive,¹⁹ legislative²⁰ and, arguably, judiciary²¹ powers. In so far as judicial powers are concerned, the Constitution provides that such power vests in the judiciary, which is a fact that is vociferously challenged. The Constitution further provides that:²²

Neither the Crown nor Parliament nor any person acting under the authority of the Crown or Parliament nor any person whatsoever shall interfere with judges or judicial officers, or other persons exercising judicial power, in the exercise of their judicial functions.

This cannot be reconciled with the fact that the King remains the traditional head of the Swazi state, enjoying legal immunity from legal suit or process as the King.²³ In the event that the King interferes with judges or judicial officers, as has been the case during his reign (and his predecessor's reign), the Constitution does not provide any effective safeguards for

¹⁶ K Hopkins 'The effect of an African Court on the domestic legal orders of African states' (2002) 2 *African Human Rights Law Journal* 237.

¹⁷ V Jaichand 'Public interest litigation strategies for advancing human rights in domestic systems of law' (2004) 1 *SUR International Journal on Human Rights* 127.

¹⁸ Sec 138.

¹⁹ Sec 64(1) of the Constitution provides that 'the executive authority of Swaziland vests in the King as Head of State and shall be exercised in accordance with the provisions of this Constitution'.

²⁰ Sec 106(a) of the Constitution provides that, subject to the provisions of the Constitution, 'the supreme legislative authority of Swaziland vests in the King-in-Parliament'. Here again the King features in so far as the legislative power is concerned.

²¹ Sec 140(1) of the Constitution provides that 'the judicial power of Swaziland vests in the Judiciary' and 'an organ or agency of the Crown shall not have or be conferred with final judicial power'.

²² Sec 141(2).

²³ Secs 228(1) & 2.

the insulation of the judiciary from such unscrupulous interferences as the King's authority cannot be challenged in a court of law.

The Constitution endorses the position prior to its promulgation:²⁴

The King and *iNgwenyama* has such rights, prerogatives and obligations as are conferred on him by this Constitution or any other law, including Swazi law and custom, and shall exercise those rights, prerogatives and obligations in terms and in the spirit of this Constitution.

Over and above this, the King remains the Commander-in-Chief of the Defence Force, Police Force and the Correctional Services.²⁵ Such absolute power is likely to be abused. In fact, the powers of the King are not delimited in any way. The introduction of the 'Swazi law and custom' aspect to the King's rights, prerogatives and obligations does not make the Constitution supreme. In fact, this causes Swazi law and custom to be in competition with the Constitution. It may well be argued that the Constitution is in fact subject to 'Swazi law and custom', which is mostly unwritten. The meaning of 'the spirit of this Constitution' is yet to be defined by the Swazi courts. Assuming the King goes beyond what is within the 'spirit of this Constitution' in exercising the rights, prerogatives and obligations stated therein or any other law, such an exercise cannot be challenged, since in terms of section 11 of the Constitution:

The King and *iNgwenyama* shall be immune from —

- (a) suit or legal process in any cause in respect of all things done or omitted to be done by him; and
- (b) being summoned to appear as a witness in any civil or criminal proceeding.

Even Swazi custom does not allow anyone to challenge the King's orders. Under the guise of Swazi law and custom, therefore, it is not unlikely that the King may interfere with the judiciary and will be immune from any suit. Assuming there is a chieftaincy or boundary dispute, in terms of section 231(3) of the Constitution, the *Liqoqo*, that is the advisory council appointed by the King, 'traditionally advises *iNgwenyama* on disputes in connection with the selection of *tikhulu* (chiefs) boundaries of chiefdoms ...' In the event that the King makes a decision that has been canvassed and decided by the judiciary, which is in terms of section 39(2) of the Constitution having 'jurisdiction in all matters civil and criminal, including matters relating to this Constitution, and such other jurisdiction as may by law be conferred on it', it will not be possible to challenge the King's decision in a court of law as he is immune, or as it were, above the law in terms of the Constitution.

5 The institution of the Monarchy put to the test

Tracing the painful history of Swaziland, the initial setback of what

²⁴ Sec 4(4).

