

**THE WRITING OF A DEMOCRATIC CONSTITUTION IN AFRICA WITH REFERENCE TO  
SWAZILAND AND UGANDA**

**Submitted in partial fulfilment of the requirements of the degree Master of Laws (LLM) in  
Human Rights and Democratisation in Africa, Faculty of Law, Centre for Human Rights,  
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## **A legitimate process:**

The South African government, backed by a powerful security apparatus with sweeping emergency powers, assumed strongly centralized and authoritarian control of the country. Then, remarkably and in the course of but a few years, the country's political leaders managed to avoid a cataclysm by negotiating a largely peaceful transition from the rigidly controlled minority regime to a wholly democratic constitutional dispensation.

After a long history of "deep division between a minority which reserved for itself all control of the political instruments of the state and a majority who sought to resist that domination", the overwhelming majority of South Africans across the political divide realized that the country had to be urgently rescued from imminent disaster by a negotiated commitment to a fundamentally new constitutional order premised upon open and democratic government and the universal enjoyment of human rights. That commitment is expressed in the preamble to the Interim Constitution...

(per Constitutional Court of the Republic of South Africa in *Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of the South Africa* 1996 (10) BCLR 1253 (CC)).

## DECLARATION

I, **THULANI RUDOLF MASEKO**, do solemnly declare that although I claim originality of this work, many of the ideas contained are not necessarily mine. Reference has been made extensively to the work of others who explored the topic before me. I declare that this work has never been presented to any University or institution. I accordingly present this work in partial fulfilment of the requirements of the award of the Master of Laws Degree in Human Rights and Democratisation in Africa, University of Pretoria, Republic of South Africa.

I take full responsibility for all shortfalls, shortcomings and inaccuracies if any, in the manuscript.

Signed \_\_\_\_\_

Date \_\_\_\_\_

Supervisor: Dr. Henry Onoria

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Signed \_\_\_\_\_

Date \_\_\_\_\_

## DEDICATION

With a great of appreciation to my mother and my sister who continue without ceasing to support and encourage me in my endeavours. Without their love and persistent support under extremely difficult circumstances, it would have been totally impossible for me to hang onto the course to the very end. These two ladies have untiringly raised and moulded me and have been a pillar of strength. May God continue to bless you guys! I recognise a special young lady who has gradually become a part of my soul.

To the many Swazis, Ugandans and Africans across the continent and the globe that continue to strive to achieve full democracy and constitutional government in the beautiful continent of Africa. The struggle for genuine constitutional governance is a challenge we cannot afford to give up. It is an ideal for which we must be ready and prepared to lay our life in search for true liberty, humanity and the restoration of dignity for the many Africans and for posterity.

Democracy and constitutionalism has eluded us for a long time, the time has come and the time is now!

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All Glory goes to the Lord God Almighty, who has seen all of us in the LLM 2005 Programme through for he says: *'I am the Lord who created you; from the time you were born, I have helped you. Do not be afraid'*.

## ABBREVIATIONS

African Charter	African Charter on Human and Peoples' Rights
African Commission	African Commission on Human on Peoples' Rights
AI	Amnesty International
AU	African Union
CA	Constituent Assembly
CANGO	Co-ordinating Assembly of Non-Government Organisations
CDC	Constitution Drafting Committee
CDC	Constitution Drafting Committee
CJ	Chief Justice
COSATU	Congress of South African Trade Unions
CRC	Constitutional Commission of Inquiry
CRC	Constitutional Review Commission
CSC	Council of Swaziland Churches
CSSDCA	Conference on Security, Stability, Development and Cooperation in Africa
DP	Democratic Party
EAC	East African Community
HC	High Court
HRC	Human Rights Committee
HRW	Human Rights Watch
IBA	International Bar Association
ICCPR	International Covenant on Civil and Political Rights
ICJ	International Commission of Jurists
IHL	International Humanitarian Law
IHR	International Human Rights Law
INM	Imbokodvo National Movement
LHR (S)	Lawyers for Human Rights Swaziland
MMD	Movement for Multiparty Democracy
MPNP	Multi-Party Negotiation Process
MPs	Movement Political System

NCA	National Constitutional Assembly
NEPAD	New Partnership for Africa's Development
NNLC	Ngwane National Liberation Congress
NNLC-YL	Ngwane National Liberatory-Youth League
NRM/A	National Resistance Movement/Army
OAU	Organisation of African Unity
PUDEMO	People's United Democratic Movement
RCC	Royal Constitutional Commission
RSP	Royal Swaziland Police
SADC	Southern Africa Development Community
SCCCO	Swaziland Coalition of Concerned Civic Organisations
SFL	Swaziland Federation of Labour
SFTU	Swaziland Federation of Trade Unions
SNAT	Swaziland National Association of Teachers
SNC	Swazi National Council
SWAYOCO	Swaziland Youth Congress
TPDF	Tanzania Peoples' Defence Forces
TRC	Tinkhundla Review Commission
UCC	Uganda Constitution Commission
UCC	Uganda Constitutional Commission
UN Charter	United Nations Charter
UNDHR	Universal Declaration of Human Rights
UPC	Uganda People's Congress
UPF	Uganda Patriotic Front
WLSA	Women and Law Southern Africa Research Trust - Swaziland Chapter



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## CHAPTER 1 INTRODUCTION

### 1.1 Introductory remarks

The writing of constitutions in Africa in the 1990s seems to have become fashionable after years of political wilderness following decades of one-party rule, military dictatorships and no-party regimes. African states engaged in the process of crafting new and democratic constitutions in search of democratic and legitimate governance based on the free will of the peoples, and to foster democratic traditions. Transition to democracy is a sacred undertaking, the challenge of which is to develop constitutional and institutional mechanisms in the hope of building viable and durable democratic values and practices that would guarantee political stability, peaceful and orderly change of government, the rule of law and the complete respect for human rights.<sup>1</sup>

Constitution-making must be seen as a means of bringing peace and creating a stable and prosperous African continent where the people take charge of the governance and their political and economic destiny in complete freedom. This study inquires into the extent to which this goal has been achieved, with particular reference to Swaziland and Uganda. Swaziland is the only absolute monarchy in the Southern Africa region after Lesotho adopted a democratic Constitution in 1993,<sup>2</sup> with the King becoming a constitutional monarch. Uganda has been operating under the Movement Political System (MPS)<sup>3</sup> that until recently did not allow free political activity.<sup>4</sup>

### 1.2 Statement of the problem

The study investigates the manner and procedure adopted by African leaders in the democratisation and constitution-making process. It focuses on the legitimacy of the exercise and considers whether or not it took on board the genuine views of the people. It will be important to see whether the method utilised was not prescribed by the powers that be. This will lead to a determination as to whether or not the postcolonial constitution-making processes were driven by the free will of the people. The Constitution of Uganda was written at a time when the country was under a regime that did not allow full and free political party participation. On the other hand, the Swaziland Constitution was made

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

<sup>2</sup> Constitution of Lesotho Order No. 16 of 1993 available at <<http://www.lesotho.gov.ls/constitute/gconstitute.htm>>(accessed 26 August 2005).

<sup>3</sup> Article 70 of the Constitution of Uganda 1995.

<sup>4</sup> Makubuya, K Attorney General and Minister for Justice and Constitutional Affairs, 'Uganda still under Movement system' writes that 'the people of Uganda on 28 August 2005, by 92.5% voted in favour of changing the political system from the Movement system to multiparty democracy' *The Monitor*, Tuesday September 6 2005. We may add that the referendum was not without controversy as political parties advised people to abstain and international observers say that the voter turn out was estimated at 47.3%.

under the *Tinkhundla* System<sup>5</sup>. Free political activity and political organisations are banned under this system. Both Swaziland and Uganda are state parties to the African Union (AU)<sup>6</sup> and have ratified the African Charter on Human and Peoples' Rights (African Charter).<sup>7</sup> This research discusses the two countries' obligations under the African Charter and determines whether or not the making of new constitutions under the *Tinkhundla* and Movement systems respectively, complied with article 13 of the African Charter and other international instruments on the right to participate.

### 1.3 Objectives and scope of the research

Africa<sup>8</sup> engaged in the process of crafting democratic constitutions, so-called third generation constitutions.<sup>9</sup> This was motivated by, among others, the argument that most if not all of the constitutions Africa inherited from the colonial powers were not formulated by Africans themselves, but had been imposed, and that these constitutions did not reflect the true values and aspirations of the African people. Africa altered and repealed the inherited constitutions soon after independence, without necessarily opening democratic space. Many African countries began the process of crafting home-grown (autochthonous) constitutions with a view to entrenching African values. This study seeks to investigate the extent to which the post-colonial constitutions are reflective of the will of the African people and the level to which the people were able to freely and fully participate in the constitution-making process.

### 1.4 Value and relevance of the research

The study is of value and relevance because of Africa's continued soul searching for stability and constitutional democratic governance. If this goal is to be attained, researchers, scholars, legal practitioners and academic writers have to dedicate time in order to enrich constitutional debate. It is through debates and engagements that the search for constitutional stability will be achieved, in line

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<sup>5</sup> Introduced by King Sobhuza II by Establishment of Parliament Order No. 23 of 1978 repealed and replaced by Establishment of Parliament Order No. 1 of 1992.

<sup>6</sup> Swaziland signed the AU Act on 01/03/2001 and ratified it on 08/08/2001. Uganda signed it on 25/02/2001 and ratified it on 03/04/2001, available at <<http://www.africa-union.org/home/Welcome.htm>>(accessed on 21 September 2005).

<sup>7</sup> Swaziland ratified the Charter on 15 September 1995 while Uganda did so on 27 May 1986 available at <[http://www.achpr.org/english/\\_doc\\_target/documentation.html?/ratifications/ratification\\_charter\\_en.pdf](http://www.achpr.org/english/_doc_target/documentation.html?/ratifications/ratification_charter_en.pdf)>(accessed 16 August 2005).

<sup>8</sup> Swaziland started the process in October 1973 after the repeal of the independence Constitution while Uganda began its process through the Uganda Constitutional Commission Statute No.5 (1988).

<sup>9</sup> Shivji, I.G 'Three generations of constitutions and constitution-making in Africa: an overview and assessment in social and economic context' in Rosen, M. S, (ed) (2003) *Constitutionalism in transition: Africa and Eastern Europe* 81.

with the principles of the AU of encouraging constitutional and democratic governance and doing away with unconstitutional changes of government.<sup>10</sup>

### 1.5 Hypothesis

The research is based on the hypothesis that constitution-making in Africa particularly in the countries under review did not take account of the genuine will and aspirations of the people for whose lives these constitutions are made to govern. An argument is advanced that the constitution-making processes were not people driven, but were merely window-dressing and aimed at entrenching the *status quo*. The research suggests that these constitutions will not resolve the constitutional and political problems that prevailed before their enactment because the processes lacked genuineness and openness that ought to have been the backbone the process. The study is also based on the hypothesis that the making of these constitutions was largely donor driven, so that African leaders were more concerned with appeasing donor agencies and governments than with the aspirations of the people.

### 1.6 Literature review

The focus of most commentary has not been on the essence of the right to participate as envisaged by article 13 of the African Charter<sup>11</sup>. Matsebula<sup>12</sup> documented the constitutional history of Swaziland. Recent developments are contained in the work of the International Bar Association (IBA)<sup>13</sup>, which sent a delegation to Swaziland. The International Commission of Jurists (ICJ)<sup>14</sup> conducted a fact-finding visit to Swaziland and produced a report. Again, Amnesty International (AI)<sup>15</sup> sent representatives who had a discussion with the Constitution Drafting Committee (CDC) on the

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<sup>10</sup> Article 4(m) and (p) of the AU Act.

<sup>11</sup> Adopted by the Assembly of Heads of State and Government of the Organisation of African Union, 27 June 1981<[http://www.achpr.org/english/\\_info/charter\\_en.html](http://www.achpr.org/english/_info/charter_en.html)>(accessed 19 August 2005).

<sup>12</sup> Matsebula, JSM (2000) *A History of Swaziland*.

<sup>13</sup> International Bar Association, 'Swaziland: law, custom and politics: constitutional crisis and the breakdown of the Rule of Law March 2003' available at <[http://www.ibanet.org/humanrights/Factfinding\\_Missions.cfm#missions](http://www.ibanet.org/humanrights/Factfinding_Missions.cfm#missions)>(accessed on 5 August 2005).

<sup>14</sup> International Commission of Jurists, 'Report of the Centre for the Independence of Judges and Lawyers- Fact-Finding Mission to the Kingdom of Swaziland June 2003' available at<[http://icjcanada.org/en/documents/2003-06\\_Swaziland.pdf](http://icjcanada.org/en/documents/2003-06_Swaziland.pdf)>(accessed on 5 August 2005).

<sup>15</sup> Amnesty International, 'Memorandum to the Constitution Drafting Committee on the Draft Constitution for Swaziland, October 2003' available at <<http://www.amnestyusa.org/countries/swaziland/document.do?id=80256DD400782B8480256F39005CB6D0>> (accessed 6 August 2005).

constitution-making process and issued a memorandum thereafter. The IBA<sup>16</sup> perused the draft constitution and published an analysis. The Commonwealth Secretariat<sup>17</sup> also sent a team of experts to Swaziland to observe, the October 2003 general elections. At the end of their mission and upon consulting various stakeholders, produced a report on the situation in the country. There will be reference to other pieces of work in the course of the research.<sup>18</sup>

With regard to the Ugandan experience reference will be made to the report of Human Rights Watch (HRW)<sup>19</sup> and the work of Benjamin Odoki.<sup>20</sup> Oloka-Onyango<sup>21</sup> has produced a number of publications on constitutionalism. Mamdani's<sup>22</sup> writing will be referred to. Ssenkumba has published work regarding the dilemmas of democracy in Africa, particularly in Uganda.<sup>23</sup> The work of the Uganda Constitution Commission (UCC)<sup>24</sup> will be reviewed. The Report of the Commission of Inquiry (Constitutional Review)<sup>25</sup> will be looked into in the light of the criticism levelled against it by Mugwanya.<sup>26</sup> The study will further review the books on constitutionalism in East Africa.<sup>27</sup> Other references will include the work of Napier's,<sup>28</sup> Nnoli<sup>29</sup> and Hatchard.<sup>30</sup>

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<sup>16</sup> International Bar Association, 'Striving for democratic governance: an analysis of the draft Swaziland constitution, August 2003' available at <[http://www.ibanet.org/humanrights/Factfinding\\_Missions.cfm](http://www.ibanet.org/humanrights/Factfinding_Missions.cfm)>(accessed on 5 August 2005).

<sup>17</sup> Commonwealth Secretariat, 'Swaziland Elections Report of the Commonwealth Expert Team 18 October 2003' available at <<http://www.thecommonwealth.org/activities/democ.html>>(accessed 5 November 2003).

<sup>18</sup> Okpaluba, C (eds) (1997) *Human Rights in Swaziland: the legal response*.

<sup>19</sup> Human Rights Watch, 'Hostile to Democracy: The Movement system and political repression in Uganda' <[www.hrw.org/reports/1999/uganda/idex.htm](http://www.hrw.org/reports/1999/uganda/idex.htm)>(accessed 4 April 2004).

<sup>20</sup> Odoki, B, J 'Writing of a democratic constitution' (1993) 1 *East African Journal of Peace and Human Rights* 115, also Odoki, B, J (2004) *The Search for a national consensus: the making of the 1995 Uganda Constitution*.

<sup>21</sup> Oloka-Onyango, J (ed) (2001) *Constitutionalism in Africa creating opportunities, faces challenges*.

<sup>22</sup> Mamdani, M 'The politics of democratic reform in Uganda' (1995) 2 *East African Journal of Peace and Human Rights* 91.

<sup>23</sup> Ssenkumba, J 'The dilemmas of neutralizing opposition politics under the National Resistance Movement (NRM)' (1997) 3 *East African Journal of Peace and Human Rights* 240.

<sup>24</sup> Final Report and the Draft Constitution (1993).

<sup>25</sup> The Report of the Commission of Inquiry (Constitutional Review) Findings and Recommendations, (2003).

<sup>26</sup> Mugwanya, G.W, 'Uganda's Constitutional Review Commission: a critical inquiry' (2001) 7 *East African Journal of Peace and Human Rights* 164.

<sup>27</sup> Jjuuko, F.W, (ed) (2005) *Constitutionalism in East Africa, progress, challenges and prospects in 2002* and Tusasirwe, B (ed) (2005) *Constitutionalism in East Africa progress, challenges and prospects in 2003*.

<sup>28</sup> Napier, C 'Africa's Constitutional Renaissance? Stocktaking in the '90s' in Liebenberg, I and Solomon, H (eds) (2000) *Consolidation of Democracy in Africa: A view from the South*.

<sup>29</sup> Nnoli, O (1990) *Introduction to Politics*.



## **1.7 Methodology**

The study shall predominantly be literature review, based on library research as well as the Internet. The research adopts a critical and analytical approach.

## **1.8 Limitations of the study**

Investigating the processes of writing constitutions is a major task considering that the methods and approaches adopted may not be uniform and will differ from country to country, yet the end result is the same, being the promulgation of a constitution that will truly reflect the aspirations and values of the people. Foremost, the study will be limited by the fact that Africa has for a long time, been guided by the principle of state sovereignty so that what was utilised by one country in achieving a democratic process may not be accepted by another country, even in the face of certainty that it is a proper and effective way. The study will also be limited by the fact that one may not readily have access to ordinary citizens to get to understand their appreciation of the concept of constitutionalism, so that a factual conclusion may be made on whether or not the process met their expectations and that their aspirations were taken care of under the so-called new constitutions. Further more, the study will not give a fuller account of constitutional developments in Swaziland and Uganda due to the stricture thereof.

## **1.9 Synopsis of the study**

The study is divided into five chapters. Chapter 1 focuses on the circumstances (context) and gives an overview of the organizational structure. Chapter 2 deals with the concepts and basic principles of constitutionalism, democracy, and human rights. Chapter 3 scrutinises the legislative mechanisms that set the process in motion and how the constitutional mandate was executed. The chapter considers the effect of the enabling legislation on ratification and implementation of the rights enshrined in the African Charter. It also looks at the role of civil society in influencing the process. To a limited extent, a comparative case study of other processes in Africa, especially, the South African and Zambian experiences is made. Chapter 4 is a discussion of human rights instruments providing for the right to participate; article 13 of the African Charter, article 25 of the International Covenant on Civil and Political Rights (ICCPR) as well as article 21 of the Universal Declaration of Human Rights (UNDHR). A discussion of the content and meaning of the right to participate in international law is made, focusing on the jurisprudence of the African Commission on Human and Peoples' Rights as well as the jurisprudence of the Human Rights Committee (HRC). Chapter 5 is conclusions and recommendations.

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<sup>30</sup> Hatchard, J *et al* (eds) (2004) *Comparative Constitutionalism and Good Governance in the Commonwealth: An Eastern and African Perspective*.

## CHAPTER 2 THE ESSENCE OF CONSTITUTIONALISM

### 2.1 Introduction

At independence most, African states obtained what came to be popularly known as the independence constitutions<sup>31</sup>, otherwise first generations constitutions. In a few years, these constitutions (with the exception of the Republic of Botswana and The Gambia before the coup) were repealed, amended and jettisoned by the newly independent African states. Baloro<sup>32</sup> writes that at the initial stages, in most cases what was put in place was a one-party regime which usually at least nominally espoused one political ideology or the other for example, socialism-cum-African union in Kwame Nkrumah's Ghana, African socialism and *ujamaa* in Julius Nyerere's Tanzania and humanism in Kaunda's Zambia.

Several reasons were advanced to justify the emergence of one-party regimes (or no-party as is the case with Swaziland). Sinjenga<sup>33</sup> observes that most sub-Saharan countries shifted away from multiparty types of constitutions, which were viewed as having been imposed upon them by departing colonial states. It was argued that these constitutions were not a suitable vehicle for creating unified states from different and fragmented nations often fixed in the pre-independence era. It was further argued that western democracies were not suitable to bring about economic development.<sup>34</sup> Nevertheless, these new regimes were not without opposition as opposition groups and political parties demanded more space in the governance. These demands and the changing global<sup>35</sup> environment are fundamentally responsible for the wave of constitution-making processes in the continent.

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<sup>31</sup> Swaziland Independence Constitution Act 50/1968 and the 1962 Independence Constitution of Uganda 1962 (Laws of Uganda (2000) 1.

<sup>32</sup> Baloro, J 'Democracy and human rights in Swaziland: study of the law and practice regarding free association and assembly' in Okpaluba (n 18) 30-31.

<sup>33</sup> Sinjenga, M, 'Constitutionalism in Africa: emerging trends: the evolving African constitutionalism' (1998) 60 *The Review* 23.

<sup>34</sup> As above.

<sup>35</sup> Oloka-Onyango, J 'Constitutionalism in Africa yesterday, today, tomorrow' in Oloka-Onyango, J (ed) (2001) *Constitutionalism in Africa creating opportunities facing challenges*, 1 12-13. See also Mulikita, N, M 'A false dawn? Africa's post-1990 democratization waves' available at <<http://www.iss.co.za/pubs/ASR/12No4/Mulikita.pdf#search=>>(accessed 8 September 2005).

## 2.2 The essence of constitutionalism

Dicey<sup>36</sup> has defined constitutionalism as follows:

The idea of constitutionalism involves the proposition that the exercise of governmental power shall be bounded by rules, rules prescribing the procedure to which legislative and executive acts are to be performed and delimiting their permissible content- Constitutionalism becomes a living reality to the extent that these rules and the arbitrariness of discretion are in fact observed by the wielders of political power, and to the extent that within the forbidden zones upon which authority may not trespass there is significant room for the enjoyment of individual liberty.<sup>37</sup>

Although others contend that constitutionalism is firmly set in a western liberal democratic mould,<sup>38</sup> it is generally accepted that African lawyers have uncritically operated within this conceptual framework as handed down by Dicey, refined by De Smith<sup>39</sup> and blessed by the Law of Lagos.<sup>40</sup> It is acknowledged that constitutionalism concerns itself with two fundamental pillars; limitation of governmental power<sup>41</sup> and protection of fundamental rights and freedoms and civil liberties of the individual. Classical constitutionalism as expounded by Dicey has been taken to greater heights by academics and scholars who now speak of modern constitutionalism. Butlerichie<sup>42</sup> put it very well when he said:

Modern constitutionalism as I use the term throughout the rest of this project refers to a set of formal legal and political concepts that were developed in Western Europe during the enlightenment. These concepts, which serve as a cornerstone of liberal political and legal theory (and evolved to support that theory), are the division and limitation of government power, the recognition and protection of certain individual rights, the protection of private property and the notion of representative or democratic government. These concepts are the backdrop against which the modern constitutionalist enterprise is judged.<sup>43</sup>

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<sup>36</sup> De Smith, .A, (1964) *The New Commonwealth Constitutions* 106.

<sup>37</sup> Reproduced in Hatchard, J (n 30) 1.

<sup>38</sup> As above.

<sup>39</sup> Shivji, I.G 'State and constitutionalism: a democratic perspective' in Shivji, I.G (ed) (1991) *State and constitutionalism an African debate on democracy* 27.

<sup>40</sup> The Internal Commission of Jurists (ICJ) organised The African Conference on the Rule of Law consisting of 194 judges, practicing lawyers and teachers of law from 23 African nations as well as countries of other continents, assembled in Lagos, Nigeria, in January 1961, to discuss freely and frankly the Rule of Law with particular reference to Africa, and reaffirmed the Act of Athens and Declaration of Delhi, which in turn reaffirmed the concepts of constitutionalism, available at <[http://www.globalwebpost.com/genocide1971/h\\_rights/rol/10\\_guide.htm#lagos](http://www.globalwebpost.com/genocide1971/h_rights/rol/10_guide.htm#lagos)> (accessed on 8 September 2005).

<sup>41</sup> Wheare, K. C (1951) *Modern Constitutions* 7 wrote that 'Constitutions spring from a belief in limited government'.

See also, Bradley, *et al* (eds) (1995) 4.

<sup>42</sup> Butlerichie, D.T, 'The confines of modern constitutionalism' available at <<http://www.lawreview.edu/PLRarticles/Vol3No.1/ButleRitchies/pdf>>(accesses 21 June 2005).

<sup>43</sup> As above 6.

Despite the fact that the basic tenets of constitutionalism are by and large well accepted, they have not been without criticism. Gutto<sup>44</sup> argues that the classical formulation by Dicey is representative of the narrow conception of the state power, in simple dividing state power into three arms. He advances the argument that the judiciary is the most passive branch in that its operation is dependent on the mobilisation of the law by private citizens. The exercise of power in modern society can no longer be left to the conventional structures of government but also the role played by civil society, such as non-governmental organisations (NGOS) in influencing policies and the direction of government.

### **2.3 Constitutionalism, democracy and human rights**

Can constitutionalism be understood as being independent from democracy and human rights? In this study it is our contention that constitutionalism, democracy and human rights are intertwined and interconnected.<sup>45</sup> Mapunda<sup>46</sup> makes a similar proposition and states, “[C]onstitutionalism and [D]emocracy are inextricably interlinked. The Universal Declaration of Human Rights 1948; and all major United Nations resolutions; the International Covenant on Civil and Political Rights of 1966; the constitutions of modern states; of the African Charter on Human and Peoples’ Rights States-all these recognise [C]onstitutionalism and [D]emocracy as an integral part of fundamental human rights”.

It is worthy of pointing out that the origin of the term ‘democracy’ can be traced back to the Ancient Greece. Heywood<sup>47</sup> suggests that the following are amongst the meanings that have been attached to the word democracy in modern times; a system of rule by the poor and disadvantaged; a form of government in which the people rule themselves directly and continuously without the need for professional politicians or public officials; a society based on equal opportunity and individual merit, rather than hierarchy and privilege; a system of welfare and redistribution aimed at narrowing social inequalities; a system of decision-making based on the principle of majority rule; a system that secure the rights and interests of minorities by placing checks and balances on the majority; a means of filling public office through a competitive struggle for the popular vote, and a system of government that serves the interest of the people regardless of their participation or political life. Yet there is little controversy about the basic tenets of democracy.

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<sup>44</sup> Gutto, S.B.O ‘The rule of law, democracy and human rights: whither Africa?’ (1997) 3 *East African Journal of Peace and Human Rights* 130 133.

<sup>45</sup> Butleritchie (n 42), also Osiatynnski, W ‘Constitutionalism, democracy, constitutional culture’ 151-158 and Henwood, R ‘Constitutional culture in Africa’ 107-122 both in Wyrzykowski, W (ed) (2000) *Constitutional cultures*.

<sup>46</sup> Mapunda A. M ‘Conditions for the functioning of a democratic constitution’ (1995) *Conference on Constitutionalism and the legal system in a democracy East and Central Africa Chief Justice Colloquium* 35.

<sup>47</sup> Heywod, A (2002) *Politics* 4.

## 2.4 Experiences with constitutionalism, democracy and human rights in Swaziland and Uganda prior to constitution-making

This research seeks to show that in the context of Swaziland and Uganda, democracy properly conceived has not been realised. Chapter 3 will show that when His Majesty King Sobhuza II repealed<sup>48</sup> the 1968 Constitution the Bill of Rights with its semblance of fundamental rights and freedoms was also abrogated. As a result the people of Swaziland have for a long time been denied the right and opportunity to freely and democratically elect their government. At a workshop organised by the Council of Swaziland Churches (CSC),<sup>49</sup> participants observed that there is lack of tolerance within the political set-up in Swaziland; the system of government is inconsistent with universally recognised standards of democracy and human rights and that civil society has no political space within which to operate freely.

Democracy and human rights are not consonant with oppressive and draconian laws such as the Public Order Act<sup>50</sup> and the Proclamation.<sup>51</sup> These two pieces of legislation affect in a direct way the exercise and enjoyment of democratic rights and freedoms such as freedom of association and assembly for they prohibit political processions, political public meetings and political public gatherings. The Proclamation was designed to give more teeth to the Public Order Act as it absolutely bans political parties and similar bodies, prohibits any form of political activity outside the *Tinkhundla* centres.<sup>52</sup> Decrees 11, 12 and 13 of the Proclamation provide thus:

11. All political parties and similar bodies that cultivate and bring about disturbances and ill-feelings within the Nations are hereby dissolved and prohibited.
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 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.
13. Any person who forms or attempts 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.

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<sup>48</sup> King's Proclamation to the Nation of 12 April 1973.

<sup>49</sup> Council of Swaziland Churches and Southern Africa Conflict Prevention Network workshop, 'Bridging the political divide' (2002).

<sup>50</sup> Act No. 17/1963.

<sup>51</sup> n 48.

<sup>52</sup> Amendment Decree No. 1/1981.

In respect of Uganda, Onoria<sup>53</sup> narrates a fuller account of the human rights situation in Uganda. He observes that:

Notwithstanding the provisions on human rights under the 1962 and 1967 constitutions, the human rights situation in Uganda was largely dismal, the period from 1962 to 1995 was characterised by abuses in the form of arbitrary arrests, preventive detention, torture, disappearances. Both the constitutional and legal framework that prevailed in Uganda's post independence history militated against the practical enjoyment of rights and freedoms guaranteed. Violations of rights during the successive regimes from 1962 were commonplace, while protection of rights was almost non-existent. The constitutional and legal framework was riddled with restrictions and limitations on rights and freedoms as well as on the enforcement process and mechanisms.

HRW<sup>54</sup> indicates that although human rights violations and abuses were more prevalent before the coming into power of the National Resistance Movement (NRM/A) in 1986, there continues to date abuses of human rights even after the 1995 Constitution was adopted. HRW states that the NRM/A has legally curtailed civil and political rights in favour of a one party state through the Political Organisations Act. It has curtailed the right to freedom of assembly and association as well as placing restrictions on civil society and subverting a free media. Khiddu-Makubuya<sup>55</sup> argues that the causes of breaches of the rule of law and violations of human rights in Uganda are still very much around.

Mamdani<sup>56</sup> observed that the movement versus party question is becoming outdated as fast as the NRM/A is turning itself into a political party. The movement system has turned out to be a transitional arrangement that is giving way to political parties. He argued that there is no need for a referendum on the question of the movement versus party politics. It is important to note that most regional and international human rights instruments have combined constitutionalism, democracy and human rights as a *sine qua non* of each other. In this regard the Harare Commonwealth Declaration<sup>57</sup> as well as the

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<sup>53</sup> Onoria, H (2003) 'Protection and enforcement of human rights and freedoms under the 1995 Constitution: a study submitted in respect of collaborative research between the Centre for Basic Research (CBR) and the Faculties of Arts, Law and Social Sciences of Makerere University (MU) in respect of performance of 1995 Constitution of the Republic of Uganda after Five Years (1995-2000)' 1.

<sup>54</sup> n 19, recorded that the 1986 commission of inquiry into human rights violations was able to provide a detailed account of human rights abuses in Uganda. It is regrettable that the inquiry did not investigate violations beyond 1986.

<sup>55</sup> Khiddu-Makubuya, E 'The rule of law and human rights in Uganda- the missing link' in Hansen H. B *et al* (eds) *Changing Uganda* (1999) 217.

<sup>56</sup> Mamdani, M 'The politics of democratic reform in Uganda' (1995) 2 *East African Journal of Peace and Human Rights* 91 100.

<sup>57</sup> Harare Commonwealth Declaration (1991) available at <<http://www.thecommonwealth.org>>(accessed 12 August 2005).

New Partnership for Africa's Development (NEPAD)<sup>58</sup> are instructive. Article 79 of the NEPAD provides:

**ii) Democracy and Political Governance Initiative**

79. It is now generally acknowledged that development is impossible in the absence of true democracy, respect for human rights, peace and good governance. With the New Partnership for Africa's Development, Africa undertakes to respect the global standards of democracy, which core components include political pluralism, allowing for the existence of several political parties and workers' unions, fair, open, free and democratic elections periodically organised to enable the populace choose their leaders freely.

It is submitted that in Africa today constitutionalism, democracy and human rights must be understood in this context.

**2.5 Concluding remarks**

Above we have looked briefly at the ideals of constitutionalism, democracy and human rights. We have come to the conclusion that these concepts are not independent from each other, rather they are inseparable and intertwined. Butleritchie<sup>59</sup> states that:

The natural notion law notion that 'people' are supreme is conflated and reduced to an institution (or set of institutions) through which the will of the people (to use the eighteenth century terminology) can be joked and determined. These institutions create the appearance of control by the people, but frequently insulate the structures of state from actual democratic control. Democratic institutions then were built into apparatus of modern constitutionalism...Democracy in this view is dependent on constitutionalism.

This chapter has shown that it is generally agreed that constitutionalism in liberal political discourse revolves around issues of limited powers of government and individual rights. These issues make room for the rule of law, separation of powers, periodic elections, independence of the judiciary, and the right to private property.<sup>60</sup> Constitutionalism also implies that the constitution cannot be suspended, circumvented or disregarded by political organs of government, and that it can be amended only in accordance with the procedures appropriately enshrined to change the constitutional character, and that give effect to the will of the people acting in a constitutional mode.<sup>61</sup>

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<sup>58</sup> Available at <<http://www.nepad.org/2005/files/home.php>>(accessed 12 August 2005).

<sup>59</sup> n 45 27

<sup>60</sup> Ihonvbere, J.O, 'Towards a new constitutionalism in Africa' (2000) 13, also Kanyongolo, F 'The constitution and the democratic process in Malawi' in Sichone (ed) (1998) *The state and constitutionalism in Southern Africa* 2.

<sup>61</sup> Henri, L 'Elements of constitutionalism' (1998) 60*The Review* 12.

## CHAPTER 3 THE WRITING OF A DEMOCRATIC CONSTITUTION IN AFRICA WITH REFERENCE TO SWAZILAND AND UGANDA

### 3.1 Introduction

The constitution of a nation is not simply a statute, which mechanically defines the structures of government. It is a 'mirror reflecting the national soul' the identification of ideals and aspirations of a nation; the articulation of the values bonding its people and disciplining its government.<sup>62</sup>

Bradley and Wade<sup>63</sup> define a constitution as a thing *antecedent* to a government, and a government is only the creation of a constitution. A constitution is not the act of a government, but of a people constituting a government, and a government without a constitution is power without a right. These definitions tell us what a constitution is and why it is necessary. They explain why a constitution must be crafted with passion as well as its observance. Put differently, a constitution is an account of the ways in which a people establish and limit the power by which they govern themselves, in accordance with the ends and purposes that define their existence as a political community.<sup>64</sup>

In this chapter, we seek to address the following questions; Do the constitutions of Africa crafted in the 1990s, particularly those of Swaziland and Uganda 'reflect the national soul'? Do they identify the values, ideals and aspirations of the nation? Do they have in built mechanisms to limit the power and discipline the government? Do they promote and protect fundamental human rights and freedoms and civil liberties of the individual? Two preliminary issues are worth highlighting. These are who are the people? And who is the nation? This is precipitated by the fact that most often that not, African leaders refer and do things for and on behalf of their 'people' or the 'nation'. In this connection, King Sobhuza II proclaimed when he repealed the 1968 Constitution:

that I and my *people* heartily desire at long last, after a long constitutional struggle, to achieve full freedom and independence under a *constitution created by ourselves for ourselves* in complete liberty without outside pressures; as a *nation* we desire to march forward progressively under our own constitution guaranteeing peace, order and good government and the happiness and welfare of all our *people*.<sup>65</sup>

In ancient Greek the term 'people' referred to the many disadvantaged and property less mass.<sup>66</sup> However, in modern constitutional and democratic terms 'people' has been used in a number of ways.

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<sup>62</sup> *S v Acheson* 1991 (2) SA 805 at 813 per Mohamed DCJ (as he then was), cited with approval by Masuku J in *Rex v Mandla Ablon Dlamini* Criminal Case No. 7/2002 (HC) (unreported) 7.

<sup>63</sup> Above (n 41) 5.

<sup>64</sup> Belz, H 'Written constitutionalism as the American project' available at <[http://www.constitution.org/cmt/belz/lcfl\\_i.htm](http://www.constitution.org/cmt/belz/lcfl_i.htm)>(accessed on 3 August 2005).

<sup>65</sup> Decree 2(e) of the King's Proclamation (emphasis added).

<sup>66</sup> Heywood (n 47) 69.



People may be viewed as a single, cohesive and collective body bound together by a common or collective interest, in which case they are one and indivisible. This view tends to generate a model of democracy that focuses on the general or collective will of, rather than the private will. 'People' may mean 'the majority'. Used in this sense, democracy then means the strict application of the principle of majority rule in which the will of the many or numerically strongest overrides that of the minority, hence, degenerating into the tyranny of the majority. In the final analysis 'people' can be thought of as a collection of free and equal individuals, each of whom has a right to make independent decisions.<sup>67</sup>

Alongside the term 'people' is the word 'nation'. Heywood<sup>68</sup> suggests that this word symbolises a psycho-political construct. What sets a nation apart from any other groups or collectivity is that its members regard themselves as a nation. A nation perceives itself as a distinctive political community. For the sake of constitutional developments, it becomes crucial that a people as a nation come to some consensus on issues affecting governance. One person or a clique acting alone cannot claim to be acting for and on behalf of a people or a nation without their involvement.<sup>69</sup> It therefore poses the question whether the King had the authority to repeal the Constitution on behalf of the people of Swaziland. We also question whether the NRM/A government had the capacity to suspend the operation of political parties when it came to power.

### **3.2 Pre-conditions for the writing of a democratic constitution**

In 2003, a scholar wrote that:

We live in an era of constitution making. Of close to 200 national constitutions in existence today, more than half have been re-written. New nations and radically new regimes, seeking democratic credentials that are often a condition for recognition by other nations and by other international political, financial, aid, and trade organisations, make writing of a constitution a priority.<sup>70</sup>

Therefore, the purpose of writing a constitution is among other things to establish democratic credentials that will lead to democratic tradition guaranteeing good governance, the rule of law and the protection and promotion of fundamental rights and freedoms. Yet to achieve democratic credentials requires a good and viable constitution. It is for this reason that Odoki<sup>71</sup> observes that a good and viable constitution should be generally understood and accepted by the people. A constitution needs

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<sup>67</sup> As above.

<sup>68</sup> As above 106.

<sup>69</sup> Article 19 of the African Charter prohibits the domination of a people by another.

<sup>70</sup> Hart, V 'Democratic constitution making' Special Report, United States Institute of Peace available at <<http://www.usip.org>>(accessed 3 August 2005).

<sup>71</sup> Odoki, B. J 'Writing of a democratic constitution' (1993) 1 *East African Journal of Peace and Human Rights* 195-199.

to be put through the process of popularisation with a view to generate a public interest in it, and an attitude that everybody has a stake in it, that it is the common property of all. The people must be made to identify with the constitution. Without this sense of identification, of attachment, a constitution would always remain remote and artificial with less real existence than the paper on which it is written.<sup>72</sup>

There is considerable debate and opinions differ insofar as the method of people's participation is concerned, particularly, 'democratic constitution-making'.<sup>73</sup> How the constitution is made, matters as much as what it says.<sup>74</sup> It is for this reason that in the constitution-making practice of recent decades, norms of democratic procedure, transparency and accountability that are applied to daily political decision-making are also demanded of constitution deliberations.<sup>75</sup> It has been suggested that:

Ultimately the aim of the constitution-making process is the achievement of a constitution that is legitimate, credible and enduring. It must be a constitution, which guarantees the rights and freedoms considered to be fundamental for all people without unjustified grounds of discrimination. It must provide a structure for effective conduct of good governance, which promotes peace, economic development, and the welfare of its citizens. A constitution that is legitimate, credible and enduring should incorporate two elements. Firstly, it should provide for human rights and an independent judiciary. The second important attribute of such a constitution is that it must provide conditions for free and fair elections and an effective mechanism for the transfer of power.<sup>76</sup>

We submit that in order for such a constitution to be realised, emphasis must be placed on the process leading to its promulgation. The question of participation become of crucial significance. Hatchard<sup>77</sup> observes that the process must come from the integration of ideas of the major stakeholders in the country. These include the government, political parties, both within and without parliament, organs of civil society and individual citizens. It follows that the process is not one that the government should neither control nor unduly influence nor should it be a merely formal technical exercise.

Transition to a new constitutional order is no simple task. This explains why new practices of writing a democratic constitution has included prior agreements on broad principles as a guarantee of communication, right down to local community for and by all parties in the process, elections for

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<sup>72</sup> As above.

<sup>73</sup> Mapunda (n 46) 35.

<sup>74</sup> Hart (n 70) 4.

<sup>75</sup> As above.

<sup>76</sup> Mwanakatwe, J 'Constitution-making process' The Post, available at<[www.post.co.zm/mwanakatwe.html](http://www.post.co.zm/mwanakatwe.html)> (accessed 14 August 2005).

<sup>77</sup> Hatchard (n 30) 28.

constitution assemblies, open drafting committees aspiring to transparency and accountability of decision-making and approval by various combinations of representative bodies, such as democratically elected legislatures, courts or referendums.<sup>78</sup> The following are considered to be the essentials of a democratic process of writing a democratic constitution.