²⁵ Sec 4(3).

seemed to be a flourishing democracy happened as a result of the decision in the case of *Bhekindlela Ngwenya v The Deputy Prime Minister and the Chief Immigration Officer*.²⁶ In the *Ngwenya* case, the Swaziland Court of Appeal struck down the deportation order of Mr Bhekindlela Ngwenya, an opposition party member and member of parliament, as unconstitutional. Soon thereafter, a joint meeting of both houses of parliament declared that the Independence Constitution was unworkable. Subsequently, the then King of Swaziland, Sobhuza II, repealed the Independence Constitution, dissolved parliament and banned all political parties, including the ruling Imbokodvo National Movement, all political activities and meetings. This was done through the King's Proclamation to the Nation, Decree No 12 of 1973 (1973 Decree). Some of the provisions of this Decree deserve express mention here.

For example, paragraph 12 of the Proclamation provides as follows:

No meetings of political nature and no procession or demonstration shall be held or take place in any public place unless with the prior consent of the Commissioner of Police; and consent shall not be given if the Commissioner of Police has reason to believe that such meeting, procession or demonstration is directly or indirectly related to political movements or the riotous assemblies which may disturb peace or otherwise disturb the maintenance of law and order.

Paragraph 13 of the Proclamation provides as follows:

Any person who forms or attempts or conspires to form a political party or who organizes 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.

Interestingly, the abovementioned provisions are arguably still part of Swaziland's contemporary legal order. Section 268(1) of the Constitution provides that 'the existing law, after the commencement of this Constitution, shall as far as possible be construed with such modifications, adaptations, qualifications and exceptions as may be necessary to bring it into conformity with this Constitution'. This means that the King still retains all executive, legislative and, arguably, judicial powers because, save for the judicial power, nothing in the Constitution states otherwise.

While on one hand, respect for the rule of law cannot exist without a strict adherence to democratic principles, on the other, stability and development cannot be achieved without democracy and the rule of law. Hence, the respect for human rights remains a pipe dream despite the new Constitution. Piechowiak rightly argues that 'the contemporary state based on a respect for human rights is usually characterised as a *democratic state governed by the rule of law* . . .'²⁷

²⁶ 1970-1976 SLR 119 & 123.

²⁷ M Piechowiak 'What are human rights? The concept of human rights and their extra-legal justification' in R Hanski & M Suksi *An introduction to the international protection of human rights. A textbook* (1999) 10 (my emphasis).

Thus the application and enforcement of human rights are crucial components of a respect for the rule of law in a democratic state. Swaziland cannot be said to embrace such. Respect for the rule of law is not only a domestic concern because its denunciation is a threat to the international community. It should not be denied to its citizens under the guise of the principle of sovereignty. Shumba asserts forcefully and rightly that 'sovereignty should never become a sanctuary for dictatorship and human rights violations *and the blatant disregard of the rule of law*'.²⁸ Unfortunately, Swaziland does seem to be a sanctuary for dictatorship and human rights violations where blatant disregard of the rule of law is common place.

Experience has shown that African states calling themselves 'democratic' or boasting of a written constitution guaranteeing human rights mislead in many respects. Mangu summarises this in the following words:²⁹

In most African countries, democracy, constitutional state and rule of law remain castles in the air, just a conventional 'costume' to attend international conferences in New York, London, Paris, Rome, Geneva or Brussels, to win some economic and financial aid from the West. The 'costume' is put off once the meetings are over or financial assistance obtained.

While Swaziland has a written Constitution and also joins the 'bandwagon' of those states calling themselves democracies, under the *tinkhundla* system of government and the current political landscape, it cannot satisfy the definition of a democracy, unless of course the concept of democracy is redefined. Section 1 of the Constitution boastfully provides that 'Swaziland is a unitary, sovereign, democratic Kingdom'. If the rule of law is a 'conventional costume' in most African countries, as suggested by Mangu, then, surely, peace and stability will remain a pipe dream in Africa. On Swaziland's ratification of the African Charter, Hlatshwayo posed the very important question of whether there was really a genuine need for the adoption of a bill of rights now that Swaziland had, among other things, ratified the African Charter, or whether she was working towards a constitution that will have a bill of rights simply because it is the most fashionable thing to do in order to secure international acceptability.³⁰ The latter statement is not far from the truth, and the Constitution as it stands is a true indictment to this fact. The only salvation to this unfortunate situation is for Africa, and Swaziland in particular, to adopt a 'human rights approach' in the

²⁸ G Shumba 'A critical reflection on the 2002 presidential election in Zimbabwe' (2002) 2 *African Human Rights Law Journal* 331 (my emphasis).