### 3.2.1 Democratic process

Democracy is a universally recognised ideal as well as a goal, which is based on common values, shared by peoples throughout the world community irrespective of cultural, political, social and economic differences.<sup>79</sup> Abraham Lincoln defined democracy to mean a '[G]overnment of the people by the people and for the people'.<sup>80</sup> Democracy exists where the people are organised according to the belief in and practice of principles of democracy.<sup>81</sup> It has been suggested that:

...it is hard to argue against democracy. A democratic constitution is no longer simply one that establishes democratic governance. It is also a constitution that is made in a democratic process. There is thus a moral claim to participation, according to the norms of democracy. A claim of necessity for participation is based on the belief that without the general sense of "ownership" that comes from sharing in the authorship, today's public will not understand, respect, support, and live within the constraints of constitutional government. Whether there is also a legal right to participate, for whom, and what all of this means in practical terms, are also key issues for modern constitutionalism, whose reputation and effectiveness depend upon democracy in its process as well as its outcome.<sup>82</sup>

The elite-made constitutions, according to the new paradigm, lack the crucial element of legitimacy. It will do so because the process, not just the final text, is seen as flawed. If the writing of a democratic constitution is to be meaningful, rather than working within the framework of an existing body of procedures and precedents, the process must be started from a clean slate.<sup>83</sup> In this regard, the setting up of commissions is fraught with scepticism because commissions tend to limit participation as it is constituted by very few people, most likely to be influenced by the government of the day and the findings depend on the discretion of the person who appoints the commission.<sup>84</sup>

A democratic constitution will ensure pluralism. Popular opinion suggests that there can be no democracy without pluralism. The AU under the NEPAD has put the matter beyond any doubt by

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<sup>78</sup> Hart (n 70) 2.

<sup>79</sup> Universal Declaration on democracy, reprinted in the *Netherlands Quarterly of Human Rights* (200) 1 127-130.

<sup>80</sup> Mapunda (n 46) 35.

<sup>81</sup> As above.

<sup>82</sup> Hart 3-4.

<sup>83</sup> As above 7.

<sup>84</sup> Mapunda (n 46) 37.

setting out the elements of democracy.<sup>85</sup> As such a multiparty dispensation is an essential element of democratic constitution-making. Pluralism guarantees the right to freedom of association, and enables effective participation in the process. Pluralism provides not only the government with different view points on issues of the day, it also provides the people with a choice of candidates, parties and policies for which to vote.<sup>86</sup> Be that as it may, provision must be made for individual independent candidates. Mulikita<sup>87</sup> contends that the role of political parties in promoting democracy cannot be over-emphasised. They are the very *raison d'être* of multiparty democracy; without them a country cannot be said to be democratic. Political parties ensure that the desires and felt needs, expectations and demands of their members are translated into concrete specific legislation, policies and programmes of government. They play a watchdog role for civil society.

### 3.2.2 Citizen participation

One of the fundamental virtues of democracy is the capacity of the citizens to participate freely without hindrance or let in the government.<sup>88</sup> It is the key role of the citizens. A right to public participation in constitution-making creates a stronger ground on which the process stands.<sup>89</sup> It is not desirable that people merely participate according to the manner prescribed by those managing the process, but according to ethos and dictates of democratic participation, and according to ground rules and procedures agreed upon. The right of individuals to participate in decision-making is envisaged in the human rights discourse and is provided for in several human rights instruments.<sup>90</sup> Participation must be understood in the light of inclusiveness,<sup>91</sup> including the empowerment of genuine civil society organisations to articulate the concerns of the voiceless.

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<sup>85</sup> NEPAD (n 58, also n 79).

<sup>86</sup> Mapunda (n 46) 40, Mulikita (n 35) 112.

<sup>87</sup> Mulikita 112.

<sup>88</sup> Nwabueze, B, O (1993) *Democratisation* 91 also *Figueroa v Canada (Attorney General)* in *Commonwealth Human Rights Law Digest* (2004) 3 430.

<sup>89</sup> Hart (n 70) 7.

<sup>90</sup> Kufour, K.O, 'The African Charter for Popular Participation in Development and Transformation: a critical review (2000) 18 *Netherlands Quarterly of Human Rights* 7.

<sup>91</sup> Mulikita (n 35) says that: '[T]he principle of inclusiveness in constitution making is important as it ensures broad participation and helps to build legitimacy and broad based ownership for the final product.' 111.

### 3.2.3 Equality

The very essence of human rights is equality. The UNDHR<sup>92</sup> provides that:

All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood.<sup>93</sup>

It is worthy to emphasise that a democratic constitution must be founded on equality. This means that people must be viewed and valued with equality, be accorded equal opportunities and not be discriminated against on any ground, such as race, ethnic group, colour, sex, language, religion, political or any other opinion, national and social origin, fortune, birth or any status.<sup>94</sup>

### 3.2.4 Free and fair elections

Free and fair multiparty elections are a hallmark of a democratic dispensation. They are deemed to lead to democratic and legitimate authority. A democratically written constitution must be the product of free and fair electoral systems and procedures regarding who participates.<sup>95</sup> Since democratic governance is established where people elect their government, it is imperative that those who write a country's constitution have the legitimate mandate and authority of the people. All obstacles and impediments that may prevent or make it difficult for people to elect their representatives must be removed. A constitution drawn as a result of a democratic process, inevitably enshrine the principle of free, fair and transparent elections, but also makes a smooth transfer of power from one government to another possible.<sup>96</sup>

### 3.2.5 Rule of Law and control of abuse of power

A democratic constitution can only be written under an environment where there is no abuse of power by officials of government. Constitution-making leads to a change of government, and as a process of transition, it is necessary that while the transition is being negotiated, proper checks and balances and mechanisms to prevent abuse of power to guide those in office are put in place. Mapunda<sup>97</sup> suggests that abuse of power can be minimised by structuring the government in a manner that provides mutual checks and balances between the Executive, the Judiciary and the Legislature, by having strong and

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<sup>92</sup> Adopted and proclaimed by General Assembly resolution 217 A (III) of 10 December 1948 available at <<http://www.un.org/Overview/rights.html>>(accessed 19 August 2005).

<sup>93</sup> Article 1 of the UNDHR.

<sup>94</sup> Article 2 of the African Charter.

<sup>95</sup> Mapunda (n 46) 38.

<sup>96</sup> Mulikita (n 35) 109.

<sup>97</sup> Mapunda 39, Mulikita suggests that holding regular free and fair elections can deter abuse of power, 109-110.

independent courts and agencies with power to act against any illegal action by government officials and by incorporating a Bill of Rights in the Constitution.

In a democracy the law is supreme. The writing of a democratic constitution, which is the supreme law, requires that during the process of writing, everyone respects the law and be accountable if they violate it. It has been suggested that in a democracy it is the “[L]aw which should be the King”. The King is subject to the law. It is crucial that government officials obey court orders and refrain from making disparaging and adverse comments concerning the judiciary and judicial proceedings. Government officials, however highly placed may not and should not discuss in public matters pending in courts. It will be in respect of the democratic process and to the Rule of Law and independence of the judiciary that the courts should be protected against any criticism which is merely cynical, invective, sarcastic or tending to bring the court into ridicule or contempt the administration of justice.<sup>98</sup>

### **3.2.6 Accountability and transparency**

Other attributes of a democratic process are transparency and accountability. While accountability means that officials must make decisions and perform duties according to the will and wishes of the people and not for themselves, and that they must be responsible for their actions, transparency means that public officials are answerable to the people. Transparency must exist at two levels. First at the level of electing or appointing leaders. A system of screening and scrutinising candidates must be established. In the second instance, once in office, public officials should be subject to criticism, commendations, and condemnation for their actions or misdeeds.

In relation to constitution-making, the body of officials elected to write the constitution must account to the electorate, whose mandate they execute. At the point of gathering the views of the people, transparency must not only be done it must be seen to be done. At the very least, a transparent process allows people to hold public meetings, regular briefings, and maintain communication with the citizens and operate collectively. Government does not let people speculate or indulge in rumours on matters of national interest and does not intimidate or muzzle the press.<sup>99</sup>

### **3.2.7 Political tolerance**

The making of a constitution is a political exercise. Political tolerance simple means that leaders must tolerate the views of those who disagree with them.<sup>100</sup> Since the task of writing a constitution involves a cross-section of society, tolerance of views is an essential element. Those in power must not stifle

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<sup>98</sup> As above 40.

<sup>99</sup> As above.

<sup>100</sup> Kadaga R, Deputy Speaker of the Parliament of Uganda, said ‘People should tolerate one another, irrespective of their divergent political views’ Sunday Monitor August 14, 2005 3.

the freedom of others from convening meetings and public gatherings to discuss, debate and interrogate issues pertaining to the process. They must not take offence where there is genuine criticism and that those who are not in power must be free and allowed to organise and speak out.

Tolerance also means that while the majority of the people govern, minorities must also be protected. Individual citizens must tolerate each other's views. Multiparty democracy ensures that the right of the people to organise is meaningful, for genuine public participation requires social inclusion, personal security, and freedom of speech and assembly. A strong civil society, civic education, and good channels of communication between all levels of society facilitate the process.<sup>101</sup> A constitution used to be thought of as a social contract, negotiated by appropriate representatives, concluded, signed and observed. In modern constitutionalism however, a constitution must be seen as a conversation, conducted by all concerned, open to new entrances and issues, seeking a workable formula that will be sustainable rather than assuredly stable.<sup>102</sup>

### 3.2.8 Human rights

It is generally accepted that human rights are entitlements a person has and enjoys by virtue of being a human being.<sup>103</sup> They are inalienable, inherent, universally recognised and indivisible. A democratic process of writing a democratic constitution cannot be executed under an environment where fundamental rights and freedoms are restricted. In any case, these rights must be entrenched in the constitution,<sup>104</sup> so before they are entrenched, they must be enjoyed. It is only logical that these rights be enjoyed at the time the process of writing a democratic constitution is going on in order to enable citizens to organise and participate freely.

In summary, we contend that a democratic process of writing a democratic constitution provides a forum for peaceful resolution for competing interests. It is only through a constitution that ensures legitimacy and respect for those who govern and the governed. A constitution, which is a product of democratic process, is a vehicle for good governance and development. Popular participation has been recognised as vital in the successful resolution of conflicts.<sup>105</sup>

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<sup>101</sup> Hart (n 70) 1.

<sup>102</sup> As above 3.

<sup>103</sup> Reproductive Health Outlook available at <<http://www.rho.org/html/glossary.html>>(accessed 30 August 2005).

<sup>104</sup> Mapunda (n 46) 41.

<sup>105</sup> Above (n 90). Elements of a democratic process of writing a constitution are further discussed by Modiba, S and Duncan J 'Whose constitution is it?: Constitution-making and constitutionalism in Southern Africa' (2004) 4 *Open Society Initiative for Southern Africa* 4 7.

### 3.3 The case of constitution-making in Swaziland

#### 3.3.1 Brief constitutional background

Swaziland gained independence from the United Kingdom on 6 September 1968<sup>106</sup> through a Westminster-type constitution. Hlatswayo<sup>107</sup> discusses the structure of the Constitution and states that it established the three arms of government, the parliament,<sup>108</sup> executive<sup>109</sup> and judiciary.<sup>110</sup> This Constitution, it is worthy of mention, was preceded by a 1967 Constitution under which national elections were held, under a multi-party system on the 20 April 1967.<sup>111</sup>

#### 3.3.2 Repeal of the 1968 Constitution

There seem to be consensus among constitutional writers that the most significant factor attributable as a major reason for the repeal of the Constitution was the emergence of the opposition Ngwane National Liberatory Congress (NNLC) in Parliament after the 1972 general elections. Hlatshwayo<sup>112</sup> writes that the loss of three seats by the Imbokodvo National Movement (INM) actually ushered in a new era in Swaziland's political culture. When the new Parliament convened the next year, there was almost tangible tension between the ruling party, the INM, and the opposition NNLC. It would seem that the INM Members of Parliament (MPs) were bent on making the life of the opposition difficult by exhibiting a somewhat hostile attitude. This tension came to a breaking point when the Government declared one of the opposition members, Thomas Bhekindlela Ngwenya, a prohibited immigrant.

The repeal of the Constitution is perhaps one of the significant events in the constitutional history of Swaziland.<sup>113</sup> It is more important because it marked the first constitutional crisis of the newly independent state, and its cause can be traced to the existence of constitutional rules from two separate sources within one system.<sup>114</sup>

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<sup>106</sup> Above (n 31).

<sup>107</sup> Hlatswayo, N. A 'The ideology of traditionalism and its implications for principles of constitutionalism: the case of Swaziland', (unpublished Master of Laws thesis October 1992) 130.

<sup>108</sup> Chapter V of the 1968 Constitution.

<sup>109</sup> Chapter VII of the 1968 Constitution.

<sup>110</sup> Chapter IX of the 1968 Constitution.

<sup>111</sup> Matesbula (n 12) 243.

<sup>112</sup> At 101.

<sup>113</sup> Khumalo, B 'Legal pluralism and constitutional tensions: the evolution of the constitutional system in Swaziland since 1968' (unpublished Master of Laws thesis June 1993) 96.

<sup>114</sup> Khumalo contends that the different sources were that the independence Constitution attempted to separate the elements of the traditional political system from the modern constitution system within one system, 96.



### 3.3.3 The Bhekindlela Thomas Ngwenya cases

The political controversy over the presence of the NNLC in parliament resulted in three of the most significant judicial pronouncements in the short history of the modern Constitution. The *Ngwenya* cases were a test of the role of the judiciary as the custodian of the Constitution, rights and freedoms.<sup>115</sup> Before the elected members of parliament could be sworn in, it was alleged that one of the members of the opposition NNLC, Bhekindlela Thomas Ngwenya was not a citizen of Swaziland. The Deputy Prime Minister, as Minister responsible for immigration, issued a declaration declaring *Ngwenya* a prohibited immigrant.<sup>116</sup>

*Ngwenya* challenged the declaration, seeking an order declaring him to be “a citizen of Swaziland.”<sup>117</sup> Delivering judgement Sir Phillip Pike CJ (as he then was) first observed that in view of the importance of the matter, affecting as it did the fundamental rights of a person who claimed to be a citizen and who had been resident in Swaziland for some years until his deportation, a direction was given that it be heard by the full bench of two judges. On a balance of probabilities the court was not satisfied that government had proved that *Ngwenya* was not a citizen of Swaziland, and consequently the deportation order was set aside.

Government appealed. While the appeal was pending, an amendment to the Immigration Act<sup>118</sup> was rushed and tabled to Parliament and quickly passed into law. The Amendment Act established a tribunal to decide cases of disputed nationality. An appeal against its decision could be made to the Prime Minister whose decision was final, thus excluding the jurisdiction of the courts. Its application was to be retrospective.<sup>119</sup> The tribunal invited *Ngwenya* to appear before it so that it could determine his citizen status.<sup>120</sup> This was despite the fact that *Ngwenya*'s citizenship had been confirmed by the High Court. The tribunal came to the conclusion that *Ngwenya* was not a citizen of Swaziland in that

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<sup>115</sup> As above 102.

<sup>116</sup> Purportedly issued in terms of section 9(1)(g) of the Immigration Act No. 32 of 1964, published under Government Gazette No. 65 of 1972.

<sup>117</sup> *Bhekindlela Thomas Ngwenya v The Deputy Prime Minister* 1970-76 SLR (H.C) 88.

<sup>118</sup> Immigration (Amendment) Act No. 22 of 1972.

<sup>119</sup> Khumanlo 105.

<sup>120</sup> Mthembu, R.S 'Human rights and parliamentary elections in Swaziland' in Okpaluba (n 18) 124.

he was born in the Republic of South Africa. *Ngwenya*<sup>121</sup> challenged the competence of the decision of the tribunal as well as its constitutionality. Hill CJ (as he then was) sitting alone dismissed it.<sup>122</sup>

This judgment was clearly wrong, based on a deliberate lack of appreciation of the relationship between an Act of Parliament on the one hand and the Constitution on the other as well as the role of the courts in protecting and promoting fundamental rights and freedoms. Overturning Hill CJ, the Court of Appeal<sup>123</sup> held that constitutionally, legislative interference with the jurisdiction of the High Court would be an alteration of the Constitution hence it required a joint sitting of Parliament in compliance with the requirements of section 134 of the Constitution. Constitutional writers observe that the finding of the Court of Appeal enraged government.<sup>124</sup> It was as a result of this decision that the Constitution was repealed. In the afternoon of 12 April 1973, the Prime Minister introduced a motion in both Houses of Parliament to the effect that the Constitution be abrogated.<sup>125</sup> Members of the opposition walked out of parliament in protest to these constitutional manoeuvres, and the motion received unanimous support from both Houses.<sup>126</sup> On the same day, King Sobhuza II announced the repeal of the Constitution.<sup>127</sup>

### 3.3.4 Judicial pronouncements on the Proclamation

Both the High Court<sup>128</sup> and the Court of Appeal of Swaziland<sup>129</sup> have in different judgments come to the conclusion that the repeal of the Constitution was unlawful. In the High Court judgement although he found that the repeal was unlawful, Masuku J concluded that it could not be set aside because it had become a *grundnorm*. Sapire CJ disagreed and questioned whether the Proclamation had become such a *grundnorm* and said:

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<sup>121</sup> *Bhekindlela Thomas Ngwenya v The Deputy Prime Minister and the Chief Immigration Officer* 1970-76 SLR (H.C) 119.

<sup>122</sup> Khumalo writes that in the intervening period between the first application and this one, Chief Justice Sir Phillip Pike had vacated office. He does not tell us the reasons, 107.

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

<sup>124</sup> Mthembu, Hlatswayo and Khumalo all agree that the government was not pleased with the decision and this led to the ruling party manoeuvring the Constitution and its electoral process.

<sup>125</sup> Matsebula 258.

<sup>126</sup> Hlatswayo 145.

<sup>127</sup> King's Proclamation to the Nation.

<sup>128</sup> *Lucky Nhlanhla Bhembe v The King* Criminal Case No 75/2002 (H.C) per Masuku J, *Nhlanhla Lucky Bhembe and Ray Gwebu and Another Criminal Case* Nos. 75 and 11 of 2002 per Sapire CJ (unreported).

<sup>129</sup> *Ray Gwebu v Rex and Lucky Nhlanhla Bhembe v Rex* Criminal Case Nos. 19 and 20 of 2002 (C.A) (unreported).

...The Late King purported to act in accordance with powers he claimed to have, but which were nowhere to be found provided for in the 1968 independence constitution. I appreciate that a host of conundrums stem both from the view I express, and that enumerated by my brother. If the abrogation by proclamation of the 1968 constitution was incompetent in 1973, can the passage of time alone convert what was invalid into a grundnorm? At what stage did that which was invalid become valid? If the validity had been tested in earlier years close to 1973 what would have been the result? Can the 1973 Proclamation and the later confirmatory decrees become of themselves a valid empowerment of the King to legislate by Decree? Does it really alter the outcome because the issue is only put squarely to the test some thirty years after the event? Is not the process by which my brother sees the development and establishment of the grundnorm, nothing more than the negation of the Rule of Law? I would be hard pressed to answer these questions with confidence, but incline to the view that the opinions endorsed by my brother are a negation of the Rule of Law. I question whether the King ever has had power to amend much less to abrogate the Constitution, whether by decree or otherwise. The 1968 Constitution had as my brother has observed provision for its amendment. Perceived impracticality of this provision could not itself empower or justify abrogation.”<sup>130</sup>

This was judicial activism at its best. However, this judgment could not survive, as the Court of Appeal<sup>131</sup> disagreed holding that what happened in 1973 was a successful ‘revolution’ on the strength of the judgments of *Madzimbamuto v Lardiner-Burke and Another*,<sup>132</sup> *Mangope v van der Walt and Another NNO*<sup>133</sup> as well as *Michell and Others v Director of Public Prosecutions*.<sup>134</sup> The court per Browde JA said that:

Finally, the indications before us are that the Government was not opposed, at least ostensibly, to a democratic dispensation. I say this despite a strong feeling amongst many that thus far this ostensible attitude has been mere lip-service.<sup>135</sup>

We argue that the court missed a golden opportunity of helping re-write in a constructive<sup>136</sup> way the constitutional history of Swaziland. We contend that not only is such statement erroneous, but also misleading because respect for fundamental rights and freedoms even at the time the decision was delivered was absolutely nil, as the very Proclamation which the court was called upon to decide its validity was and still is denying citizens their rights. The constitution-making process has never been spared criticism. It is regrettably that the court came to this conclusion. It would have been better if the

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<sup>130</sup> Above (n 128) 3.

<sup>131</sup> Above (n 129).

<sup>132</sup> (1968) 3 All ER 561 (PC).

<sup>133</sup> 1994 (3) SA 850 (BGD)

<sup>134</sup> (1987) LRC (Const) 127.

<sup>135</sup> Above (n129) 16.

<sup>136</sup> Udombana, N.J ‘Interpreting rights globally; courts and constitutional rights in emerging democracies’ (2005) 5 *AHRLJ* 47 67.

court did not pronounce on the willingness or otherwise of the government to embrace democratic governance as this matter is still hotly contested.

In any event, the court had already found that the Proclamation violated the provisions of the African Charter. In our view, the court ought to have gone the extra mile of declaring the Proclamation null and void, notwithstanding that the African Charter had not been incorporated into national law.<sup>137</sup>

### **3.3.5 The making of the Constitution (the 'Cattle Byre Constitution')**

The search for a constitution in Swaziland began on 6 September 1973 when Sobhuza II appointed a Royal Constitutional Commission (RCC) with the mandate of going throughout Swaziland to get the views of the people on the form of constitution they wanted.<sup>138</sup> The RCC made two fundamental recommendations; that Swaziland be declared a no-party state with the Swazi National Council (SNC) being the only policy-making body, and that there must be a two-chamber house of parliament composed of the assembly and senate. The Constitution Advisory Committee (CAC), whose task was to look at the report of the RCC and advise the King on the suitability of the report, followed it. The coming about of the 2005 Swaziland Constitution, which His Majesty King Mswati III signed into law on 26 July 2005,<sup>139</sup> has therefore taken thirty-two years.

#### **3.3.5.1 The *Tinkhundla* Review Commission (TRC) 1992**

As pressure for constitutional reforms mounted,<sup>140</sup> the King appointed a number of committees and commissions. The first of this came to be popularly known as *Vusela I* and its mandate was the same as the earlier 1973 commission. The system was severely criticised as people called for the introduction of multiparty democracy and a constitutional monarch,<sup>141</sup> the result of which was the

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<sup>137</sup> *Registered Trustees of the Constitutional Rights Project (CRP) v The President of the Federal Republic of Nigeria and Others* Suit No. M/102/93, the High Court of Lagos State per the Honourable Justice, Onalaja, O found that the fact that Nigeria had ratified and incorporated the Charter means that municipal law cannot prevail over international law. The judge continued to hold that, even if the Charter had not been incorporated, the position would have remained the same; discussed by Ngabirano, P, B 'Case Comment- does municipal law prevail over international human rights law in Africa?' *East African Journal of Peace and Human Rights* (1995) 2 102.

<sup>138</sup> Matsebula (n 12) 265.

<sup>139</sup> The Times of Swaziland 27 July 2005 carried as a headline on the front page 'Historic!' on the same note The Swazi Observer 27 July 2005 proclaimed 'A new identity for Swaziland'.

<sup>140</sup> Organisations such as the Swaziland Federation of Trade Unions (SFTU), the banned Peoples' United Democratic Movement (PUDEMO) and the Swaziland Youth Congress (SWAYOCO), Swaziland National Association of Teachers (SNAT), and later the Swaziland Federation of Labour (SFL) and the revived Ngwane National Liberatory Congress (NNLC) and others demanded genuine democratic changes.

<sup>141</sup> Baloro (n 32) 51.

appointment of the *Tinkhundla* Review Commission (TRC).<sup>142</sup> Its terms of reference included considering and making appropriate recommendations to promote the democratic process in Swaziland.<sup>143</sup>

The TRC was accountable to the King<sup>144</sup> and its reports were to be confidential and not disclosed to anybody until further notice,<sup>145</sup> any member of the public who wanted to make submissions would do so in person and could not represent or be represented at any instance in any capacity.<sup>146</sup> Because it was single-handedly appointed, the Commission was received with mixed feelings. Organised pro-democracy groups denounced it as being undemocratically appointed and that one person drew up its terms of reference.<sup>147</sup> It presented its report<sup>148</sup> to the King and recommended among others that there must be a written constitution for Swaziland<sup>149</sup> and that some people wanted political parties while others did not.<sup>150</sup> It recommended that it had carefully considered both views and was of the view that multiparty is not one of the principles of democracy whilst it is certainly one of its mechanisms. It however concluded that the nation's opinion on multiparty or the unbanning of political parties be tested in the future.<sup>151</sup>

### 3.3.5.2 The Constitutional Review Commission (CRC) 1996

At the height of political unrest and instability, the King appointed the Constitutional Review Commission (CRC).<sup>152</sup> Although its terms of reference were initially to produce a draft constitution for Swaziland, the mandate was subsequently changed so that it had to produce a report.<sup>153</sup> It presented

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<sup>142</sup> Established by Decree No.1/1992.

<sup>143</sup> Section 3(d) of Decree No. 1/1992.

<sup>144</sup> Section 4 of Decree No. 1/1992.

<sup>145</sup> Section 5 of Decree No. 1/1992.

<sup>146</sup> Section 9 of Decree No. 1/1992.

<sup>147</sup> One of the members, Mandla Hlatshwako refused to participate in the Commission and his organisation, PUDEMO refused that he be part of it because they had not mandated him. See Mzizi, J.B 'Leadership, civil society and democratisation in Swaziland' in Bujra, A. *et al* (eds) (2002) *Leadership, Civil Society and democratisation in Africa: case studies from Southern Africa* 165 also Russon, R 'Social movements and democratisation in Swaziland' in Sachikonye, L (ed) (1995) *Democracy, civil society and the state: social movements in Southern Africa* 66.

<sup>148</sup> TRC Report 30 June 1992.

<sup>149</sup> TRC Report paragraph 44.

<sup>150</sup> TRC Report paragraph 49.

<sup>151</sup> TRC Report paragraph (k) 88.

<sup>152</sup> Established by Decree No. 2/1996.

<sup>153</sup> Amendment Decree No.1/2000.

its report to the King in August 2001.<sup>154</sup> The report is shallow, lack statistical support for the recommendations, misleading and contradictory in many respects. It states that the Commission was ‘truly representative of all political persuasions and opinions. Members were drawn from political organisations, trade unions, medical doctors, lawyers, civil servants, the private sector, University Professors and lecturers, businessmen, Chiefs, Priests, whites, coloureds and indigenous Swazis.’<sup>155</sup> It does not mention that the members did not represent constituencies, but serving in their individual capacities. Section 4 of the Decree reads:

#### Representation

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

That the members did not represent any body is clear from the Commission’s admission that for the reason of section 4 above, ‘group submissions were not allowed...In a way, it could be said that the collection of the submissions was done ‘in camera’.<sup>156</sup> We contend that the recommendations of the CRC failed to ensure that the writing of the constitution would guarantee constitutionalism. It failed to ensure that the three arms of government are clearly demarcated and delimited.<sup>157</sup> In making the King an absolute monarch it recommended, “there is a (small) minority which recommends that the powers of the Monarchy must be limited.”<sup>158</sup>

It recommended that the King continues to hold executive authority with the power to appoint and dismiss the Prime Minister and Ministers,<sup>159</sup> fundamental rights and freedoms must not be incompatible with Swazi custom and tradition,<sup>160</sup> the right to freedom of association and assembly, to form and join political parties continue to be restricted as political parties must remain banned.<sup>161</sup> While courts are the custodians of the law, they are to apply the law with due regard to the customs and traditions of the Swazi people. The courts’ jurisdiction on bail matters is severely curtailed in that

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<sup>154</sup> CRC Final Report on the submissions and progress report on the project for the recording and codification of Swazi Law and Custom.

<sup>155</sup> CRC Report 21.

<sup>156</sup> CRC Report 27.

<sup>157</sup> CRC Report 21. The reference to Swazi law and custom is as provided for under Amendment Decree No. 1 of 1982 and the Kings’ Proclamation as it makes the King an absolute monarch by vesting all powers in him.

<sup>158</sup> As above.

<sup>159</sup> As above 80-81.

<sup>160</sup> As above 83.

<sup>161</sup> As above 95.

they should not grant bail.<sup>162</sup> That the recommendations were not meant for the production of a constitution that would ensure constitutionalism was well expressed by Okapaluba when he said:

If you give me the Constitutional Review Commission document, there is nothing to put down there, there is no principle there that can enable anybody to draft anything... If you talk of Swaziland, I think the CRC had every opportunity to put in some of those things there. They had five (5) years to do that. Where are the documents they are supposed to have read, to show the homework they did, that they have consulted the people?<sup>163</sup>

### 3.3.5.3 The Constitution Drafting Committee (CDC) 2002

Like the previous bodies, the King handpicked members of the Constitution Drafting Committee (CDC).<sup>164</sup> Its function was to draft in consultation with the Attorney General and other experts, a constitution suitable for the Kingdom of Swaziland<sup>165</sup> and was accountable to the King.<sup>166</sup> Criticism against it being undemocratically elected fell on deaf ears as the Committee continued to work. Dissenting voices called for a more open and democratically elected, all-inclusive and broad-based structure. Organisations demanded among others, that all obstacles and impediments to free political participation and activity be removed; the Prince David led CDC be democratised and widened up to encompass all stakeholders on agreed ground rules and terms of reference; there must be put in place an interim transitional executive authority; there must be put in place an autonomous electoral body and there must be agreement on an appropriate time for elections.<sup>167</sup>

The Commonwealth Expert Team later observed that: '[W]e do not regard the credibility of these National Elections as an issue: no elections can be credible when they are for a Parliament which does not have power and when political parties are banned.'<sup>168</sup> The report further recommended for an early promulgation of a new constitution providing for the power to be held by Parliament, political parties and ensuring respect for the rule of law; establishment under the constitution of an independent election management body and other issues.

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<sup>162</sup> As above 82.

<sup>163</sup> Okapaluba, C 'Constitutions and constitutionalism' a paper delivered at the workshop of the Council of Swaziland Churches (n 49).

<sup>164</sup> Decree No.1/2002.

<sup>165</sup> Section 3 of Decree No.1/2002.

<sup>166</sup> Section 9 of Decree No. 1/2002.

<sup>167</sup> There was a demand that the October 2003 national elections be postponed pending the finalisation of the constitution, in terms of which elections would be conducted even if they would establish an interim government.

<sup>168</sup> Commonwealth Secretariat (n 17) 18.

#### 3.3.5.4 Presentation of the draft constitution and reactions

The CDC produced its first draft constitution and presented it to the King on 31 May 2003.<sup>169</sup> The King extended its period to purportedly allow the people to read and make inputs before the constitution could be adopted. Even as this was happening, the call for an open all-inclusive process based on the free and popular will of all the people continued.<sup>170</sup> The draft constitution was subjected to all forms of criticism. First among them being that it was not written in the vernacular language<sup>171</sup> to enable the vast majority of illiterate Swazis to read and understand it. As a result, a SiSwati version was produced.

Local and international organisations presented the most critics. Among these the (IBA)<sup>172</sup>, which observed that in order that a constitutional review and making-process is legitimate, it must satisfy four tests. These are that, the process must be as inclusive as possible, as transparent as possible, as participatory as possible and it must be accountable to the people. AI<sup>173</sup> produced its observations, which it made available to the CDC. The CDC and government accused organisations of interfering and refused them entry to local communities for purposes of conducting civic education.<sup>174</sup>

#### 3.3.5.5 Rule of law crisis

One of the major challenges that the CDC faced was that it worked under an environment when the country was facing a crisis in the Rule of Law. In November 2002, the Court of Appeal delivered two judgments,<sup>175</sup> the essence of which was that the King lacked authority to make law by decree and

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<sup>169</sup> In his written presentation the Chairman informed the King and the world that they as the Committee had thought long and hard about a system that Swaziland should follow, and concluded that the country should remain a no-party state. From this it is clear that it is not the people who do not want democracy but those who were tasked to write the constitution for and on behalf of the people.

<sup>170</sup> These calls were being made by many groups including Lawyers for Human Rights (S), the newly formed Swaziland Coalition of Concerned Civic Organisation (SCCCO), later joined by the National Constitutional Assembly (NCA) formed on 27 September 2003 with a view to concentrate on influencing the direction of the process and if need be, produce an alternative working constitution from the point of view of civil society.

<sup>171</sup> Kalu, A 'Language and politics: towards a new Lexicon of African constitutionalism' in Oloka-Onyango, J (editor) (2001) *Constitutionalism in Africa creating opportunities, facing challenges* 37-51 39, the writer argues that because African constitutions are written in foreign languages, they tend to convey values they do not uphold.

<sup>172</sup> The IBA came out with 58 recommendations all of which were ignored by the CDC (n 16) 27.

<sup>173</sup> Amnesty International (n 15).

<sup>174</sup> Such organisations included Lawyers for Human Rights (S), Women and Law Southern Africa Research Trust (Swaziland Chapter), the Co-ordinating Assembly of Non-governmental Organisations (CANGO), SCCCOC and others.

<sup>175</sup> *Ray Gwebu and Lucky Nhlana Bhembe above and Commissioner of Police and Two Others v Madeli Fakudze* Civil Appeal Case No. 38/2002 (unreported).



committing the Commissioner of Police for contempt of court. In response government issued a statement in which it refused to comply contending that the judges had no power to strip the King powers given to him by the Swazi people. The statement alleged that forces outside the system influenced the judges and that they had not acted independently. As a result, government declared that it would not recognise the judgements.<sup>176</sup> In December 2002, all the judges of the Court of Appeal resigned.<sup>177</sup> The full bench of the High Court in defending the impaired integrity and dignity of the court issued an order that the Prime Minister purges his contempt.<sup>178</sup> He refused.

Other cases in which the government showed gross contempt for the Rule of Law are the *Lindiwe Dlamini v Qethuka Sigombeni Dlamini and Tuluwane Sikhondze*.<sup>179</sup> In this case the Attorney General in the company of the Major General of the Umbutfo Swaziland Defence Force Sobantu Dlamini, the Commissioner Police Edgar Hillary and the Commissioner of Prisons Mnguni Simelane confronted the judges presiding over the case. They instructed the judges to stop hearing the matter or resign.<sup>180</sup> The judges refused to resign choosing to stand by the oath of office.<sup>181</sup> One more case that deserves mention is that of Ben Zwane.<sup>182</sup> Zwane was purportedly transferred from his position as Clerk to Parliament to that of Under Secretary in the Ministry of Agriculture and Cooperatives. He challenged the transfer at the Industrial Court, which found in his favour. The Prime Minister and government refused to comply with the judgement, contending that it had taken a political decision. To date it has been observed that the crisis in the rule of law continues.<sup>183</sup> AI<sup>184</sup>, the IBA and the ICJ make a full discussion of these developments.<sup>185</sup>

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<sup>176</sup> Press Statement 22/02 His Excellency the Right Honourable Prime Minister Dr. B.S.S. Dlamini 28 November 2002.

<sup>177</sup> They only resumed work around June 2005 after a protracted process of negotiations with the government, after the Minister for Justice and Constitutional Affairs who also was Chairman of the Constitution Drafting Committee filed an affidavit undertaking that all judgments of the Court will be complied with. All along the country operated without a Court of Appeal.

<sup>178</sup> *The Attorney General v Ray Gwebu and Lucky Nhlanhla Bhembe* Case No. 3699/2002 (H.C) (unreported).

<sup>179</sup> Civil case No. 3091/2002 (H.C) (unreported),

<sup>180</sup> A letter dated 1 November 2002 in court file confirmed this.

<sup>181</sup> Statement read in open court by Chief Justice Sapire, court file.

<sup>182</sup> Industrial Court Case No 20/2002 (unreported).

<sup>183</sup> Statement of the Coalition published in the Times of Swaziland Sunday 24 August 2005 available at <<http://www.times.co.sz/058.html#article 9>>(accessed 24 August 2005).

<sup>184</sup> Amnesty International, 'Swaziland human rights at risk in a climate of political and legal uncertainty' 20 July 2004' available at <<http://www.amnesty.org/AI/indexAFR55/004/220>>(accessed 8 September 2005).

<sup>185</sup> Above (n 14 and 16 respectively).

### 3.3.5.6 Persecution of dissenting voices

In the meantime, dissenting voices to the regime were being prosecuted. A case in point is that of leaders of the trade unions<sup>186</sup> and the trial of Mario Masuku, leader of the opposition PUDEMO. Masuku was charged with the crime of sedition<sup>187</sup> for allegedly uttering in public words translated to mean, 'Down with His Majesty King Mswati's reign' and having made a statement in public persuading churches, schools, and colleges, Universities everywhere and every house that all these places should become houses for revolution. The court acquitted and discharged him on the ground that the prosecution had failed to prove its case beyond reasonable doubt.<sup>188</sup>

These are the conditions under which the Constitution of 2005 was written. The question that begs an answer is whether it can be said that the process was designed to give birth to a credible democratic constitution reflecting the genuine aspirations and views of the Swazi people? In this study we take the position that the Swaziland constitution-making process was not designed to yield such a constitution.

### 3.3.5.7 A process gone wrong

Four organisations filed an application to the High Court under the NCA<sup>189</sup> for an order among others, that they are entitled to participate in the process, pursuant to the relevant provisions of Decree No. 2 of 1996, that they are and have always been entitled in pursuit of their right and legitimate expectations to participate in the constitution-making process in that the CRC was obliged at all material times to receive and consider oral and written presentations from applicants in terms of the African Charter and the NEPAD.

While the proceedings were pending in court, the King purportedly exercising customary powers summoned the nation to the *Ludzidzini* Royal residence to debate the draft constitution. The four organisations, applicants in the above-mentioned matter attended the meeting and raised objections to the discussion on the ground of the rule of *sub judice*.<sup>190</sup> However, the meeting proceeded government contending that there was no court order stopping discussion of the draft constitution. Eventually organised groups withdrew from the discussion after complaining to the Chairman that the proceedings were in any event stage-managed and they were not given a fair chance to present.

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<sup>186</sup> Amnesty International Report on Swaziland available at <<http://web.amnesty.org/web/ar2001.nsf/webafrcountries/SWAZILAND?OpenDocument>>(accessed 8 September 2005).

<sup>187</sup> Section 4(1)(b) of the Seditious and Subversive Activities Act No. 46 of 1938 as amended.

<sup>188</sup> *Rex v Mario Masuku* Criminal Case No. 84/2001 (H.C) (unreported) see Amnesty International Report on Swaziland available at <<http://web.amnesty.org/web/ar2002.nsf/afr/swaziland?Open>>(accessed 8 September 2005).

<sup>189</sup> Civil Case No 1671/2004 (H.C).

<sup>190</sup> Letter presented to the Chairman of the meeting Prince David in September 2004.

### 3.3.5.8 Swaziland Constitution Bill No. 8 of 2004

In October 2004 the Swaziland Constitution Bill No. 8 of 2004 was presented and tabled before Parliament. Before the debate started, the four organisations again filed an urgent application seeking an interdict, preventing Parliament from debating and passing the bill into law.<sup>191</sup> The basis of the application was that pending the determination of the main application discussed above, Parliament must be interdicted from debating the constitution. They contended that Parliament was not independent and therefore not suited to enact a national constitution, in the light of its powerlessness. The full bench of all five judges of the High Court heard the matter<sup>192</sup> and dismissed it, upholding points *in limine*<sup>193</sup> raised by the Attorney General on behalf of the respondents, with reasons delivered later.

In a judgement of 23 March 2005, the court gave its reasons. An analysis of this disappointing judgement is beyond the scope of the study. It suffices to say that the judgement represents a very sad day for Swaziland insofar as judicial activism is concerned.<sup>194</sup> The court missed yet another opportunity of rising to the occasion in defence of fundamental rights and freedoms to guarantee the right to participation. It wrongly found that according to Decree No. 2 of 1996, organisations have no right to participate in the process. It held that labour unions are creatures of industrial laws and therefore have no business with the constitution and that political parties remain banned in terms of the King's Proclamation.

### 3.3.5.9 Adoption of the Constitution

Amidst the challenges to the process, the King after referring back to Parliament the areas he wished to be revisited signed the constitution into law. Although Parliament enacted the Constitution and later rubber-stamped by the 'people' at the meeting convened at *Ludzidzini* royal residence, the adoption method itself is subject to the court challenge, which at the time of writing this research was still before the court.<sup>195</sup> Applicants seek an order directing the Government to convene and constitute a constitutional assembly, national convention or such other democratic institution, which the court

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<sup>191</sup> *Swaziland Federation of Trade Unions, People's United Democratic Movement, Swaziland Federation of Labour, Ngwane National Liberatory Congress v Chairman of the Constitutional Review Commission and Six Others* Civil Case No. 3367 /2004.

<sup>192</sup> Annandale ACJ, Matsebula J, Maphalala J, Nkambule AJ and Shabangu AJ.

<sup>193</sup> The Attorney General had argued that the applicants had failed to establish urgency, that the court had no jurisdiction to entertain the matter since it was a matter affecting the principle of separation of powers, that the applicants had no *locus standi* and that the applicants failed to set out grounds for an interdict among others.

<sup>194</sup> Tibatemwa-Ekirikubinza, L 'The judiciary and enforcement of human rights: between judicial activism and judicial restraint' (2002) 8 *East African Journal of Peace and Human Rights* 145-173, see also Udombana (n 136).

<sup>195</sup> Above (n 189).

deems necessary, which is broadly representative of the Swaziland society, including all representative bodies that are entitled to and are willing to take part.

It is not surprising that while the King said that 'no one should complain about the constitution, but follow what it says';<sup>196</sup> it remains rejected by many organisations.<sup>197</sup> It is not enough that the international community has welcomed the Constitution.<sup>198</sup> The Secretary of the Commonwealth Don McKinnon is on record having said that the adoption of the Constitution is a historic day for the people of Swaziland!<sup>199</sup> In this study, we observe that while the international community has played a significant role in ensuring that Swaziland has a written Constitution, particularly the Commonwealth, it has however, reneged from its fundamental principles as enshrined in the Harare Declaration.