²⁹ AM Mangu *Human rights theories and practices: A selection of summaries of lectures* (African Human Rights Camp, October-November 2000, Rustenburg, South Africa) 1.

³⁰ N Hlatshwayo 'Forging a practicable bill of rights for the recognition and protection of fundamental human rights: A preliminary enquiry' in C Okpaluba *et al Human rights in Swaziland: The legal response* (1997) 81.

realisation of the most 'long dreamt aspiration' of being governed by the rule of law. As to which extent Swaziland can take this right direction remains to be seen. So far, the future remains bleak.

In its most recent report, Amnesty International raised serious concerns that³¹

[b]y the end of June [2004] there was still no breakthrough towards acceptance by the government of the Court of Appeal rulings of November 2002. As all the judges of the Court of Appeal had resigned in protest at the time, the country remained without a Court of Appeal.

In the case of *Chief Mtfuso II (formerly known as Nkenke Dlamini) and Others v Swaziland Government*,³² the Court of Appeal of Swaziland ordered that all persons who were forcefully removed from their homes as a result of their failure to pay allegiance to Prince Maguga, one of King Mswati's brothers, through a removal order by the Minister of Home Affairs, Prince Sobandla, yet another of King Mswati's brothers, were to be allowed to return to their homes. Notwithstanding this judgment, the Swaziland government prohibited these persons from returning to their homes. Reacting to this judgment, amongst others, the then Prime Minister of Swaziland, Dr Sibusiso Dlamini, stated the following:³³

Government does not intend to recognise the two judgments of the Court of Appeal . . . The government does not accept the judgment of the Court of Appeal in respect of the actions of the Commissioner of Police and his officers who acted properly and in accordance with Swazi law and custom. The nation shall not allow itself a situation of lawlessness that could definitively lead to bloodshed if the evicted persons were to be allowed to return to the areas concerned. Therefore the judgment in this regard will not be obeyed. The government agencies responsible for implementing the Court of Appeal judgment have, therefore, been instructed not to comply with it . . . This statement should not be viewed as interference with or contempt for the rule of law. It should be acknowledged that we are currently in a transitional stage and government's position on the above issues will be addressed in the new Constitution.

When one analyses the above statement, especially the part that reads 'the government does not accept the judgment of the Court of Appeal', it is clear that the Court of Appeal was disregarded in Swaziland. This is made worse by the fact that King Mswati III has up to today never disassociated himself from this statement by the former Prime Minister. This unfortunate statement led to the Court of Appeal judges resigning *en masse*. This created a serious gap in the Swaziland justice system. For

³¹ Amnesty International 'Swaziland: Human rights at risk in a climate of political and legal uncertainty' <http://web.amnesty.org/library/index/engaf550042004> (accessed 13 August 2004).

³² Unreported Appeal Case No 40/2000.

³³ As cited in the report of the ICJ/CJIL, *Swaziland: Fact-finding mission to the Kingdom of Swaziland*, 10 June 2003 14-15, using BBC monitoring of *Radio Swaziland*, 28 November 2002, 16:12 GMT.

almost two years, Swaziland did not have a Court of Appeal, the highest court of that land. The Court of Appeal later reconvened and is now operational. One is inclined to conclude that, despite the existence of a Constitution, history is likely to repeat itself. As to when this will happen, time will tell.

6 Human rights and the rule of law

The relationship between human rights and the rule of law in relation to the case of Swaziland is of critical importance in addressing the shaky ground upon which the kingdom is currently resting. Ahmed El-Obaid and Appiagyei-Atua argue that, during the time that the OAU was established, human rights in Africa were to be peoples' rights in that, for instance, freedom was seen as national freedom as opposed to individual freedom.³⁴ While this statement was important at the time, that is, during the era of decolonisation, the time has come for Africa (Swaziland included) to give special attention to individual freedoms over and above national freedom. National freedom is pointless without individual freedom.