### 3.3.5.10 Amendment clause

Like its predecessor the 1968 Constitution, the 2005 Constitution provides for a method of amendment.<sup>200</sup> Its mode of adoption is substantially the same as the provisions of section 134 of the 1968 Constitution. In order to amend it, a joint sitting of both Houses of Parliament is required.<sup>201</sup> The bill to amend the Constitution must be published in the Gazette for not less than thirty days.<sup>202</sup> Where the amendment is to affect specially entrenched provisions it needs the votes of not less than three-quarters of all members of the two chambers<sup>203</sup> and it must be submitted to a referendum and get approval of a simple majority of all votes validly cast.<sup>204</sup> For the entrenched provisions the

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<sup>196</sup> The Times of Swaziland July 27 2005, The Swazi Observer July 27 2005.

<sup>197</sup> Statement of the SCCCO published on 24 August 2005, the NCA statement of July 2005. PUDEMO said in 2004 and their position has not changed "We will only be interested in a constitution that would be inclusive of the entire people of Swaziland, not just a few. So we reject this draft constitution with contempt," available at <[http://www.irinnews.org/report.asp?ReportID=35515&SelectRegion=Southern\\_Africa](http://www.irinnews.org/report.asp?ReportID=35515&SelectRegion=Southern_Africa)>(accessed 29 August 2005). Commenting during the visit by Njogonkulu Ndungane the Bishop of the Anglican Church of Southern Africa, Swaziland's Anglican Bishop Meshack Mabuza said on his country's controversial palace-driven constitutional reform process: "It is not the content of the constitution that bothers us, it is the process of the constitution - it will only be legitimate if the people have a hand in the process," available at <[http://www.irinnews.org/report.asp?ReportID=42136&SelectRegion=Southern\\_Africa&SelectCountry=SWAZILAND](http://www.irinnews.org/report.asp?ReportID=42136&SelectRegion=Southern_Africa&SelectCountry=SWAZILAND)>(accessed on 29 August 2005).

<sup>198</sup> Sisay, L United Nations Development Deputy Representative Resident to Swaziland quoted saying 'This is a very great day for Swaziland. I think Swazis have witnessed the dawn of a new era' The Swazi Observer 27 July 2005.

<sup>199</sup> Available at <<http://www.thecommonwealth.org/Templates/System/LatestNews.asp?NodeID=144636>>(accessed 1 September 2005).

<sup>200</sup> Chapter XVII of the Constitution.

<sup>201</sup> Section 245(2) of the Constitution.

<sup>202</sup> Section 246(3) of the Constitution.

<sup>203</sup> Section 246(1) of the Constitution.

<sup>204</sup> Section 246(3) of the Constitution.

amendment will not pass unless at its final reading is supported by at least two-thirds of all the members of both Houses of Parliament.<sup>205</sup> Once all the requirements have been fulfilled the bill will then be submitted to the King for assent.<sup>206</sup>

A question that arises is, if in 1972, the King contended that the Constitution failed to provide mechanisms for amendment, why does the 2005 Constitution provide for amendment in a similar fashion? We submit that in 1972, it was not that the Constitution could not be amended, but the presence of the opposition was the real issue. Members of the opposition could oppose manipulation of the Constitution to vest all powers to an individual. The CDC was able to achieve this because it was composed of members whose interest was to entrench the *status quo*.

### 3.3.5.11 Concluding remarks

The *Tinkhundla* system was able to blind the world and the people of Swaziland into believing that the constitution-making process was genuine. The fact of the matter is that the regime was entrenching itself under the disguise of a constitution claiming to be popularly based. Hlatshwayo<sup>207</sup> who resigned from the CRC put it well when he said:

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

## 3.4 The case of constitution-making in Uganda

### 3.4.1 Brief constitutional history 1962-1986

Uganda was a British Protectorate from around 1900 to 1962 when she gained independence under a written Constitution often referred to as the Blue Book. On the 9 October 1962 the country achieved independence with Apollo Milton Obote being its first independent Prime Minister.<sup>208</sup> She had an Executive, Legislature and independent Judiciary. She was a semi-Federal State, pluralistic, Government, opposition and to spare, Westminster style and could pass as new Democracy.<sup>209</sup> Oloka-Onyango writes that the process of promulgation of the independence Constitution resembled in many ways the “amiable farce” of treaty-negotiation that took place with the advent of colonialism.<sup>210</sup>

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<sup>205</sup> Section 247(1) of the Constitution.

<sup>206</sup> Section 248 of the Constitution.

<sup>207</sup> Above (n 49) 15.

<sup>208</sup> Mutibwa, P. M, (1992) *Uganda since independence: a history of unfulfilled hopes* 24.

<sup>209</sup> Wambuzi CJ, S.W.W, (as he then was) ‘Constitutionalism and the legal system in a democracy’ 6 (n 46).

<sup>210</sup> Oloka-Onyango, J (1993) *Judicial power and colonialism in Uganda* 19.

### 3.4.2 The pigeon-hole Constitution

Four years after independence, the country saw the first ever-unconstitutional usurpation of power. As a result of the 1966 coup, which marked the country's first constitutional crisis, a new Constitution was put in place. While the making of the 1962 was by a handful of Ugandans, who were deliberately moved from Uganda to Britain during the deliberations, with the major input being made by the departing colonial masters, the 1966 Constitution was endorsed by members of the National Assembly before even reading it. It came to be known as the 'pigeon-hole' Constitution, because Obote, told Members of Parliament that they would find copies in their pigeon holes at the end of e National Assembly sitting.<sup>211</sup>

Three judicial decisions deserve mention *Grace Stuart Ibingira and Others v Uganda*,<sup>212</sup> *Grace Ibingira and Others v The Attorney General*<sup>213</sup> and *Uganda v Commissioner of Prisons, ex parte Matovu*.<sup>214</sup> The first two cases respectively were about members who had ideological and constitutional differences with Obote as leader of the party Uganda People's Congress (UPC) as well as Prime Minister.<sup>215</sup> They were deported and they challenged the deportation. The court of first instance dismissed the application and they appealed to the East African Court, which upheld the appeal. In the second case, the court refused to set aside regulations purportedly promulgated pursuant to the Emergency Powers Act 1966.

*Ex parte Matovu* pertains to a constitutional challenge of the 1966 *coup* as a violation of the Constitution. The court refused to declare unlawful the seizure of power and restore the *status quo ante*. The *Matovu* case has proved to be the most haunting and damaging legacy upon the exercise of judicial power in independent Uganda.<sup>216</sup> The 1967 Constitution was introduced. Its hallmark was the abolition of traditional institutions (kingship), creation of a one-party state and making Uganda a republic.<sup>217</sup> This era was marked by the enactment of draconian laws, erosion of individual rights and freedoms and human rights abuses.

After the 1966 constitutional crisis, Uganda went through a series of instability from Obote to Idi Amin and finally to the NRM/A era. Amin's era was characterised as the reign of terror, and was eventually removed from power by a joint military operation of the Tanzania Peoples' Defence Forces (TPDF)

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<sup>211</sup> Wambuzi (n 209), see also Mtibwa 58.

<sup>212</sup> (1966) EA 306.

<sup>213</sup> (1966) EA 445.

<sup>214</sup> (1966) EA 514.

<sup>215</sup> Mtibwa (n 208) 37-39.

<sup>216</sup> Oloka-Onyango (n 210) 25.

<sup>217</sup> Mtibwa 61.

and the Uganda military guerrillas. He was forced to flee Kampala. In 1980 national elections were conducted that returned Obote into power. These elections were heavily disputed as being not free and fair, the result of which most of the political parties resorted to guerrilla warfare against the newly installed regime. They believed the elections were rigged. It has been argued that the crucial issue that led to the NRM/A going to the bush was to remove a repugnant system of government.<sup>218</sup>

On 27 January, Obote was removed from power through a bloodless coup.<sup>219</sup> The new military leadership entered into a peace accord with the exiled NRM/A leadership in Nairobi, Kenya on 17 December 1985. However, the ruling military failed to abide by the terms of the peace agreement, consequent to which the NRM/A continued fighting, until they captured Kampala on 26 January 1986

### 3.4.3 The constitution-making process

Once in power, the NRM/A government produced a Ten Point Programme. In this study we are concerned with the first point, the restoration of democracy.<sup>220</sup> In working towards democracy the NRA/M undertook to work for the promulgation of a new national constitution.<sup>221</sup> Mutibwa has stated that:

One of the major tasks which the NRM set itself was the making of a new national constitution. While in the bush, as early as 1982 if not earlier, the NRM leaders considered this question. There were some who wanted to capture power with the constitution already written, but the majority view was that it should be the Ugandan people themselves who should create the new documents and that this could only be done after the dictatorial government of Obote and the whole repugnant system that went with it had been overthrown. Thus after capturing power in Kampala, the NRM government reiterated its decision to let the people of Uganda draw up their new constitution, and a Ministry of Constitutional Affairs was set up to supervise it.<sup>222</sup>

### 3.4.4 The Uganda Constitutional Commission (UCC) 1988-1993

To fulfil its promise the NRM/A government established the Uganda Constitutional Commission (UCC).<sup>223</sup> The Statute noted that, in the past, the people of Uganda have been afforded very little or no opportunity to freely participate in the promulgation of their national Constitution thus the National Resistance Government recognised the need to involve the people in the determination and promulgation of a national Constitution that will be respected and upheld by the people of Uganda,

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<sup>218</sup> As above.

<sup>219</sup> As above 154.

<sup>220</sup> Mutibwa 180, also Gamukama, R, J 'Constitutionalism in post-independence Uganda politics; the role of the military, 1962-1998' (unpublished LLB dissertation 1999) 102, also Museveni, Y, K (1997) *Sowing the mustard seed: The Struggle for Freedom and Democracy in Uganda* 217.

<sup>221</sup> Mutibwa 185.

<sup>222</sup> As above.

<sup>223</sup> Above (n 8).

with a view to achieving a national consensus on the most suitable constitutional arrangement for the country.

The Commission was composed of twenty-one members all of whom were appointed by the President.<sup>224</sup> We argue that the President's appointment of the members compromised its independence. We contend that the writing of a democratic constitution must be based on a free and conducive political environment, free from government interference. The process must not only be free, but must actually be seen to be free as the requirements of democracy demand. The observation made earlier that the weakness of commissions is that they tend to be undermined by allegiance to the appointing authority is inevitable.

### 3.4.5 Credibility of the UCC questioned

Bazaara<sup>225</sup> has noted that:

The appointment of the members of the Commission was very controversial and probably affected the kind of constitution that eventually emerged. Critics have argued that the biggest drawback was that the members of the Constitutional Commission were handpicked and many were deemed to be sympathetic to the NRM. Organised political interests such as political parties were not invited to send their own chosen representatives. Questions have been raised about the manner in which the Constitutional Commission went about 'educating' people. It has been argued that the commission posed and the debates it organised were designed in such a way as to favour the NRM as against the multi-partists. Most controversial was the Constitutional Commission's suggestion that political party activities be frozen until some future date. In short the Constitutional Commission created a framework for the Constituent Assembly to proscribe freedom of assembly and association.

Its composition left a lot to be desired.<sup>226</sup> The appointment particularly, of the Director of Legal Affairs in the National Resistance Movement Secretariat<sup>227</sup> as well as the Chief Political Commissar in the NRA<sup>228</sup> and other members of the armed forces is questionable.<sup>229</sup> In the constitutional history of

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<sup>224</sup> Section 2(2) of the Statute 1989. Museveni writes: 'They were appointed by me in consultation with the Minister for Constitutional Affairs. They were selected because they represented the broad spectrum of opinions in the country. Some were identified with the idea of a movement structure of governance, some were from the old political parties, some were from the monarchist groups, and some from the churches' (n 220) 194.

<sup>225</sup> Bazaara, N 'Mixed results in Uganda's constitutional development: an assessment' in Kibwana, K (eds) (1999) *Constitutionalism in East Africa; progress, challenges and prospects in 1999* 40 45.

<sup>226</sup> Kanyeihamba, G.W (2002) *Constitutional and political history of Uganda from 1894 to the present* 249, observes that notwithstanding its wide representation the UCC was often criticised as having been hand picked by the appointing authority with little if any consultation with interested parties, and from time to time the commission and the government had to defend its independence and integrity.

<sup>227</sup> Section 2(1)(d) of the 1988 Statute.

<sup>228</sup> Section 2(2) of the 1988 Statute.



Uganda we note how the army has always been in the forefront in directing, or being manipulated and manipulative in the affairs of the government. The involvement of the military in the process, we submit, is indicative of the show of power and that the NRM government is still militaristic in its approach.<sup>230</sup> In any case it is itself a product of a military takeover. Gamukama<sup>231</sup> argues that the involvement of the army in the process was a positive step. He writes that:

... after such representation the army would be more likely to regard the Constitution with respect for having participated in its making. In this regard, we argue that it would be a little more difficult for a civilian President or group of persons seeking to overthrow the Constitution to do so with the support of the army. It is also likely that participation by the army would be less likely to result to unconstitutional actions such as a coup.

We submit this reasoning is erroneous for the following questions. Who did the army represent in the Commission? Is the army not part of the government machinery and if it is, what was the need for its representation? Is or was the army not under the civilian control of the NRM/A government, if so what was the need for its representation? Is the President not the Commander-in-Chief of the Armed Forces,<sup>232</sup> if so why was the executive over-represented in the Commission because the army falls under the direct control of the President who is head of the executive of government? Does the history of the country not show that the executive has always manipulated the army to achieve political objectives? In the light of the above the contention supporting the involvement of the army cannot be sustained. The army is not an institution independent from the government.

In our view the composition of any constitutional body must be inclusive of all stakeholders and not dominated by government appointees. Commenting about the Commission's composition, Odoki says:

I believe they also represented various political shades of opinion. There were those who were understood to belong to the Democratic Party (DP), the Uganda People's Congress (UPC), and the Uganda Patriotic Front (UPF). Some Commissioners were understood to be Movementists and yet others were monarchists. A few were liberals and at least one was thought not to belong to any political party at all. However, once we

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<sup>229</sup> Oloka-Onyango (1993) *Governance, state structures and constitutionalism in Uganda*, writes that the UCC comprised of strong adherents of the Movement system and the appointment of its members was not transparent although it claimed to consist of members of the opposition parties, and that it was extremely circumvent about the mode of political organisation and the system of governance that it went about 'educating' the public on, 18.

<sup>230</sup> Walubiri, P. M 'The constitutional review process: a realistic chance towards democratic governance?' (2001) *Dialogue on the constitutional review process in Uganda a compendium of workshop proceedings*, writes that when political parties protested the ban on political activity, the NRM resorted to using violence or the threat of it to enforce the ban, 20.

<sup>231</sup> n 220.

<sup>232</sup> Oloka-Onyango, J 'Army representation in Parliament is not constitutional' *The New Vision* June 18 2004. Not only was the army participating in the process, it is represented in parliament. This is as equally bad for constitutional governance.

assumed duties as Commissioners, it was difficult to tell what opinions we each held or represented. We were all required to carry out our duties impartially and objectively and be guided only by the people's views and the national interest. Our personal views or preferences were irrelevant; this was made clear to all at the beginning of our work and was insisted upon throughout the duration of the Commission.<sup>233</sup>

The concession that it was not known what opinions each of the Commissioners held is enough to make the exercise questionable. The question is, what democratic principles guided the appointing authority when electing, and what guarantees were there that the views of the people would not be compromised? In any case the conclusion by the Commission that political parties must exist within the parameters set out by the Movement system is evidence of lack of independence.<sup>234</sup>

The Statute had a punitive clause. Persons who disobeyed the Commission or those who presented false or fabricated documents were to be charged and if convicted, liable to a fine not exceeding seven thousand shillings or to a term of imprisonment not exceeding six months.<sup>235</sup> This we contend undermined the right of the people to speak and express themselves without fear, especially in the light of the presence of oppressive laws.<sup>236</sup> While we fully agree with the sentiments expressed by Odoki<sup>237</sup> in so far as democracy and constitution-making is concerned, there is a sharp point of departure. We do not agree that democracy can be a product of a non-democratic process. We have contended that it is difficult to argue against democracy. A democratic, free and open environment must precede the writing of a popular democratic constitution.<sup>238</sup> While there argument for democracy

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<sup>233</sup> Odoki (2004) (n 20) 8.

<sup>234</sup> Above (n 24) 771.

<sup>235</sup> Section 5(2), section 12 of the Swaziland Decree No. 2/1996.

<sup>236</sup> Legal Notice No. 1/1986 as amended by various pieces of legislation including the Constitution (Amendment) Statute No. 6 of 1988 empowering the President in accordance with the advise of Cabinet to declare a state of insurgency in the country, and the sedition laws in the Uganda Penal Code Act Cap 20.

<sup>237</sup> Odoki (n 20 EAJPHR) 206, where he sets out elements of democracy as follows; periodic election of leaders; political accountability of leaders on issues of openness, probity and honesty; respect of and protection of basic human rights especially freedom of expression and of association; pluralism to allow alternative ideas; institutions and leaders; independence of the judiciary; maintenance of the rule of law; popular participation in governance; separation of powers; promotion of literacy and politicisation of the people to know their rights and enhance political awareness; and provision of reasonable standards of living.

<sup>238</sup> Barya, J 'Political Parties, the Movement and the Referendum on Political Systems in Uganda: One Step Forward, Two Steps Back?' in Oloka-Onyango, J (200) (eds) *No-Party Democracy in Uganda Myths and Realities* 24 28 writes that: 'Parties were not permitted to present candidates for any elections, they were not permitted to hold public rallies, establish local party branches or call delegates' conferences...These prohibitions were actually unconstitutional and illegal because they were not sanctioned by any known law on Uganda's statute books. The NRM claimed that the ban was as a result of a 'gentleman's agreement' between itself and DP... Whether or not the gentleman's agreement existed, it did not constitute a broad base because it was not an agreement between all

based on African values cannot be ignored and overemphasised, we submit that African indigenous values were never based on exclusion.<sup>239</sup>

Oloka-Onyango observes that:

Thus, in a context where political activity was effectively proscribed and with some parts of the country ravaged by civil conflict, wholesome debate over principles of constitutionalism was rendered nearly impossible. And yet in its report, the Commission sought to give lip-service respect to alternatives other than the Movement one.<sup>240</sup>

While the UCC conducted an impressive campaign to reach out to the Ugandans, it is regrettable that it adopted the restrictive political system that already prevailed in Uganda, claiming that it is what the people wanted. It may very well be contended that by adopting a restrictive system the UCC acted against the spirit of the terms of reference in terms of which it had to establish a free and democratic system of government that would guarantee fundamental rights and freedoms of the people of Uganda, create viable political institutions that would ensure maximum consensus and orderly succession to government, endeavour to develop a system of government that would ensure peoples' participation in the government, endeavour to develop a democratic, free and fair electoral system that would ensure peoples' representation in the legislature and at other levels and establish and uphold the principle of public accountability by the holders of public offices and political posts.

Odongo<sup>241</sup> states that President Museveni and the NRM/A die-hards abandoned their original genuine democratisation process. He contends that the NRM/A leadership ordered the UCC to stop wasting time formulating a new political system, but to put the dubious "no-party" in the constitution, to become the only system in Uganda. This begs the question of the wisdom of members of the judiciary assuming positions and roles that would compromise the independence of the judiciary as they are manipulated by politicians to legitimatise otherwise illegitimate processes.

Insofar as democracy and political rights are concerned the Commission did not take into account that democratisation was being compromised in favour of the existing Movement system. The criticisms levelled against it have not been baseless, but confirmed.<sup>242</sup> Our conclusion in this respect is that the

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political parties and the NRM. The NRM actually appointed some individuals from political parties themselves rather than allowing political parties to nominate party members into the NRM government.'

<sup>239</sup> Mkapa, B., President of the United Republic of Tanzania addressing the Parliament of Uganda on 24 August 2005, Sunday Monitor, September 4 2005.

<sup>240</sup> Oloka-Onyango (n 229) 19.

<sup>241</sup> Odongo, O (2000) *A Political History of Uganda: The Origin of Museveni's Referendum* 77.

<sup>242</sup> Odoki (n 237) 220- 223.

draft constitution that formed the basis of discussions by the National Constituent Assembly was clouded with questions of illegitimacy.

### 3.4.6 The Constituent Assembly (CA) 1993 and the 1995 Constitution

After the UCC had submitted its report, the Constituent Assembly (CA)<sup>243</sup> was set up. The preamble of the Statute pays tribute to the Ten Point Programme as designed by the NRM/A confirming that the process cannot be divorced from the aspirations as formulated by the NRM/A. The functions of the CA were to scrutinise, debate, and prepare a final draft of the constitutional text as prepared and submitted by the UCC<sup>244</sup> and to enact and promulgate a new Constitution.<sup>245</sup> The CA was not to be completely free from the executive. The Commission of the CA was responsible for its 'technical' affairs and administration.<sup>246</sup> The Commissioner was appointed by the President in accordance with the advise of the Cabinet<sup>247</sup> while the two Deputy Commissioners were appointed by the President on the advise of the Minister for Constitutional Affairs.<sup>248</sup> It is clear from these provisions that the executive did not wish to let the process run without its influence and control. In our observation a sub-committee of the CA created by the CA should have been a better option to take care of logistical issues, dully consulting and reporting to the CA from time to time as a body mandate by the CA house.