A careful scrutiny of the Bill of Rights as contained in the Constitution shows that a lot of individual rights are not guaranteed. As already mentioned above, emphasis is put on civil and political rights, also restricted by the Constitution. To name but a few examples, the right to life is guaranteed in so far as it is not in pursuance of an execution of a sentence of a court;³⁵ the freedom of conscience is guaranteed in so far as it does not concern abortion, which remains unlawful;³⁶ the right to equality before the law does not take into account sexual orientation and marital status as being part of the grounds of discrimination;³⁷ and the right to freedom of assembly and association is guaranteed in so far as it is within the confines of the so-called 'democratic, participatory, *tinkhundla*-based system' of government, thus shutting out multi-party democracy³⁸ within a 'sovereign democratic Kingdom'.³⁹

Seen against this background, the relationship between human rights and the rule of law in Swaziland will be approached in the following

³⁴ E Ahmed El-Obaid & K Appiagyei-Atua 'Human rights in Africa — A new perspective on linking the past to the present' (1996) 41 *McGill Law Journal* 827.

³⁵ Sec 15(1). Sec 15(2) states that the death penalty shall not be mandatory. This means that it is not abolished. See also sec 18(1) of the Constitution which guarantees that the dignity of every person is inviolable.

³⁶ Sec 14(1)(b) read together with sec 15(5) of the Constitution.

³⁷ Secs 20(1) & (2). The grounds that are listed are gender, race, colour, ethnic origin, tribe, birth, creed or origin, social or economic standing, political opinion, age or disability.

³⁸ See sec 79 read together with sec 25 of the Constitution.

³⁹ Sec 1.

manner: Firstly, the starting point is to establish a sound understanding of the rule of law, tracing it from Professor Dicey. One must, however, be careful when interpreting the meaning of the rule of law. Like any other principle of law, its meaning is capable of different interpretations. Secondly, the concept of human rights will be explored. The development of human rights law as a response to the devastations of World War II will be traced. Thirdly, the African human rights system, under which Swaziland falls in so far as its human rights and the rule of law are concerned, will be discussed.

7 The rule of law

Dicey,⁴⁰ who popularised the idea of the rule of law, summarised the rule of law into three heads. Firstly, that no man could be punished or lawfully interfered with by authorities except for breaches of law. This means that all government actions must be authorised by law. Swaziland presents a dilemma in this regard due to its unwritten Swazi law and custom. If such authority of government actions were to be derived from unwritten laws, to what extent can the rule of law flourish? Secondly, no man is above the law and everyone, regardless of rank, is subject to the ordinary laws of the land.⁴¹ Again, Swaziland presents a dilemma in that the King is, according to the Constitution, above the law, even though in terms of section 2(2) of the Constitution, he has the 'right and duty at all times to uphold and defend this Constitution'. How then can the rule of law prevail? Thirdly, there is no need for a bill of rights because the general principles of the Constitution are the result of judicial decisions determining the rights of the private person.

In respect of Swaziland, where the King retains all legislative, executive and, arguably, judicial powers, it is very difficult to assert that the rule of law has a good basis for existence. As argued above, the King retains these powers. Commenting at Swaziland's draft Constitution, the report by the International Bar Association noted that⁴²

[t]he draft Constitution muddies distinction between the royal, executive and legislative functions of the King, potentially at the expense of the promotion of the rule of law which is an expressed aim in the Preamble.

This argument still holds under the final Constitution.

One main problem encountered in Dicey's interpretation of the rule of law is that, no matter how unjust or unfair the 'law' can be, both the

⁴⁰ AV Dicey *Introduction to the law of the constitution* (1865) 188.

⁴¹ Under this head, it may be argued that even monarchies are and should not be above the law.

⁴² International Bar Association *Striving for democratic governance: An analysis of the draft Swaziland Constitution* (2003) 17.

government and the governed must strictly adhere to it. Having a law in place does not necessarily mean that the law will protect the rights of the governed; neither does it mean that the government's actions will be legitimate for the simple reason that it is prescribed in the law. A constitution with a bill of rights guaranteeing human rights and freedoms, which Dicey disapproves of, is today seen as the best approach to instilling a culture of democracy within a society. In fact, a bill of rights is only workable if it is justiciable. Justiciability goes beyond the enforcement of the provisions of a bill of rights. It requires state organs, including the King in the case of Swaziland, to refrain from interfering with the courts in the pursuit of upholding the rights provided therein. This approach is also related to the principle of constitutionalism,⁴³ as government's limitation should be guided by a constitution providing for the principle of separation of powers together with a respect for human rights and freedoms, the latter being enshrined in a bill of rights.