We have contended that we do not agree with the army taking part and influencing the constitution-making process in the UCC. We submit that the involvement of ten (10) members of the NRA in the CA cannot be justified in terms of constitutionalism proper. Although on the face of it, the CA Statute provided that the political parties that had participated in the 1980 general elections participate, their participation was extremely limited. The election rules had very stringent provisions,<sup>249</sup> which made the participation of the political parties meaningless in our opinion.

HRW<sup>250</sup> has stated that this state of affairs gave the NRM/A government an opportunity to translate its administrative ban on political party activity into a legal ban. The rules also prohibited persons from attempting to use political party, tribal or religious affiliations or any other sectarian ground as a basis

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<sup>243</sup> Statute No. 6/1993.

<sup>244</sup> Section 8(1)(a) of Statute No. 6/1993.

<sup>245</sup> Section 8(1)(b) of Statute No.6/1993.

<sup>246</sup> Section 20(b)(i)(ii) of Statute No. 6/1993.

<sup>247</sup> Section 21(2) of Statute No. 6/1993.

<sup>248</sup> Section 21(2) of Statute No. 6/1993.

<sup>249</sup> Constituent Assembly (Elections Rules) Regulation (1993), Regulation 11.

<sup>250</sup> Above (n 19).

for such candidature as a delegate.<sup>251</sup> Contravening this rule was a ground for disqualification. Odoki writes that the majority views were in favour of the Movement system to operate for sometime, the Commission came to the conclusion that this issue could not be decided on in terms of either a movement or multiparty system.<sup>252</sup>

While this may have been the case, we contend that it could have been difficult for people to submit otherwise in view of the fact that multiparty democracy had been demonised,<sup>253</sup> especially by the NRM/A and had been either banned or suspended by previous regimes. In any event, even as the process was going on the fundamental rights and freedoms of association and assembly were restricted. It was therefore a given that the prevailing NRM/A arrangement enjoyed advantage over party politics. We question whether the constitutional upheavals the country has gone through should squarely be blamed on political parties, or the army and greedy political leadership with no national vision. This is particularly so considering that even under the so-called no-party or one party states Africa had continued to be ravaged by war and mismanagement.<sup>254</sup>

The CA<sup>255</sup> suffered similar questions of credibility as the UCC. Oloka-Onyango states that the CA reaffirmed the monopoly of political power by the NRM/A.<sup>256</sup> Kanyeihamba has expressed similar sentiments when he says that:

The failure of the NRM diehards, both within and outside the Constituent Assembly, to agree and compromise with other political forces undermined the force and legitimacy of the Constitution.... An anticipated truly representative Constituent Assembly was turned into a rigid Movement Caucus that reduced what should have been a revered national treasure to be defended at all times, into a partisan instrument with contradictions and which would later be rendered less sanctified by the same caucus through political arrogance and misconceptions...<sup>257</sup>

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<sup>251</sup> Rule 11(2). The Statute was unsuccessfully challenged in the matter of *Rwanyarare and Two Others v Attorney General* Miscellaneous Application No. 85/1993 (unreported).

<sup>252</sup> Odoki (n 20) 212.

<sup>253</sup> Odoki (n 237) 209 says that '...political parties have played a controversial role in the politics of Uganda and they are being blamed for mismanagement of the country, divisive tendencies and alienation of large sections of society from governance because of the winner-take-all.'

<sup>254</sup> At the time the study was written Uganda was still grappling with the war in the North and the NRM/A government had so far failed to bring it to an end while children, women and many civilians continue to be victims.

<sup>255</sup> Bazaara (n 225) 46.

<sup>256</sup> Oloka-Onyango (n 229) 25.

<sup>257</sup> Kanyeihamba (n 226) 255-256.

### 3.4.7 The Commission of Inquiry (CRC)

Six years after the promulgation of the Constitution a Commission of Inquiry<sup>258</sup> was appointed to review the constitutional situation. It has been observed that:<sup>259</sup>

...the mode of appointment and membership of the Commission as well as the Commission's mandate, *inter alia*, raise serious questions on the prospects of the Commission's work... A glimpse of the past and present realities under the "No-Party/Movement" regime that has guided Uganda constitutional and political life, reveals that the regime has long been characterised by political and legal engineering, manoeuvring and consolidation and ultimately adopted the "no change" slogan whose dangers are to deny people a better future.

Although it was 'hand picked' and raised a lot of doubt, it recommended drastic changes, and it can perhaps be said that it contributed to influencing the shift from the Movement system to multiparty democracy.<sup>260</sup>

### 3.4.8 Amendment clause

The Constitution provides for amendment in chapter 18. Parliament is endowed with the power to amend.<sup>261</sup> Section 260 sets out sections that cannot be amended unless they have been approved by referendum, while section 261 provides for sections which require approval by district councils. In terms of article 262, amendments other than those that require a referendum and approval by district councils, can only be taken as passed if a bill to that effect is supported by not less than two-thirds of all members of Parliament at the second and third reading.

It is important to note that at the writing of the manuscript the Constitution was going through an overhaul, as a result of the referendum to change from the Movement system to a multiparty democracy. Oloka-Onyango<sup>262</sup> argues that Parliament is not competent to pass the amendment of the Constitution (the Amendment Bill has come to be known as the Omnibus Amendment Bill because it seeks to amend the entire Constitution without taking into account that different aspects require different methods of amendment, the effect of which is to undermine constitutionalism). Oloka-Onyango writes:

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<sup>258</sup> Legal Notice No. 1/2001 Commission of Inquiry Act Cap. 56.

<sup>259</sup> Mugwanya, G.W, 'Uganda's Constitutional Review Commission: a critical inquiry' (2001) 2 *East African Journal of Peace and Human Rights* 164- 168.

<sup>260</sup> Above (n 25) 4-36 recommended that: 'The multiparty form of participation be adopted through the process provided for by article 74(2) of the Constitution.'

<sup>261</sup> Section 259 of the 1995 Constitution.

<sup>262</sup> Oloka-Onyango, J 'Parliament not competent to pass Omnibus Amendment Bill: a case for a Constituent Assembly?' *The Monitor* March 15, 2005.

A review of the amendment bill demonstrates that a number of the basic principles of the 1995 Constitution (such as unity, democracy and freedom) are under threat from the revisions. What would happen with the adoption of the amendment proposals is in effect the writing of a new Constitution, since the omnibus Bill is in substance a fundamental overhaul of the 1995 instrument. In such circumstances, the only competent body would be a Constituent Assembly.<sup>263</sup>

The Supreme Court prevented an unlawful attempt to amend the Constitution (Constitution Amendment Act 13/2000) in *Paul Ssemogerere and 2 Others v The Attorney General*.<sup>264</sup>

### 3.4.9 Safeguarding constitutional amendment

There is debate whether once an inclusive and representative body, such as Constituent Assembly, Constitutional Convention, genuine Constitutional Commission or such other body, has adopted a constitution; it can be left with parliament to amend. This is in light of the fact that most African parliaments tend to be overwhelmingly dominated by the majority party. They manipulate the peoples' wishes to entrench themselves in power. Mulikita<sup>265</sup> observes that some of the most articulate pro-democracy leaders, who came into office on the crest of the democratic waves of the 1990s, have sought to manipulate the constitutions in order to perpetuate their presidential tenure.

In Uganda, while the UCC recommended that the President should be restricted to serve two terms after which he or she would be ineligible for re-election,<sup>266</sup> the NRM/A dominated parliament uplifted the Presidential term limit to allow President Museveni to run for office indefinitely! We contend that if an amendment is to affect the very essence of the Constitution, it must not be left to the exclusive preserve of parliament. It must be referred to an inclusive body just as its adoption was done to allow other stakeholders who may not be in Parliament such as minority parties and civil society to have an input. Then it can be referred to a referendum, preceded by massive civic education so that citizens can identify with the amendment. Constitutional amendment is tricky and delicate business; it requires a tricky balancing act.<sup>267</sup> Leaving it to the sole responsibility of the legislature is not an ideal situation for it is questionable whether all Members of Parliament are prepared to undertake a critical and informed view of proposed constitutional changes.<sup>268</sup>

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<sup>263</sup> As above, see also Comments on the Constitution (Amendment Bill) submitted to members of Committee on Legal and Parliamentary Affairs dated 1 March 2005, in which he raises fundamental issues, (see also n 266 below).

<sup>264</sup> Constitutional Petition No. 1 of 2002 (unreported).

<sup>265</sup> Above (n 35) 105.

<sup>266</sup> Above (n 24) 789.

<sup>267</sup> Hatchard, J 'Establishing popular and durable national constitutions in Commonwealth Africa' in Andenas, M (ed) (2000) *The creation and amendment of constitutional norms* 17.

<sup>268</sup> As above 19, the writer refers to the Zimbabwe experience, in which only one Member of Parliament was able to analyse a judgement of the Supreme Court that had triggered the amendment.

### 3.4.10 Concluding remarks

In conclusion, it can be said that while the UCC was intended to yield national consensus, the process fell short of achieving this goal. Barya<sup>269</sup> notes that the legitimacy of the constitution depended on both the method of making the constitution and the content. Nassali<sup>270</sup> observes that it is evident that there is a serious lack of societal consensus on the political future of Uganda, a state of affairs aggravated by the lack of constructive debate. Walubiri<sup>271</sup> made the most telling statement on the process when he said:

From the foregoing discussion one would get the impression that the 1995 Constitution is a sound and satisfactory instrument that would stand the test of time. This impression is deceptive because in the critical areas of human rights, governance and resource sharing, serious and critical issues were left unresolved. The tensions created by the unresolved issues are like a time bomb that threatens the entire constitutional order.

### 3.4.11 The South African and Zambian experience

South Africa did not use the methods of setting up a commission in the process of enacting its constitution. It followed the route of a Constituent Assembly, which was preceded by the levelling of the political field.<sup>272</sup> South Africa convened a Multi-Party Negotiation Process (MPNP), in which it was agreed that all groups would participate on the basis of equality and that decisions would be taken by sufficient consensus.<sup>273</sup> The process took place outside of parliament. At the multi-party forum it was agreed that an interim Constitution to set up an interim government be drafted and a date for all-racial elections be held while a duly elected body of representatives guided by constitutional principles crafts a national Constitution. Accordingly, the CA<sup>274</sup> was elected and it produced the Constitution on 8 May 1996, which was referred to the Constitutional Court for certification, to consider if it complied with the constitutional principles. The court certified the Constitution on 6 September 1996.<sup>275</sup> South Africa

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<sup>269</sup> Barya, J.B (1993) *Popular democracy and the legitimacy of the constitution: some reflections on Uganda's constitution-making process* 29.

<sup>270</sup> Nassali, M. 'Constitutional transition and the Movement System in Uganda' in Oloka-Onyango, J (ed) (2004) *Constitutionalism and transition: Africa and Eastern European perspectives* 213.

<sup>271</sup> Above (n 230) 25.

<sup>272</sup> Malherbe, R 'A new beginning: introduction to the South African Constitution and Bill of Rights' (2000) 18 *Netherlands Quarterly of Human Rights* 45-65 46.

<sup>273</sup> Hatchard (n 267) 11.

<sup>274</sup> Hatchard (n 30) 37-38.

<sup>275</sup> *Certification of the Constitution of the Republic of the South Africa* 1996 (10) BCLR 1253 (CC).



became a success story after years of internal conflict and the Constitution is regarded as the most progressive Constitution of the modern times.<sup>276</sup>

The Zambian process shows a more complex situation. Zambian constitutional commissions were never really demonstrable independent from the government. Two commissions are of significance, the Choma Commission of 1972 and the Mwanakatwe Commission of 1991. The Choma Commission was undermined by two factors, firstly that the government announced before hand that Zambia would change from a multiparty to a one-party state. Secondly it was accountable and reported directly to the Government. As a result, the government was able to discard recommendations it did not like. In 1991 the new government of the Movement for Multiparty Democracy (MMD) employed the 'pick and choose' tactics hence the product was yet another flawed Constitution.<sup>277</sup> For instance, it rejected recommendations from the Mwanakatwe Commission to submit the Constitution to a CA to debate and adopt it before parliament would pass it into law, on the ground that the CA would interfere with the jurisdiction of parliament to legislate.<sup>278</sup> Thus not only was it President Kaunda who wanted to control the process, but also his successors in President Chiluba and now President Mwanamasa.<sup>279</sup>

### 3.4.12 Concluding remarks

While the putting in place of a constitutional commission is but one way of initiating constitution-making, it is certainly not the most ideal. The Swaziland, Ugandan, Zambian, Zimbabwean<sup>280</sup> as well as the Kenyan<sup>281</sup> experiences are illustrative of the fact that commissions tend to lack independence and get manipulated by the appointing authority. The writing of a constitution is merely the beginning of and a step towards good governance.<sup>282</sup> While it was contended that the independence Constitutions were imposed from outside and therefore lacking in local roots or popular legitimacy,<sup>283</sup>

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<sup>276</sup> Vos de Pierre, 'Introduction to South Africa's 1996 Bill of Rights' (1997) 15 *Netherlands Quarterly of Human Rights* 225.

<sup>277</sup> Hatchard (n 267) 8.

<sup>278</sup> Hansungule, M 'Experiences at constitution-making processes in SADC: the Zambian exercise' (2004) 4 *Open Society Initiative for Southern Africa* 28 31.

<sup>279</sup> Consequently, the legitimacy of 1996 Constitution continues to be questioned on the grounds that it does not reflect the views of the Zambian people and that it was manipulated by the ruling party; see Hatchard (n 30) 31.

<sup>280</sup> Hatchard, J 'Some reflections on constitution-making from Zimbabwe' (2001) 45 *Journal of African Law* 210.

<sup>281</sup> Kibwana, K 'Constitutional developments in Kenya' in Kibwana, K et al (eds) (2002) *Constitutionalism in East Africa progress, challenges and prospects in 1991* 1.

<sup>282</sup> Hatchard (n 30) 314.

<sup>283</sup> As above 313.

there is very little reason if any, why we cannot come to a similar conclusion, especially with regard to the Swaziland<sup>284</sup> and Uganda<sup>285</sup> processes.

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<sup>284</sup> Maseko, T.R 'Organised civil society in the constitution-making process: the case of Swaziland' (2004) 4 *Open Society Initiative for Southern Africa* 33, contends that civil society demanded consensus on the process itself, on the political environment, on the content of the constitution as well as consensus on the mode of adoption of the final constitution. These demands were never met and the adoption of the Constitution at the cattle byre was not by any means by consensus.

<sup>285</sup> It is recorded that the debate at the CA over what political system Uganda should have (the Movement-Political system dichotomy) attracted a walk out from the CA of over sixty delegates, signalling lack of consensus (Mugwanya n 259) 164-165.

## CHAPTER 4 THE RIGHT TO PARTICIPATE IN INTERNATIONAL LAW

### 4.1 Introduction

Traditionally international law has been defined as the law that governs relations between states.<sup>286</sup> In this light, international law does not pertain itself with the citizens or individuals within a particular country. However, international law can be classified into various categories; international humanitarian law (IHL), international human rights law (IHRL) as well as international trade law<sup>287</sup>. In this research we are concerned with IHRL. This is the part of international law dealing with the protection and promotion of human rights. The United Nations Charter (UN Charter)<sup>288</sup> makes mention on the protection, observance and respect for human rights.<sup>289</sup>

It is accepted that sources of IHRL include the UDHR,<sup>290</sup> international human rights instruments (which include conventions, treaties and declarations) as well as peremptory norms of human rights. The UDHR marked the beginning of international human rights law, though many states recognised human rights before this. It is a non-treaty text that has over time been complemented by a series of legally binding international treaties. Article 21 provides for the right to take part in government of a country, directly or through freely chosen representatives.

### 4.2 African Charter on Human and Peoples' Rights

In October 1981, the Organisation of African Unity (OAU) (now the AU), adopted the African Charter. Article 13 provides that:<sup>291</sup>

1. Every citizen shall have the right to participate freely in the government of his country, either directly or through freely chosen representatives in accordance with the provisions of the law.
2. Every citizen shall have the right of equal access to the public service of the country.
3. Every individual shall have the right of access to public property and services in strict equality of all persons before the law.

In terms of article 1 of the African Charter, member states of the AU are enjoined to undertake and adopt legislative and other measures to give effect to the rights enshrined in the African Charter. The

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<sup>286</sup> Shaw, M.N (1997) *International Law*, 29.

<sup>287</sup> Available <[http://encyclopedia.laborlawtalk.com/International\\_law](http://encyclopedia.laborlawtalk.com/International_law)> (accessed on 22 September 2005).

<sup>288</sup> UN Charter entered into force 24 October 1945 available at <<http://www.unhchr.ch/html/menu3/b/ch-cont.htm>>(accessed on 26 September 2005).

<sup>289</sup> Article 62 of the UN Charter.

<sup>290</sup> Above (n 91).

<sup>291</sup> African Commission on Human and Peoples' Rights available at <[http://www.achpr.org/english/\\_info/news\\_en.html](http://www.achpr.org/english/_info/news_en.html)>(accessed on 22 September 2005).

African Commission on Human on Peoples' Rights (African Commission) is established<sup>292</sup> to promote and protect<sup>293</sup> human rights. In the exercise of its protective mandate the African Commission determines communications submitted to it by those who allege human rights violations.

In the African context there are recent instruments providing for the to the right to participate. This may be listed as the AU Declaration on Principles Governing Democratic Elections in Africa,<sup>294</sup> Conference on Security, Stability, Development and Cooperation in Africa (CSSDCA)<sup>295</sup> the Lomé Declaration of July 2000 on the framework for an OAU response to unconstitutional changes of government.<sup>296</sup>

### 4.3 Jurisprudence of the African Commission

In giving effect to the right to participate, the African Commission has stated that the right entail a number of other rights, such as free expression, association and assembly, the freedom to receive and impart information. In this connection, it has held that African state parties to the African Charter should not place unnecessary impediments to the exercise of freedoms. It stated that:

A basic premise of international human rights law is that certain standards must be constant across national borders, and governments must be held accountable to these standards... To participate freely in government entails, among other things, the right to vote for the representatives of one's choice... The right of a people to determine their 'political status' can be interpreted as involving the right ... to be able to choose freely those persons or party that will govern them. It is a counterpart of the right enjoyed by individuals under article 13. In regulating the use of this right, the competent authorities should not enact provisions which would limit the exercise of this freedom. The competent authorities should not override constitutional provisions or undermine fundamental rights guaranteed by the constitution and international human rights standards.<sup>297</sup>

In the context of the constitution-making in Swaziland and Uganda, we have indicated that the process was undertaken under a state emergency and insurgency respectively and political parties or

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<sup>292</sup> Article 30 of the African Charter.

<sup>293</sup> Article 45(1), (2) of the African Charter.

<sup>294</sup> AU Doc AHG/Decl.1 (XXXVIII), 2002 available at [http://www.ohchr.org/english/law/compilation\\_democracy/ahg.htm](http://www.ohchr.org/english/law/compilation_democracy/ahg.htm) (accessed on 23 September 2005).

<sup>295</sup> AHG/Decl.4 (XXXVI), 2000 available at [http://www.ohchr.org/english/law/compilation\\_democracy/cssdca.htm](http://www.ohchr.org/english/law/compilation_democracy/cssdca.htm) (accessed on 23 September 2005).

<sup>296</sup> AU Doc AHG/Decl.5 XXXVI available at [http://www.ohchr.org/english/law/compilation\\_democracy/lomedec.htm](http://www.ohchr.org/english/law/compilation_democracy/lomedec.htm) (accessed on 23 September 2005).

<sup>297</sup> *Constitutional Rights Project and Another v Nigeria* Communication 102/93, *Civil Liberties Organisation (in respect of Bar Association) v Nigeria* Communication 101/93, African Human Rights Law Reports (2000) 186 and 191 respectively.

organisations were banned (in the case of Swaziland) and administratively suspended (in the case of Uganda). In *Jawara v The Gambia*<sup>298</sup> the African Commission found that:

67. The imposition of the ban on former ministers and members of parliament is in contravention of their rights to participate freely in the government of their country provided for under article 13(1) of the Charter...

68. Also the banning of political parties is a violation of the complainants' rights to freedom of association guaranteed under article 10(1) of the Charter.

In *Legal Resources Foundation v Zambia*,<sup>299</sup> a communication pertaining to an attempt by the Zambian government to bar former President Kenneth Kanda from running for Presidential elections, by an amendment to the Constitution, the African Commission found that no state party should avoid its responsibility by recourse to the limitations and 'claw-back' clauses in the African Charter. The African Charter must be interpreted holistically and all clauses must reinforce each other. It stated that the purpose and effect of any limitation must be examined, and the limitation cannot be used to subvert rights. Justification cannot be derived from popular will, as popular will cannot be used to limit the responsibilities of state parties under the African Charter.