According to the Declaration of Delhi, the International Commission of Jurists recognised that the rule of law is a dynamic concept for the expansion and fulfilment of which jurists are primarily responsible and which should be employed, not only to safeguard and advance the civil and political rights of the individual in a free society, but also to establish social, economic, educational and cultural conditions under which his legitimate aspirations and dignity may be realised.⁴⁴ The rule of law is described by Li as 'a condition of government in which the supremacy of democratically made laws, equality before law, procedural justice and effective constraints on government arbitrariness all exist'.⁴⁵ From this, it may be argued that only a government which embodies democratic principles can respect the rule of law. Li further states that one core meaning of the rule of law is 'limitation', that is, the law has to place certain limits on what the government can do and prescribe how the government conducts its business.⁴⁶

This 'limitation' is only found where the principle of constitutionalism is upheld, constitutionalism being a 'system of institutional arrangements designed to empower and limit the government, at the same time forming an institutional foundation for the rule of law'. Li argues that the only time-tested way for the rule of law to be respected is in a

⁴³ According to Henkin, constitutionalism means the government to be constituted shall be constrained by the Constitution and shall govern only according to its terms and subject to its limitations, only with agreed powers and for agreed purposes, as quoted by PJJ Olivier 'Constitutionalism in the new South Africa' in RA Licht & B de Villiers (eds) *South Africa's crisis of constitutional democracy* (1994) 19.

⁴⁴ See Declaration of Delhi of 1959 http://www.icj.org/article.php3?id_article=3088&i-d_rubrique=11 (accessed 17 September 2004).

⁴⁵ B Li 'Constitutionalism and the rule of law' in B Li & L Zhou *Perspectives* http://www.oycf.org/Perspectives/5_043000/what_is_rule_of_law.htm (accessed 17 September 2004).

⁴⁶ As above.

constitutional structure that includes separation of powers, checks and balances and judicial independence.⁴⁷ The separation of powers, checks and balances and judicial independence should not only be worth the paper upon which they are stipulated, but should for practical purposes be essential in the smooth functioning of an open society based upon human rights and a respect for the rule of law.

In this context, the rule of law should be seen as a state's application and adherence to the law in accordance with international human rights law. While the law is to be applied by the government, both the government and the governed must adhere to the law. The greater responsibility lies with the government, because the governed are more vulnerable to any abuse of power. Even a greater responsibility lies with the King who is, as experience taught us, prone to the exercise of power beyond what is within 'acceptable limitations' in a democratic state. Ideally, any law applied by the government and adhered to by the governed, should be in accordance with international human rights law. This is one of the reasons for ratifying and acceding to international human rights instruments.

This brings this discussion to the question as to the nature of human rights law. The starting point would be an understanding of the meaning of human rights before venturing into its 'law' component.

8 Human rights

Piechowiak argues that, in the most general sense, human rights are understood as rights which belong to any individual as a consequence of being human, independently of acts of the law.⁴⁸ In this sense, Piechowiak argues that the enjoyment of human rights is independent of the law. This view, however, is impractical because it ignores the fact that law is the best means by which human rights can be enforced. Hence we have a plethora of human rights instruments comprising what is today known as human rights law. Making human rights a law adds a binding effect to a respect of human rights.

In Swaziland, there is a misconception that any human rights advocacy is contrary to Swazi culture. This is evidenced by the authorities' hostile attitude to the culture of human rights, which has become the contemporary phenomenon. It is for this reason that the Preamble to the Constitution talks of a need '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'.

⁴⁷ As above.

⁴⁸ Piechowiak (n 27 above) 3.

Drzewicki contends that each human right constitutes a specific kind of normative standard and a public law relationship between human beings and public authorities, aimed at the most fundamental human values and needing protection against excessive interference by public authorities.⁴⁹ This is otherwise known as the vertical dimension. Human rights law, therefore, seeks to make those universally acceptable normative standards binding to both the state and the individual. Without a written constitution providing for fundamental human rights, it is difficult to see a human rights culture flourishing in any state. Swaziland is now a step ahead with the coming into force of its written Constitution, yet still distant from achieving a maximum, effective and workable human rights culture. While the relationship between individuals is excluded from the classic concept of human rights, which focuses on the interaction between the state and the individual, Drzewicki argues that human rights law has integrated certain aspects of the relationship between private parties.⁵⁰ This is otherwise known as a horizontal dimension.