Referring to General Comment No. 25 of the HRC it concluded that, the requirement that the right to participate must be exercised 'according to the law' does not mean that the law should be used to take the right away, rather to regulate how it should be enjoyed. It reaffirmed that the African Charter makes it clear that citizens have the right to participate in the governance of their country 'directly or through freely chosen representatives....',<sup>300</sup>

In relation to the Swaziland, the African Commission has found that the King's Proclamation violates the African Charter.<sup>301</sup> Although it has given Swaziland six months to rectify the defects caused by the Proclamation in relation to the making of the Constitution, the Swaziland government has not taken any steps.<sup>302</sup> The decision confirms that unless a process is carried out under a free political environment, there is no way it can give birth to a legitimate result. It is perhaps regrettable that the African Commission has not yet made reference to the provisions of the African Charter for Popular

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<sup>298</sup> *Jawara v The Gambia* Communication 147/95 and 149/96 *African Human Rights Law Report* (2000) 107.

<sup>299</sup> Communication 211/98 *African Human Rights Law Report* (2001) 84.

<sup>300</sup> As above.

<sup>301</sup> *Lawyers for Human Rights (Swaziland) v Swaziland* Communication 251/2002 (appendix attached).

<sup>302</sup> The Times of Swaziland 6 September 2005 'Swaziland given six months to respond to the OAU' available at <<http://www.times.co.sz/031.html>>(accessed 9 September 2005).

Participation in Development and Transformation,<sup>303</sup> which expands on the principle of popular participation.

#### **4.4 International Covenant on Civil and Political Rights (ICCPR)**

Article 25 of the ICCPR<sup>304</sup> is almost similarly worded as the UDHR and the African Charter. It provides:

Every citizen shall have the right and the opportunity, without any of the distinctions mentioned in article 2 and without unreasonable restrictions:

- (a) To take part in the conduct of public affairs, directly or through freely chosen representatives;
- (b) To vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors;
- (c) To have access, on general terms of equality, to public service in his country.

Pursuant to this article, the HRC<sup>305</sup> produced General Comment No. 25<sup>306</sup> to define the content, meaning and extend of the right to participate. This is the most elaborate exposition of the right to participate. The HRC has stated that whatever form of constitution or government is in force, the Covenant requires States to adopt such legislative and other measures as may be necessary to ensure that citizens have an effective opportunity to enjoy the rights it protects. Article 25 lies at the core of democratic government based on the consent of the people. The article 25 rights, according to the HRC are related to, but distinct from, the right of peoples to self-determination. By virtue of the rights covered by article 1(1) peoples have the right to freely determine their political status and to enjoy the right to choose the form of their constitution or government. Article 25 deals with the right of individuals to participate in those processes, which constitute the conduct of public affairs.

The article 25 rights must be understood in the light of the provisions of article 2(2) of the ICCPR, which enjoins state parties by existing legislative or other measures, to undertake to take the necessary steps, in accordance with its constitutional processes and with the provisions of the Covenant, to adopt such laws or other measures as may be necessary to give effect to the rights recognized in the Covenant. This means that in conducting constitutional processes State parties have

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<sup>303</sup> Adopted in Arusha, Tanzania in February 1990, available at <http://www.africaaction.org/african-initiatives/chartall.htm> (accessed 15 September 2005).

<sup>304</sup> Available at [http://www.unhcr.ch/html/menu3/b/a\\_ccpr.htm](http://www.unhcr.ch/html/menu3/b/a_ccpr.htm) (accessed on 22 September 2005).

<sup>305</sup> Established by Article 28 of the ICCPR.

<sup>306</sup> HRC available at <http://www.ohchr.org/english/bodies/hrc/comments.htm> (accessed on 22 September 2005).

to ensure that citizens are guaranteed the right to participate freely, without fear, let or hindrance in the exercise of this right.

Swaziland acceded to the ICCPR on 26 March 2004 while Uganda did so on 21 June 1995.<sup>307</sup>

#### 4.5 Jurisprudence of the HRC

Is constitution-making equivalent to participating in public affairs? The HRC has dealt with this question and held in the affirmative. In *Grand Chief Donald Marshall*<sup>308</sup> the HRC was faced with the question whether participation in constitutional conferences constituted a conduct of public affairs. It put the matter thus; '[A]t issue in the present case is whether the constitutional conferences constitute 'a conduct of public affairs'. It came to the conclusion that it 'cannot but conclude that they do indeed constitute a conduct of public affairs'. The HRC held that it is beyond question that the conduct of public affairs in a democratic state is the task of representatives of the people, elected for that purpose, and public officials appointed in accordance with the law.

The HRC later expanded the right to participate in constitutional in General Comment No. 25 when it said that:

Citizens also participate in the conduct of public affairs when they choose or change their constitution or decide public issues through a referendum or other electoral process conducted in accordance with paragraph (b). Citizens may participate directly by taking part in popular assemblies which have the power to make decisions about local issues or about the affairs of a particular community and in bodies established, no distinction should be made between citizens as regards their participation on the grounds mentioned in article 2, paragraph 1, and no unreasonable restrictions should be imposed.<sup>309</sup>

#### 4.6 The Siracusa Principles

The Siracusa Principles<sup>310</sup> are a product of a meeting of distinguished experts who met to consider the limitations and derogation provisions of the ICCPR. The principles lay out the conditions under which the Covenant rights, including the right to participate may properly be limited<sup>311</sup> or derogated<sup>312</sup>

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<sup>307</sup> Available at <<http://www.ohchr.org/english/law/ccpr-ratify.htm>>(accessed 21 October 2005).

<sup>308</sup> *Grand Chief Donald Marshall, Grand Captain Alexander Denny and Advisor Simon Marshall, as officers of the Grand Council of the Mikmaq tribal society v Canada* available at <<http://wwwserver.law.wits.ac.za/humanrts/undocs/html/dec205.htm>>(accessed on 23 September 2005).

<sup>309</sup> General Comment No. 25, paragraph 6.

<sup>310</sup> UN Economic and Social Council 'The Siracusa Principles on the limitation and derogation provisions in the International Covenant on Civil and Political Rights', available at <<http://www.article23.org.hk/english/research/ICCPR.doc>>(accessed 24 September 2005).

<sup>311</sup> Part I of the Siracusa Principles.

<sup>312</sup> Part II of the Siracusa Principles (as above).

from. The principles in giving meaning to limitation clauses expand such concepts as 'prescribed by law', 'in a democratic society', 'public order', 'public health', 'public morals', national security', 'public safety', 'rights and freedoms of others'.

In relation to derogation clauses, it explains the meaning that should be attached to 'public emergency which threatens the life of a nation', 'proclamation, notification and termination of a public emergency', strictly required by the exigency of the situation', 'non-derogable rights', and deals with 'some general principles and application of a public emergency and consequent derogation measures'. It is interesting to note that when constitution-making was going on in Swaziland and Uganda, the fundamental right to participate in public affairs was limited, not by derogation but proscription. Thus the situation as it prevailed could not be justified under the general limitation and derogation clause as espoused by the Siracusa principles.

#### 4.8 Concluding remarks

It is our conclusion that the suspension and banning of political parties in Swaziland and Uganda constituted unreasonable restrictions. It amounted to a violation of the fundamental right to participate freely in public affairs as envisaged by article 21 of the UDHR, article 25 of the ICCPR as well as article 13 of the African Charter. No wonder the Uganda Constitution is being subjected to an overhaul. It is a matter of time before the Swaziland Constitution goes through the same.<sup>313</sup> The Swaziland government is already defending the Constitution as pressure mounts that the Constitution does not reflect the true and genuine aspirations of the people of Swaziland. The Prime Minister, Themba Dlamini has instructed all state institutions, particularly the Royal Swaziland Police (RSP) to defend the Constitution.<sup>314</sup> He argues that '[T]hose who want to defy it should have at least a certain percentage of the population to justify their actions.' This is a spurious statement because right from the beginning of the process, there have always been dissenting voices, which the King and government deliberately chose to ignore, even as the process progressed.<sup>315</sup>

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<sup>313</sup> Both international and local groups are calling for more pressure on Swaziland to fully democratise, 'More outside pressure is needed to help pro-reform elements inside the country bring back a constitutional monarchy and genuine democracy- the best guarantees that Swazi volatility will not eventually infect the region', The International Crisis Group (ICG), Times of Swaziland<<http://www.times.co.sz/002.html#article4>>(accessed on 22September 2005).

<sup>314</sup> The Times of Swaziland 'Woe unto marchers' available at<<http://www.times.co.sz/002.html#article10>> (accessed on 20 September 2005).

<sup>315</sup> Maroleng, C *Africa Watch* 'Swaziland: The King's Constitution' observed that: '...the question of what role the monarchy must play in Swazi politics (a problem that has bedevilled this tiny Kingdom ever since it gained its independence from Britain in 1968) remains fundamentally untouched. More specifically, this relates to the ways in which a genuinely inclusive political system one able to incorporate the demands of a modern state—can coexist



The pending march by civic organisations is indicative of the fact that the Constitution lack popular legitimacy.<sup>316</sup> Frankly, it is a dubious defence for His Majesty and the government to say everyone was given a chance to participate, when they systematically stifled free association and assembly, free expression and fundamental rights and freedoms, and that all the commissions were not only hand-picked but appointed and accountable to him alone! He rejected a democratic, people-driven, inclusive, broad-based and transparent process, insisting on conducting the process under a state of emergency. The Congress of South African Trade Unions (COSATU) made similar observations when they visited Swaziland on a fact-finding mission. Its Secretary General, Zwelinzima Vavi expressed the organisation's views on the Constitution of Swaziland thus:

Swaziland remains trapped in undemocratic practices, the 1973 decree and now the recent enactment of a new but undemocratic constitution that is a product of undemocratic processes...Political parties remain banned, trade unions and civil society restricted and people's basic freedoms completely undermined and denied. This itself means that the principles of the African Union and NEPAD are not adhered to by the Swaziland ruling elite<sup>317</sup>

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with the vast power and privileges accruing to those who owe their position to a traditional system centred on the ruling Dlamini royal lineage...' available at

<<http://www.iss.co.za/pubs/ASR/12No3/AWMaroleng.html>>(accessed on September 2005).

<sup>316</sup> The Times of Swaziland 23 September 2005 available at<<http://www.times.co.sz/002.html#article8>> (accessed 24 September 2005) quoted the King as saying 'Marching a bad decision' and that "I do not believe that there are some people who may say they are not satisfied with the document as everyone was given a chance to submit," The king said a number of commissions were commissioned to get the people's views in the constitution-making process, and that even the UN was pleased with the Constitution. Meanwhile the Law Society of Swaziland appealed for tolerance, as the Secretary General said: "Then we see a conflict. There will be chaos. This will cause the police to come in and assault the marchers. The police must be there to keep law and order. They must do so with high spirit of tolerance. "The Swazi News 24 September 2005 available at<<http://www.times.co.sz/031.html#article8>>(accessed on 24 September 2005).

<sup>317</sup> The Times of Swaziland Sunday, 25 September 2005, available at<<http://www.times.co.sz/058.html#article11>> (accessed 26 September 2005). The NNLC has expressed similar sentiments and its youth, NNLC-YL is among those that had rejected the constitution, in particular the constitutional making process, The Times of Swaziland available at<<http://www.times.co.sz/058.html#article1>>(accessed on 5 October 2005).

## CHAPTER 5 CONCLUSIONS AND RECOMMENDATIONS

### 5.1 Introduction

It is important to observe that in order for a constitution-making process to give birth to genuine constitutionalism, it must be founded on the pillars of democracy. It goes without saying that an illegitimate process cannot give birth to a legitimate product. Above, we have attempted to show that both the Swaziland and Uganda constitution making processes were conducted under conditions not conducive to peoples' free and effective participation, thus the credibility of the end product remains questionable, even as Uganda is transforming itself from the Movement system to a multiparty arrangement.<sup>318</sup>

### 5.2 Conclusions

It is our opinion that the study has been able to show that the making of the constitutions of Swaziland and Uganda respectively, was not based on the free will of the people. This is clear from the political environment that prevailed when the exercise was being conducted, from the provisions of the legal instruments that set the process in motion, the manner and mode of appointment of the members of the commissions, as well as the authority to whom they were accountable. Both in Swaziland and Uganda the process was pursued under a state of emergency,<sup>319</sup> for the reason that while the King's Proclamation has frozen all fundamental rights and freedom, in Uganda the 1988 amendment to the Constitution empowering the President to declare a state of insurgency anytime, created a state uncertainty, thus effecting the administrative ban on free political activity by imposing uncertainty.

### 5.3 Recommendations

While African leaders have set out standards for good governance, human rights and democracy, these principles remain unimplemented in many African countries. From the UN, to the AU and to regional organisations such as the Southern Africa Development Community (SADC) and East African Community (EAC), which Swaziland and Uganda are members respectively, fundamental rights of the people to be responsible for the destiny of their countries is emphasised.

Foremost, we recommend that the provisions of IHRL<sup>320</sup> as enshrined in human rights instruments be adhered to.<sup>321</sup> We argue that IHRL has become obligations *erga omnes* and *ius cogens* as rules of

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<sup>318</sup> Oloka-Onyango, J 'Transition is about transiting from Museveni IV to Museveni V' The Monitor March 16 2005.

<sup>319</sup> This is contrary to international standards governing the imposition of state of emergency as provided for under General Comment No. 29 of the HRC paragraph 2, available at <<http://www.ohchr.org/english/bodies/hrc/comments.htm>> (accessed on 26 September 2005).

<sup>320</sup> UN Declaration on the Rights and Responsibility of Individual, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms, adopted by General Assembly

international customary law, thus state parties cannot derogate from. This contention is based on the principle of *pacta sunt servanda* as provided for under article 26 of the Vienna Convention on the Law of Treaties.<sup>322</sup>

The pre-conditions for the crafting of a genuine democratic constitution discussed in chapter 3 above are essential for a legitimate and credible process. The international community must adopt the same attitude with regard to the standards and attitude of dealing with undemocratic regimes. Insofar as Swaziland and Uganda are concerned, it is our contention that both regional and international organisations, particularly the Commonwealth, have betrayed the people by supporting exclusionary processes in contravention of the very principles of the Harare Declaration. That before a constitutional process is undertaken, all undue restrictions and impediments to popular, free and effective peoples' participation be removed, in order to achieve maximum consensus. All groupings and organisations with an interest in governance are allowed to participate as a matter of necessity.<sup>323</sup>

Incumbent governments must not be in charge, control and manipulate the process and thus entrench themselves in power, under the guise of a constitutional process which is stage-managed. It is crucially significant that people at all levels identify with the constitution-making process. A constitution that is legitimate, must not only enjoy the support of the majority, but also command the respect of the minority who have been involved in its crafting.<sup>324</sup> Constitutionalism can only be achieved, where the fundamental law is genuinely founded on the true aspirations of the people, not a product of political manipulation. In order that a people-driven constitution is generally acceptable to all, it must have been adopted by an inclusive body of all representatives of the people duly mandated and authorised to do so.<sup>325</sup>

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resolution 53/144 of 9 December 1998, available at <<http://www.ohchr.org/english/law/freedom.htm>> (accessed 28 September 2005).

<sup>321</sup> For Swaziland's obligations under international see the reports by the IBA (n 16), AI (n 14) as and the ICJ (n 15). For Uganda the HRW (n 19). Shaw, (n284) 96-98.

<sup>322</sup> Adopted by the General Assembly on entered into force on 17 January 1980, available at <<http://www.un.org/law/ilc/texts/treaties.htm>>(accessed 24 September 2005).

<sup>323</sup> Hatchard (n 30) 31.

<sup>324</sup> Oloka-Onyango, (n1) 3, makes the point that a political system that does not enjoy the confidence and respect of the majority and the minority is prone to friction and instability.

<sup>325</sup> Haroub, O *et al* (eds) (2002) *Towards political liberalisation in Uganda a report of the Uganda Fact-finding Mission* 70.

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## **General Comments**

General Comment No. 25 on article 25 of the ICCPR adopted by the HRC at its 1510th meeting (fifty-seventh session) on 12 July 1996.

General Comment No. 29 on article 4 of the ICCPR adopted by the HRC at the 1950th meeting on 24 July 2001.

UN Economic and Social Council 'The Siracusa Principles on the limitation and derogation provisions in the International Covenant on Civil and Political Rights'.

251/2002

Rapporteur:

32 <sup>nd</sup> Session:	Commissioner Barney Pityana
33 <sup>rd</sup> Session:	Commissioner Barney Pityana
34 <sup>th</sup> Session:	Commissioner Andrew R. Chigovera
35 <sup>th</sup> Session:	Commissioner Andrew R. Chigovera
36 <sup>th</sup> Session:	Commissioner Andrew R. Chigovera
37 <sup>th</sup> Session:	Commissioner Andrew R. Chigovera

### Summary of Facts

1. The Complainant is Lawyers for Human Rights, a human rights NGO based in Swaziland.
2. The Complaint was received at the Secretariat of the Commission on 3 June 2002 and is against the Kingdom of Swaziland which is a party to the African Charter on Human and Peoples' Rights.
3. The Complainant states that the Kingdom of Swaziland gained independence on 6 September 1968 under the Swaziland Independence Constitution Order, Act No. 50 of 1968. The 1968 Constitution enshrined several fundamental principles of democratic governance such as the supremacy of the Constitution and separation of powers and clearly laid down procedures for amending the Constitution.
4. The 1968 Constitution also provided for a justiciable Bill of Rights which secured the protection of fundamental human rights and freedoms including the right to freedom of association, expression and assembly
5. The .Complainant alleges that on 12 April 1973, King Sobhuza II issued the King's Proclamation to the Nation No. 12 of 1973 whereby he declared that he had assumed supreme power in the Kingdom of Swaziland and that all legislative, executive and judicial power vested in him. In addition, he repealed the democratic Constitution of Swaziland that was enacted in 1968.
6. It is alleged that the King's Proclamation resulted in the loss of the protections afforded to the Swazi people under the Constitution's Bill of Rights, which effectively incorporated the rights ensured by the African Charter.
7. According to the complaint, the provisions of the Proclamation outlawing political parties violate the Swazi people's freedom of association, expression and assembly, thereby diminishing the rights, duties, and

freedoms of the Swazi people that are enshrined in the African Charter on People's and Human Rights.

8. Furthermore, it is alleged that the Swazi people do not possess effective judicial remedies because the King retains the power to overturn all court decisions, thereby removing any meaningful legal avenue for redress.

## **Complaint**

9. The Complainant alleges that the following Articles of the African Charter have been violated: Articles 1, 7, 10, 11, 13, 26

## **Procedure**

10. At its 32nd ordinary session, the African Commission decided to be seized of the communication.
11. On 30 October 2002, the Secretariat informed the parties of the decision of the African Commission and requested them to transmit their written submissions on admissibility within a period of 3 months.
12. At its 33rd Ordinary Session held in Niamey, Niger from 15 to 29 May 2003, the African Commission examined the communication and decided to defer its consideration on admissibility to the 34th Ordinary Session.
13. On 10 June 2003, the Secretariat of the African Commission wrote informing the parties to the communication of the African Commission's decision and reminded them to forward their submissions on admissibility within 2 months.
14. During its deliberations at the 34th Ordinary Session held from 6 to 20 November 2003 in Banjul, The Gambia, the African Commission however decided to defer consideration of the communication
15. On 4 December 2003, the parties to the communication were informed of the decision of the African Commission and requested the parties to forward their written submissions on admissibility within 2 months.
16. At the 35th Ordinary Session held from 21 May to 4 June 2004 in Banjul, The Gambia, the Complainant made oral submissions before the African Commission. The African Commission considered the communication and declared it admissible.
17. At its 36th Ordinary Session held in Dakar, Senegal from 23 November- 7 December 2004, the African Commission deferred consideration on the



merits of the communication to give the Respondent State one more chance to make its submissions.

18. At its 37th Ordinary Session held in Banjul, The Gambia from 27 April to 11 May 2005, the African Commission considered the communication and took a decision on the merits thereof.

## **LAW**

### **Admissibility**

19. The African Commission was seized with the present communication at its 32nd Ordinary Session which was held in Banjul, The Gambia from 17 to 23 October 2002. The Respondent State has since been requested numerous times to forward its submissions on admissibility but to no avail. The African Commission will therefore proceed to deal with this matter on admissibility based on the facts presented by the Complainant.

20. Article 56 of the African Charter governs admissibility of communications brought before the African Commission in accordance with Article 55 of the African Charter. All of the conditions of this Article are met by the present communication except Article 56 (5), which merits special attention in determining the admissibility of this communication.

21. Article 56(5) of the African Charter provides:-

*Communications . . . received by the African Commission shall be considered if they -:*

*(5) are sent after exhausting local remedies, if any, unless it is obvious that this procedure is unduly prolonged.*

22. The rule requiring the exhaustion of local remedies as a condition of the presentation of a communication before the African Commission is premised on the principle that the Respondent State must first have an opportunity to redress by its own means, within the framework of its own domestic legal system, the wrong alleged to have been done to the individual(s).