The development of human rights law can be traced back to the formation of the UN in response to the atrocities of World War II. Drzewicki⁵¹ divides the levels of universal international human rights law into four stages, namely:

- The first stage, being 1945-1948, began with the adoption of the United Nations Charter (UN Charter)⁵² and ended with the proclamation of the Universal Declaration.⁵³ Being part of the UN, having joined on 24 September 1968, Swaziland is indeed part of the comity of nations that embrace the concept of international human rights, forming part of the broad spectrum of international law. Section 236(1)(2) of its Constitution provides that 'Swaziland shall conduct its international affairs directly or through officers of the government in accordance with the accepted principles of public or customary international law'. More importantly, section 61(1)(c) of the Constitution provides that, in its dealings with other nations, Swaziland's government shall 'promote respect for international law, treaty obligations and the settlement of international disputes by peaceful means'. This, therefore, affirms Swaziland to be among the nation states that have openly and willingly declared a duty to promote and protect human rights in accordance with international

⁴⁹ K Drzewicki 'Internationalization of human rights and their juridization' in Hanski & Suksi (n 27 above) 27.

⁵⁰ As above.

⁵¹ Drzewicki (n 49 above) 33.

⁵² 1945.

⁵³ 1948.

norms and standards, having due regard to the UN Charter provisions.

- The second stage, 1949-1966, is the codification of the programme set out in the Universal Declaration into CESC⁵⁴ and CCPR.⁵⁵ Swaziland should be applauded for not missing the opportunity of being a state party to these two important covenants. However, acceding to these instruments is one thing; implementing them is another. The challenge for Swaziland lies in the latter. The Constitution will provide a good basis for such implementation and respect for the rule of law provides a vehicle with which such implementation can be achieved.
- The third stage, being 1967-1989, was characterised by the adoption of multiple conventions and protocols, and the initiation of a whole set of implementation measures that serve to guarantee and control the observance of recognised human rights, the entering into force of CEDAW,⁵⁶ CAT⁵⁷ and the Convention on the Rights of the Child (CRC).⁵⁸ In so far as this stage is concerned, save for the Optional Protocol to CCPR, Swaziland should be further applauded for having acceded to all these instruments, though at a very late stage. Again the question of implementation remains a challenge.
- The fourth stage, being 1989 to the present, is characterised by a wider acceptance of the supervisory mechanisms of the UN. Another notable development during this period is the World Conference of Human Rights,⁵⁹ which sought to adjust the UN to old and new challenges. As part of its social objectives, Swaziland shall in terms of section 60(1) of the Constitution 'guarantee and respect institutions which are charged by the state with responsibility for protecting and promoting human rights and freedoms by providing those institutions with adequate resources to function effectively'.

Parallel to the development of human rights law was the establishment of the three regional human systems, namely the European, American and the African human rights systems. In this way, human rights law became universally accepted and began to have a binding effect upon member states. For our purposes, therefore, international human rights law should be seen as universally acceptable normative standards regulating and binding the relationship between states, the state and the

⁵⁴ 1966.

⁵⁵ 1966.

⁵⁶ 1979.

⁵⁷ 1984.

⁵⁸ 1989.

⁵⁹ 1993.

individual, and individuals *inter se*, in accordance with international human rights treaties. Next I will consider international human rights law within the African human rights system.

9 The African human rights system

The African Charter⁶⁰ is the principal regional instrument providing for international human rights law within the African human rights system. The Charter was adopted under the auspices of the Organization of African Unity (OAU), now the African Union (AU),⁶¹ which comprises 53 member states. Being the foundational human rights instrument within the African human rights system, the African Charter provides for civil and political rights⁶²; economic, social and cultural rights;⁶³ for peoples' rights;⁶⁴ and lastly, for state⁶⁵ and individual⁶⁶ duties.

The African Charter establishes the African Commission on Human and Peoples' Rights (African Commission) under article 30 of the Charter, to promote and protect human and peoples' rights in Africa. As already mentioned above, Swaziland is a member state of the AU. So far, the African Commission is the only operational and effective enforcement mechanism within the African human rights system. The African Court on Human and Peoples' Rights⁶⁷ was established to complement the protective mandate of the African Commission. Swaziland is, however, not party to the Protocol establishing the Court.

Let us now explore the ways in which the rule of law is guaranteed in the African Charter.

One of the most glaring features of the Charter's provisions are the so-called 'claw-back' clauses, according to which rights and freedoms are exercised or denied in accordance with law. These are expressed in the following phrases: 'previously laid down by law',⁶⁸ 'subject to law

⁶⁰ OAU Doc OAU/CAB/LEG/67/3/Rev 5.

⁶¹ The African Union is established by the Constitutive Act, signed on 12 June 2000 and entered into force on 26 May 2001. The first Summit of the AU was held in South Africa in July 2002.

⁶² Arts 2-13 African Charter.

⁶³ Arts 14-18.

⁶⁴ Arts 19-24.

⁶⁵ Arts 1, 25 & 26.

⁶⁶ Arts 27-29.

⁶⁷ Established by the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of the African Court on Human and Peoples' Rights (Protocol), which came into force on 25 January 2004, thirty days after the deposit of the 15th instrument of ratification in accordance with article 34 (3) of the Protocol.

⁶⁸ Art 6 African Charter.

and order',⁶⁹ 'within the law',⁷⁰ 'provided he abides by the law',⁷¹ 'in accordance with the provisions of the law',⁷² and 'in accordance with the provisions of appropriate laws'.⁷³

The mere reference to the 'law' cannot be said to ensure respect for the rule of law. What if the law is in violation of human rights? Should individuals blindly respect the law which suppresses their freedoms? In fact, the above-named phrases tend to 'take away with the left hand that which it has given with the right hand', in the sense that they make the Charter's rights subject to limitations imposed by domestic law.⁷⁴ At face value, this renders the rights and freedoms in the Charter useless to the individual.

In so far as these phrases are concerned, the African Commission has reasoned that to allow national or domestic law to supersede or override the international law of the Charter, would be to defeat the whole purpose of the rights and freedoms enshrined the Charter. The position is that international human rights standards must always prevail over contradictory national law, and any limitation of the rights of the Charter must be in conformity with the provisions of the Charter.⁷⁵ Therefore, in order for the principle of the rule of law to be respected, the laws of the state concerned must be in accordance with international human rights standards as provided for in international human rights treaties.

The Charter does embody the rule of law as qualified by the interpretation of the African Commission. Our definition for the rule of law, being 'the application and adherence to the law in accordance with international human rights', is therefore accommodated within the Charter provisions. Without a respect for universally acceptable international normative standards, the rule of law cannot be said to exist.

As mentioned above, the African Charter specifically provides in article 1 that member states of AU shall recognise the rights, duties and freedoms enshrined in the Charter. More importantly, article 1 obliges member states to 'undertake to adopt legislative or other measures to give effect' to the rights, duties and freedoms enshrined in the Charter. This means that every legislative measure, in the form of 'law', must give effect to the provisions of the Charter. It is only through adhering to this provision that the rule of law can effectively be adhered to.

⁶⁹ Art 8.

⁷⁰ Art 9.

⁷¹ Arts 10 & 12.

⁷² Art 13.

⁷³ Art 14.

⁷⁴ EA Ankumah *The African Commission on Human and Peoples' Rights: Practice and procedures* (1996) 63.

⁷⁵ See *Media Rights Agenda & Others v Nigeria* (2000) AHRLR 200 (ACHPR 1998).

The rule of law also requires a state that is a party to an international instrument to submit to its enforcement mechanism and also to carry out or enforce that enforcement mechanism's decision. It is quite disturbing to note that, in the case of *Lawyers for Human Rights v Swaziland*,⁷⁶ the only case against Swaziland so far, the African Commission said:⁷⁷

In making this decision on the merits, the African Commission would like to point out that it is disappointed with the lack of co-operation from the Respondent State [Swaziland]. The decision on the merits was taken without any response from the State. As a matter of fact, since the communication was submitted to the Commission and in spite [of] several correspondences to the state, there has not been any response from the latter on the matter. Under such circumstances, the [African] Commission is left with no other option than to take a decision based on the information at its disposal.