23. The Complainant submits that as a result of the King's Proclamation to the Nation No. 12 of 1973, the written and democratic Constitution of the Kingdom of Swaziland enacted in 1968 containing a Bill of Rights was repealed. Furthermore, the Proclamation prohibited the Courts of the Kingdom of Swaziland from enquiring into the validity of the Proclamation or any acts undertaken in accordance with the Proclamation.

24. The Complainant indicates that under the Proclamation, the King assumes supreme power in the Kingdom and judicial power is vested in him and he retains the power to overturn all court decisions, thereby removing any

meaningful legal avenue for redress. The Complainant quotes the case of *Professor Dlamini v The King* to illustrate instances where the King has exercised his power to undermine decisions of the courts. In that case, the Court of Appeal overturned the Non-Bailable Offences Order of 1993, which ousted the courts' jurisdiction to entertain bail applications. Following the decision of the Court of Appeal, the King issued a Decree No.2 of 2001 reinstating the Non Bailable Offences Order. However, due to international pressure, the King later repealed aspects of the reinstated Non Bailable Offences Order by Decree No.3 of 2001.

25. Therefore the Complainant argues they cannot exhaust domestic remedies because they are unavailable by virtue of the Proclamation and even where a matter could be instituted and won in the courts of Swaziland, it would not constitute a meaningful, durable remedy because the King would nullify such legal victory.
26. The Complainant provides all the Proclamations made by the King and after perusing the Proclamations, the African Commission notes that no where in all the Proclamations is there an ouster clause to the effect that the Courts .of the Kingdom of Swaziland are prohibited from "enquiring into the validity of the Proclamation or any acts undertaken in accordance with the Proclamation.
27. The African Commission has considered this matter and realises that for the past 31 years the Kingdom of Swaziland has had no Constitution. Furthermore, the Complainant has presented the African Commission with information demonstrating that the King is prepared to utilise the judicial power vested in him to overturn court decisions. As such, the African Commission believes that taking into consideration the general context within which the judiciary in Swaziland is operating and the challenges that they have been faced with especially in the recent past, any remedies that could ,have been utilised with respect to the present communication would have likely been temporary. In other words, the African Commission is of the view that the likelihood of the Complainant succeeding in obtaining a remedy that would redress the situation complained of in this matter is so minimal as to render it unavailable and therefore ineffective.<sup>326</sup>

For the reasons stated herein above, the African Commission declares this communication admissible.

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<sup>326</sup> Communication 147/95 - Sir Oawda K The/The Gambia.

**Decision on the merits**  
**Submission from the Complainant**

28. The complainant submits that the Kingdom of Swaziland signed the African Charter on Human and Peoples' Rights in 1991. The significance of the signing is that the Kingdom declared an intention to be bound by the Charter.<sup>1</sup> The complainant submits further that on 15 of September 1995, the Kingdom of Swaziland then ratified the Charter and by ratifying the Charter, the Kingdom declared its final formal intention and declaration to be bound by the provisions of the Charter. Formal agreements, particularly unilateral agreements, normally require ratification in addition to the signature. This requires the representative of the state subsequently to endorse the earlier signature. This requires the representative of the state subsequently to endorse the earlier signature. This provides the state with an opportunity to reconsider its decision to be bound by the treaty, and, if necessary, to effect changes to its own law to enable it to fulfill its obligation under the treaty.<sup>2</sup>
29. The complainant notes that the Kingdom of Swaziland had ample time between 1991 and 1995 to consider whether or not to formally agree to be ~ bound by the Charter or to change its laws to fulfill its obligations in 1995.
30. The complainant notes that the Respondent State has violated Article 1 of the African Charter as the latter imposes an obligation on Member States of the African Union to adopt legislative or other measures to give effect to the rights, duties and obligation enshrined therein, noting the African Commission's decision in Communication 147/95 and 149/96<sup>3</sup> where the African Commission found that:
- Article 1 gives the Charter the legally binding character always attributed to international treaties of this sort. Therefore a violation of any provision of the Charter automatically means a violation of Article 1. If a State Party to the Charter fails to recognise the provisions of the same, there is no doubt that it is in violation of this Article. Its violation, therefore, goes to the root of the Charter.
31. The complainant states further that the African Commission found that the obligation under Article 1 commences at ratification and that ratification implies that the State party must also take pre-emptive steps to prevent

1 John Dugard (1992) International Law a South African Perspective, Juta and Co. Ltd Kenwyn at p. 266. See also D.J. Harris (1991) Cases and Materials on International Law (4th Editor) Sweet and Maxwell: London at p. 747.

2 Ibid.

3 Sir Dawda Jawara/The Gambia

human rights violations.<sup>1</sup> According to the complainant, it goes without saying that the African Commission must declare the Proclamation to be in violation of Article 1.

32. The complainant also alleges violation of Article 7 of the African Charter noting that the Proclamation vests all powers of State to the King, including Judicial powers and the authority to appoint and remove judges which necessitates the conclusion that Courts are not independent, especially in view of Decree No.3/2001. This Decree clearly ousts the Courts' jurisdiction to grant bail on matters listed in the Schedule, which schedule may be amended from time to time outside Parliament. The complainant made reference to the African Commission's decision in Communication 60/91,<sup>2</sup> where it was stated that:

Jurisdiction has thus been transferred from the normal courts to a tribunal chiefly composed of persons belonging to the executive branch that passed the Robbery and Firearms Decree. whose members do not necessarily possess any legal expertise. Article 7 1 (d) of the African Charter requires Courts or tribunal to be impartial. Regardless of the character of the individual members of such tribunals, its composition alone creates the appearance, if not lack, of impartiality.

33. According to the complainant, Decree No.3 of 2001 is in violation of Article 7, particularly Article 7 1 (d) and the African Commission is urged to find as such.

34. The complainant also alleges violation of Article 10 and alleges that Sections 11, 12 and 13 of the Proclamation in very clear terms abolish and prohibit the existence and the formation of political parties or organisations of a similar nature. In this regard, the complainant quotes *Communication 225/93* and the African Commission's Resolution on the Right to Freedom of Association which provides that;

- the competent authorities should not override constitutional provisions or undermine fundamental rights guaranteed by the constitution and international standard;
- in regulating the use of this right, the competent authorities should not enact provisions which would limit the exercise of this freedom;
- the regulation of the exercise of the right to freedom of association should be consistent with state's obligations under the African Charter on Human and Peoples' Rights

1 In Communication 129/94. Civil Liberties Organisation/Nigeria in the commentary of Professor Christof Heyns (2001) *Human Rights Law in Africa*: Kluwer Law International: The Hague at p.133. In Communication 211/98, Legal Resources Centre/The Gambia, where the Commission stated that the obligation imposed by Article 1 is peremptory.

2 Constitutional Rights Project/Nigeria.

3 Hurry-Laws/Nigeria.

35. The Commission then concluded that the Nigerian Government's acts constituted a violation of Article 10 of the African Charter. Accordingly, this Resolution equally applies to the Kingdom of Swaziland, and thus Swaziland is in violation. With regards to allegations of violation of Article 11, the complainant argues that the King's Proclamation does not only prohibit the right to associate but also the right to assemble peacefully and adds that the right to associate cannot be divorced from the right to assembly freely and peacefully. In this regard the complainant cites the African Commission's decision in Communications 147/95 and 149/96 where it stated that

the Commission in its Resolutions on the Right to Freedom of Association had also reiterated that the regulation of the exercise of the right to freedom of association should be consistent with States obligations under the African Charter on Human and Peoples' Rights. This principle does not apply to freedom of association alone but also to all other rights and freedoms enshrined in the Charter, including, the right to freedom of assembly

36. The complainant also alleged violation of Article 13 of the African Charter and stated that Section 8 of King's Proclamation of 1981 provides that "The provisions of section 11 and 12 of the King's Proclamation of the 12th April, 1973 shall not be applicable to the Tinkundla which are hereby declared and recognised as centres for meetings of the nation". According to the complainant the import of this section is that citizens can only participate in issues of governance only within structures of the present system, which does not allow free association and assembly, expression and conscience (the Tinkhundla System of Government). In this regard, the complainant refers to the Commission's decision in Communication 147/95 and 146/96 Sir Dawda Jawara/The Gambia where it stated that

the imposition of the ban on former Ministers and Members of Parliament is in contravention of their rights to participate freely in the government of their country provided for under Article 13(1) of the Charter. Also the ban on political parties is a violation of the complainants' rights to freedom of association guaranteed under Article 10(1) of the Charter \

37. And Communication 211/98<sup>1</sup> which provides that

the Charter must be interpreted holistically and all clauses must reinforce each other. The purpose or effect of any limitation must also be examined, as the limitation of the right cannot be used to subvert rights already enjoyed. Justification, therefore, cannot be derived solely from popular will, as such, cannot be used to limit the responsibilities of state parties in terms of the Charter

1 Legal Resources Foundation/Zambia

38. The complainant alleges further a violation of Article 26 of the African Charter

noting that a violation of Article 7 is relevant to Article 26 and in this regard makes reference to Communication 52/91, Communication 54/91, Communication 61/91 Communication 129/94<sup>1</sup> in which the African Commission found that

while Article 7 focuses on the individual's right to be heard, Article 26 speaks of the institutions which are essential to give meaning and content to that right. This Article clearly envisions, the protection of the Courts which have traditionally been the bastion of protection of the individual's rights against the abuses of state power .

39. The complainant noted further that it is beyond doubt that the vesting of judicial powers in the person of the King undermines the authority and independence of the Courts, more so because the King with his legislative powers can easily water down the decision of the Courts as was the case in the judgment of *Professor Dlamini v The King*, Appeal Case No. 42/2000, where the King by Decree No.2 of 2001 overturned the Court of Appeal judgment by reinstating the Non-Bailable offences Order which had been declared unconstitutional.

40. The complainant prays the African Commission to:

- finds the King's Proclamation of 12 April, 1973 to be in violation of the African Charter on Human and Peoples' Rights; and
- recommend and mandate strongly the Kingdom of Swaziland to take constitutional measures forthwith to give effect to all the provisions of the African Charter, specifically Articles 1, 7, 10, 11, 13 and 26 thereof.

#### **Commission's decision on the merits**

41. In making this decision on the merits, the African Commission would like to point out that it is disappointed with the lack of cooperation from the Respondent State. 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 several correspondences to the State, there hasn't been any response from the latter on the matter. Under. Such circumstances, the Commission is left with no other option than to take a decision based on the information at its disposal.

1 Lawyers Committee for Human Rights/Sudan, Malawi African Association/Mauritania, Amnesty International Mauritania, Civil Liberties Organization/Nigeria.

42. It must be stated however that, by relying on the information provided by the complainant, the Commission did not rush into making a decision. The Commission analyzed each allegation made and established the veracity thereof.
43. A preliminary matter that has to be addressed by the African Commission is the competence of the commission to entertain allegations of human rights violations that took place before the adoption of the Charter or even its coming into force. In making this determination the Commission has to differentiate between allegations that are no longer being perpetrated and violations that are ongoing.
44. In case of the former, that is, violations that occurred before the coming into force of the Charter but which are no longer or which stopped before the coming into force of the Charter, the Commission has no competence to entertain them. The events which occurred before the date of ratification of the Charter are therefore outside the Commission's competence *rationae temporis*. The Commission is only competent *ratione temporis* to consider events which happened after that date or, if they happened before then, constitute a violation continuing after that date.
45. In the present communication, the violations are said to have started in 1973 following the Proclamation by the King, that is, prior to the coming into force of the African Charter and continued after the coming into force of the Charter through when the Respondent State ratified the Charter and is still ongoing to date. The Commission therefore has the competence to deal with the communication.
46. The Commission has competence *ratione loci* to examine the case because the petition alleges violations of rights protected by the African Charter, which have taken place within the territory of a State Party to that Charter. It has competence *ratione materiae* as the petition alleges violations of human rights protected by the Charter, and lastly it has competence *ratione temporis* as the facts alleged in the petition took place when the obligation to respect and guarantee the rights established in the Charter was in force for the Kingdom of Swaziland. Given that Swaziland signed the Charter in 1991 and later ratified on 15 September 1995, it is clear that the alleged events continues to be perpetrated when the State became under the obligation to respect and safeguard all rights enshrined in the Charter, giving the Commission *rationae temporis* competence.
47. The two stages of signature and ratification of an international treaty provides states with the opportunity to take steps to ensure that they make the necessary domestic arrangements to ensure that by the time they ratify a treaty the latter is in conformity with their domestic law. When ratifying the Charter, the Respondent State was aware of the violation.

complaint of and had the obligation to take all the necessary steps to comply with its obligations under Article 1 of the Charter - to adopt legislative and other measures to give effect to the rights and freedoms in the Charter.

48. From the above, it is the Commission's opinion that it is competent to deal with the matter before it.
49. Having determined that it is competent to deal with the matter, the Commission will now proceed to examine each of the rights alleged to have been violated by the Respondent State.
50. The complainant argues that by ratifying the African Charter and not adopting legislative and other measures to bring the 1973 Proclamation in conformity with the Charter, the respondent State has violated Article 1 of the African Charter. The use of the terms "other measures" in Article 1 provides State Parties with a wide choice of measures to use to deal with human rights problems. In the present situation when a Decree has been passed by the Head of State abrogating the constitution, it was incumbent on the same Head of State and other relevant institutions in the country to demonstrate good faith and either reinstate the constitution or amend the Decree to bring it in conformity with the Charter provisions during or after ratification.
51. In the opinion of the Commission, by ratifying the Charter without at the same time taking appropriate measures to bring domestic laws in conformity with it, the Respondent State's action defeated the very object and spirit of the Charter and thus violating Article 1 thereof.
52. The complainant also alleges violation of Article 7 of the Charter stating that the Proclamation vests all powers of State to the King, including judicial powers and the authority to appoint and remove judges and Decree No.3/2001 which ousts the Courts' jurisdiction to grant bail on matters listed in the Schedule. According to the complainant this illustrates that Courts are not independent.
53. Article 7 of the African Charter provides for fair trial guarantees safeguards to ensure that any person accused of an offence is given a fair hearing. In its resolution on Fair Trial adopted at its Eleventh Ordinary Session, in Tunis Tunisia, from 2 to 9 March 1992, the African Commission held that the right to fair trial includes, among other things, the right to be heard, the right of an arrested person to be informed at the time of arrest in a language he/she understands, of the reason for the arrest and to be informed promptly of any charges against them, the right of arrested or detained persons to be brought promptly before a judge or other officer authorised by law to exercise judicial power and be tried within a



reasonable time or be released, the right to be presumed innocent until proven guilty by a competent court.

54. In the present communication the Proclamation of 1973 and the Decree of 2001 vested judicial power in the King and ousted the jurisdiction of the court on certain matters. The acts of vesting judicial power in the King or ousting the jurisdiction of the courts on certain matters in themselves do not only constitute a violation of the right to fair trial as guaranteed in Article 7 of the Charter, but also tend to undermine the independence of the judiciary.
55. Article 26 of the Charter provides that States Parties shall have the duty to guarantee the independence of the courts. Article 1 of the UN Basic Principles on the Independence of the Judiciary<sup>1</sup> states that the independence of the Judiciary shall be guaranteed by the State and enshrined in the Constitution or the law of the country. It is the duty of all governmental and other institutions to respect and observe the independence of judiciary. Article 11 of the same Principles states that "the term of office of judges, their independence, security ...shall be adequately secured by law." Article 18, provides that "Judges' shall be subject to suspension or removal only for reasons of incapacity or behaviour that renders them unfit to discharge their duties." Article 30 of the International Bar Association (IBA)'s Minimum Standards of Judicial Independence<sup>2</sup> also guarantees that "A Judge shall not be subject to removal unless, by reason of a criminal act or through gross or repeated neglect or physical or mental incapacity, he has shown himself manifestly unfit to hold the position. of judge" and Article 1 (b) states that "Personal independence means that the terms and conditions of judicial service are adequately secured so as to ensure that individual judges are not subject to executive control."
56. By entrusting all judicial powers to the Head of State with powers to remove judges, the Proclamation of 1973 seriously undermines the independence of the judiciary in Swaziland. The main *raison d'etre* of the principle of separation of powers is to ensure that no organ of government' becomes too powerful and abuses its power. The separation of powers amongst the three organs of government - executive, legislature and judiciary ensure checks and balances against excesses from any of them. By concentrating the powers of all three government structures into one person, the doctrine of separation of power is undermined and subject to abuse.

1 Adopted by the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders held at Milan from 26 August to 6 September 1985 and endorsed by General Assembly resolutions 40/32 of 29 November 1985 and 40/146 of 13 December 1985.

2 IBA Minimum Standards of Judicial Independence (Adopted 1982)

57. In its Resolution on the Respect and the Strengthening on the Independence of the Judiciary adopted at its 19th Ordinary Session held from 26th March to 4th April 1996 at Ouagadougou, Burkina Faso, the African Commission "recognised the need for African countries to have a strong and independent judiciary enjoying the confidence of the people for sustainable democracy and development". The Commission then "urged all State Parties to the Charter to repeal all their legislation which are inconsistent with the principles of respect of the independence of the judiciary, especially with regard to the appointment and posting of judges and to refrain from taking any action which may threaten directly or indirectly the independence and the security of judges and magistrates".
58. Clearly, retaining a law which vest all judicial powers in the Head of State with possibility of hiring and firing judges directly threatens the independence and security of judges and the judiciary as a whole. The Proclamation of 1973, to the extent that it allows the Head of State to dismiss judges and exercise judicial power is in violation of Article 26 of the African Charter.
59. With regards allegation of violation of Articles 10 and 11, the complainant submits that the Proclamation of 1973 abolishes and prohibits the existence and the formation of political parties or organisations of a similar nature and that the Proclamation also violates Article 11 - right to assemble peacefully as the right to associate cannot be divorced from the right to assembly freely and peacefully.
60. Article 10 of the African Charter provides that "every individual shall have the right to free association provided that he abides by the law And Article 11 provides that every individual shall have the right to assemble freely with others. The exercise of this right shall be subject only to necessary restrictions provided for by law..." In **Communication 225/98**<sup>1</sup> the African Commission, quoting its Resolution on the Right to Freedom of Association held that the regulation of the exercise of the right to freedom of association should be consistent with state's obligations under the African Charter and in regulating the use of this right, the competent authorities should not enact provisions which would limit the exercise of this freedom. That the competent authorities should not override constitutional provisions\_or undermine fundamental rights guaranteed by the constitution and international standard. The Commission reiterated this in **communications 147/95 and 149/96**<sup>2</sup> and concluded that this principle does not apply to freedom of association alone but also to all other rights.

1 Huri-LawsNigeria.

2 Sir Dawda Jawara/The Gambia.

and freedoms enshrined in the Charter, including, the right to freedom of assembly.

61. Admittedly, the Proclamation restricting the enjoyment of these rights was enacted prior to the coming into effect of the Charter. However, the Respondent State had an obligation to ensure that the Proclamation conforms to the Charter when it ratified the latter in 1995. By ratifying the Charter without taking appropriate steps to bring its laws in line with the same, the African Commission is of the opinion that the State has not complied with its obligations under Article 1 of the Charter and in failing to comply with the said duty, the prohibition on the establishment of political parties under the Proclamation remained effective and consequently restricted the enjoyment of the right to freedom of association and assembly of its citizens. The Commission therefore finds the State to have violated these two articles by virtue of the 1973 proclamation.

62. The complainant also alleges violation of Article 13 of the African Charter claiming that the King's Proclamation of 1973 restricted participation of citizens in governance as according to the complainant the import of sections 11 and 12 of the Proclamation is that citizens can only participate in issues of governance only within structures of the *Tinkhundia*. In Communications 147/95 and 146/96 Sir Dada Aware/The Gambia the Commission held that

the imposition of the ban on former Ministers and Members of Parliament is in contravention of their rights to participate freely in the government of their country provided for under Article 13(1) of the Charter. Also the ban on political parties is a violation of the complainants rights to freedom of association guaranteed under Article 10(1) of the Charter

63. In the present communication, the King's Proclamation clearly outlaws the formation of political parties or any similar structure. Political parties are one means through which citizens can participate in governance either directly or through elected representatives of their choice. By prohibiting the formation of political parties, the King's Proclamation seriously undermined the ability of the Swaziland people to participate in the government of their country and thus violated Article 13 of the Charter:

From the above reasoning, the African Commission is of the view that the Kingdom of Swaziland by its Proclamation of 1973 and the subsequent Decree No.3 of 2001 violated Articles 1, 7, 10, 11, 13 and 26 of the African Charter.

The Commission hereby recommends as follows:

- that the Proclamation and the Decree be brought in conformity with the provisions of the African Charter;
- that the State engages with other stakeholders, including members of civil society in the conception and drafting of the New Constitution; and
- that the Kingdom of Swaziland should inform the African Commission in writing within six months on the measures it has taken to implement the above recommendations.

Adopted by the African Commission on Human and Peoples' Rights at its 37th Ordinary Session held in Banjul, The Gambia, from 27th April to 11th May 2005.