This is a serious indictment for a state calling itself a 'democratic Kingdom'. It reflects badly on its own people and on Africa as a whole. The question that may be posed here is whether a state that does not cooperate with an enforcement mechanism established under an international human rights treaty that is binding upon it can be said to be serious in respecting human rights and the rule of law. The above quote gives an indication of where Swaziland is going, despite the adoption of the new Constitution. If the meaning of the word 'binding' is misplaced in international law, then, surely, Swaziland has effected that misplacement. The above-mentioned case is, however, beyond the scope of this work, yet very pertinent to the article under discussion.⁷⁸

10 Conclusion

From this discussion, it is very clear that there is a very close relationship between human rights and the rule of law. In order for Swaziland to be seen to respect the rule of law, she has to embrace human rights in a comprehensive manner. So far, Swaziland has failed to undertake the necessary measures to give effect to the provisions of the African Charter as required by article 1 of the Charter. The African Commission's condemnation in the *Lawyers for Human Rights* case hits the nail on the head and exposes Swaziland's hypocrisy in so far as embracing human rights and respect for the rule of law are concerned. Thus, Mugwanya argues that virtually all African states have been and continue to be the

⁷⁶ Communication 251/2002, *Lawyers for Human Rights v Swaziland* adopted by the African Commission on Human and Peoples' Rights at its 37th ordinary session held in Banjul, The Gambia, from 27 April to 11 May 2005.

⁷⁷ Para 41.

⁷⁸ Among other things, the decision of the case dealt with the question of whether or not the King's Proclamation to the Nation of 1973 was in violation of the African Charter.

most egregious human rights violators, rendering human rights illusory in the daily lives of the majority of people in Africa.⁷⁹ In so far as Swaziland is concerned, one cannot agree more with Mugwanya's observation.

While earlier scholars saw the existence of the rule of law as a product of democracy and constitutionalism, it is now argued that, with the development and globalisation of human rights, the rule of law is a direct product of the respect of international human rights. Even democracy and constitutionalism exist only where human rights are respected. In the Swaziland Constitution, it is stated that one rationale behind the drafting of the Constitution is that⁸⁰

[i]t has become necessary to review the various constitutional documents, decrees, laws, customs and practices so as to promote good governance, the rule of law, respect for our institutions and the progressive development of the Swazi nation.

With the gradual transformation of human rights into law, a respect for human rights is binding on all nations and individuals. Besides adhering to the provisions of the African Charter, the IBA report states that Swaziland has a number of general obligations with respect to human rights, which would apply to its present rule of law crisis. These include the Harare Commonwealth Declaration, 1991, wherein Swaziland pledged to work towards 'democracy, democratic processes and institutions which reflect national circumstances, the rule of law and the independence of the judiciary, just and honest government'.⁸¹

Respecting the rule of law is now part of respecting international human rights law. It is also a gateway towards peace and stability in any society, as the enjoyment of peace and stability is dependent upon the respect for international human rights law as provided for in international human rights treaties. Human rights and the rule of law face the same challenges in Africa. While their goals remain interdependent and interrelated, the application and enforcement of international human rights law remain crucial components for the respect for the rule of law.

Udombana argues that Africa is yet to achieve a true democracy that will guarantee, even minimally, the rule of law and human rights.⁸²

⁷⁹ GW Mugwanya 'Examination of state reports by the African Commission: A critical appraisal' (2001) 1 *African Human Rights Law Journal* 268.

⁸⁰ See the Preamble of the Constitution of Swaziland.

⁸¹ See art 9 of the Harare Commonwealth Declaration, 1991. <http://www.thecommonwealth.org/Templates/Internal.asp?NodeID=34457&int1stParentNodeID=20596&int2ndParentNodeID=20723> (accessed 17 September 2004).

⁸² NJ Udombana 'Can the leopard change its spots? The African Union treaty and human rights' (2002) 17 *American University International Law Review* 1236.

This, however, should not be a justification for Swaziland to compromise respect for human rights and the rule of law. Below are Thatcher's words of wisdom:⁸³

Our abiding commitment to the rule of law is the very bedrock of our civilisation. It is what makes all else possible, from the flowering of the arts to the steady advance of the sciences. The idea that men must govern themselves not by the arbitrary commands of a ruler but by their own considered judgment, is the means whereby chaos is replaced by order. Balanced by the peaceful resolution of differences, the rule of law and the institutions of representative democracy are what stand between civilization and barbarism. It is through law-governed liberty that mankind has been able to achieve so much.

⁸³ Thatcher (n 4 above) 23.