Introduction

When I recently had occasion to address students of the University of Swaziland on the constitutional crisis that the country is facing and comparing it with Zimbabwe, debating whether or not Swaziland is not on the same deadly path to constitutional decay, this is how I began the discussion and the students and indeed members of the public therein present seemed to understand fully well:

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 that animal they might have seen a few minutes before – the chameleon to be precise. *It is ever changing but never really changing* (Emphasis not mine).¹

¹ Thulani Rudolf. Maseko is an admitted attorney of the Courts of Swaziland and holds a Bachelor of Arts Degree in Law (BA Law) and a Bachelor of Laws Degree (LLB) from the University of Swaziland. He also holds a Master's Degree with Specialisation in Human Rights and Democratisation in Africa, from the University of Pretoria, South Africa. While pursuing his LLM he did short courses on Election Observation and International Law. Maseko had the privilege of doing an internship at the Constitutional Court of the Republic of South clerking for the Chief Justice, Justice Pius N. Langa. Maseko is a founder member of the National Constitutional Assembly (Swaziland) as well as Lawyers for Human Rights (Swaziland). As a practising lawyer, Maseko has handled a number of human rights cases and he successfully represented Lawyers for Human Rights (S) in a complaint filed with the African Commission on Human and Peoples' Rights against the Kingdom of Swaziland. He is a constitutional and human rights consultant and a partner with the firm of attorneys Shilubane Maseko and Partners of Mbabane.

Hlatshwayo, N ‘Swaziland constitutional framework’ a paper delivered at the workshop of the Council of Swaziland Churches (CSC) and the Southern African Conflict Prevention Network (SACPN) with the title *Bridging the political divide* held on 21-23 June 2003, Pigg’s Peak Hotel.
This in a nutshell demonstrates why the National Constitutional Assembly (Swaziland) argues that the Constitution of Swaziland Act 001 is illegitimate. The Tinkhundla system of government which is devoid of fundamental tenets of democracy remains intact.

The Swaziland constitutional review process and the struggle for genuine constitutionalism has to date lasted for thirty-two years since the unlawful repeal of the Independence Constitution on 12 April, 1973. Despite such a long period the country is not yet on the road to proper constitutionalism. This presentation will touch briefly on the historical background of Swaziland’s constitutional developments, the process leading to the purported promulgation of the Constitution, its contents thereof, the pending court challenge as well as a possible way forward.

**Brief Background**

It is well known that the Kingdom of Swaziland gained independence from the United Kingdom of Great Britain on 6 September 1968. This independence was obtained through negotiations and consultations between the then government of Great Britain, His Majesty King Sobhuza II, representatives of English settlers in Swaziland as well as other stakeholders, such as political parties. Zwane, the former Attorney-General of Swaziland (arguably the best Attorney-General Swaziland has had) writes that:

> In Swaziland the constitutional proposals which eventually formed the basis for the independence constitution were formulated by a constitutional committee composed of representatives of a majority of the people.

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2 Act 001 of 2005.


4 As above 8.
Other constitutional scholars and writers have expressed somewhat similar sentiments. Matsebula\(^5\) recorded that although members of other political groups were involved in the constitutional committee, they were denied the right to represent their constituencies, but to be a part thereof as individual members of the Swazi National Council. Matsebula writes:

> Unfortunately at this point a difference of opinion developed among the Swazi members of the committee. The difference arose out of the claim by the Swaziland Progressive Party (SPP) members that they had the right to state their party’s case, while the other Swazi members felt strongly that they were representing the Swazi National Council, not their party. It was therefore their duty to support the standpoint of the council, and not to attack it.\(^6\)

He continues to say that as a result of this dispute, John J. Nquku, who was president of the SPP was suspended from the council acting as representatives of the Swazi nation. The two other members of the party followed Nquku, being Dr Phesheya Ambrose Zwane and Mpangele Dlamini.\(^7\) We saw history repeating itself when some members of the Constitutional Review Commission (CRC) resigned\(^8\) from it because they believed their presence was meaningless as the CRC was dominated by proponents of the Tinkhundla system of government.

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\(^5\) Matsebula JSM (1989) *A History of Swaziland.*

\(^6\) As above 235.

\(^7\) As above.

\(^8\) Among those who resigned are Nkonzo Hlatshwayo who was its secretary and relocated to South Africa, Mario Masuku President of the banned People’ United Democratic Movement (PUDEMO), Mhawu Maziya then lecturer in the department of Law at the University of Swaziland, Zombodze Magagula, Dr. Jeremiah Gule who also relocated to the Republic of South Africa and others who passed on without being replaced.
Hlatshwayo,⁹ the then Secretary to the CRC gives an account of the discussion on the ins-and-outs of the Constitutional Committee.¹⁰ Similarly Khumalo,¹¹ states that a legislative council was proposed as a forum for transmitting the aspirations of the society.¹² What seems to be clear from these observations is that a constitution is and must be a product of not only consultation, but of consensus. While not everybody’s views may win the day, there is value in being generally involved in the process, so that the resultant constitution is a product of a win-win arrangement as opposed to a winner-takes-all scenario.¹³

**Repeal of the 1968 Constitution**

On 12 April 1973 His Majesty King Sobhuza II repealed the 1968 Constitution. It is no longer in question that such repeal was unlawful.¹⁴ Again on this point constitutional experts are agreed,¹⁵ that the Independence Constitution had no provision for its repeal, but for its amendment. Of fundamental significance are the reasons for which the Constitution was abrogated, that it was imposed on the Swazi people and therefore lacked legitimacy and credibility. On this, His Majesty observed that:

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¹⁰ As above 103.
¹² As above 66.
¹³ It will be demonstrated later in this discussion that the Swaziland constitution-making process was not only dominated, but also tightly controlled by the ruling Tinkhundla regime, which never allowed the participation and involvement of other organized stakeholders.
¹⁴ Ray Gwebu and Lucky Nhlanhla Bhembhe Swaziland Court of Appeal Case Nos. 19/20 2002 as yet (unreported).
¹⁵ Zwane, Hlatshwayo and Khumalo.
that the Constitution has permitted the importation into our country of highly undesirable political practices alien to, and incompatible with the way of life in our society and designed to disrupt and destroy our own peaceful and constructive and essentially democratic methods of political activity; increasingly this element engenders hostility, bitterness and unrest in our peaceful society.\textsuperscript{16}

Due to the observation that in his Majesty’s view, the Constitution was imposed, he at the same time entertained an appreciation that in order to be credible, legitimate and therefore acceptable to the people of Swaziland, a constitution for the country had to be written by the people themselves and for themselves. In this regard His Majesty said:

that I and all 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 governance and the happiness of all our people.\textsuperscript{17}

His Majesty appears to have been fully aware that not only that it was essential that the people wrote the constitution themselves, but also that they would themselves, accept and adopt it. In this connection, the King deemed appropriate to reaffirm the commitment and undertaking made in 1973 when he passed and enacted in Council the 1978 Order.\textsuperscript{18} Section 80(2) thereof reads:

Save in so far as is hereby expressly repealed or amended the King’s Proclamation of 12\textsuperscript{th} April 1973 shall continue to be of full force and effect:

Provided that the King may by Decree published in the Gazette amend or repeal the said Proclamation after a new Constitution for the Kingdom of Swaziland has been accepted by the King and the people of Swaziland and brought into force or effect.

\textsuperscript{16} King’s Proclamation to the Nation paragraph 2(c).

\textsuperscript{17} As above paragraph 2(e).

\textsuperscript{18} Establishment of the Parliament of Swaziland Order 23 of 1978.
Unpopularity of the Tinkhundla System and the constitution-making process

The Tinkhundla System of government introduced through the 1978 Order, apparently did not enjoy popular support and acceptance from the populace. Constitutional reforms were demanded in order to give meaning and effect to the promise made as stated in paragraph 2(e) of the Proclamation read with section 80(2) of the 1978 Order above. It was as a result of such demands that His Majesty King Mswati III found himself having to establish the various Vusela committees; the Tinkhundla Review Commission (TRC), Constitutional Review Commission (CRC) as well as the Constitution Drafting Committee (CDC).

The findings and recommendations of these bodies, particularly the CRC are a matter of public record, we may not go into details on its discussions, suffices to say that it did the people of Swaziland great disservice, as it recommended the retention of the Tinkhundla system of government, that the absolute powers of the King be left intact and that fundamental rights and freedoms be severely limited to the extend that political parties should remain banned and in the face of such ‘overwhelming majority’ history has it that the citizens made it very loud and clear that they want to elect the Prime Minister. Yet despite such demand, the CRC recommended that His Majesty should continue to appoint the Prime Minister.

20 Decree No. 2 of 1996.
21 Decree No. 1 of 2002.
23 Page 77.
24 Page 83.
25 Page 95.
These recommendations demonstrate in terms that are crystal clear that the CRC had no intention to put Swaziland on the highway to constitutionalism, but to entrench the Tinkhundla system of government.

The CDC and the draft constitution

Following the purported completion of the CRC of its mandate of collecting and collating the views of the people on the kind of constitution they wanted to govern them, His Majesty King Mswati III established and appointed members of the CDC.\(^{26}\) The CDC was authorised to write, in consultation with the Attorney-General, a constitution suitable for Swaziland.\(^{27}\) In doing so, it had to review any legislation be it an Order-in-Council, Act of Parliament or Proclamation (Decree), to have regard to human rights instruments as well constitutions of other countries.\(^{28}\) This was a wide mandate indeed. The CDC presented to His Majesty the King on 31 May 2003, a draft of its constitution, which was widely circulated and equally widely criticised. In effect the draft constitution gave effect to the findings and recommendations of the CRC.

Subsequently, the draft constitution was presented as a Bill\(^ {29}\) to the Parliament of Swaziland in or about October 2004. The NCA, was not convinced that the Parliament of Swaziland elected in October 2003, was and still is competent to debate and adopt a constitution for Swaziland for basically two fundamental reasons: Firstly, the Parliament is not fully representative of all the people of Swaziland, in that those citizens who believe and who have formed themselves into political organisations for purposes of governance are by law excluded from participating in the electoral process. The report of the Commonwealth Expect Team on the observation of the 2003 elections put the issue very well when it said:

\(^{26}\) Decree No. 1 of 2002.

\(^{27}\) Section 3(1).

\(^{28}\) Section 3(1)(d).

\(^{29}\) Swaziland Constitution Bill No. 8 of 2004
We 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. Whatever happens regarding the draft Constitution we hope that progress can soon be made to allow political parties and to introduce constitutional arrangements by which an elected Parliament and the Government which is drawn from it will have real power. We noted the serious concern regarding observation of the rule of law and the separation of powers, which are both key elements in any democratic arrangements.  

Secondly, recent events in the country have demonstrated beyond any shadow of doubt that Parliament is not autonomous. The idea of having a constitution adopted by an independent all inclusive and representative constitutional body is to ensure and guarantee, that, the government in power does not unduly influence and manipulate the process and proceedings of constitutional-making and its adoption. Two instances are important to demonstrate the lack of autonomy of Parliament. One, it is a matter on the public record that once Parliament had elected Honourable Mr Marwick Khumalo as Speaker of the House, the country was held at ransom by His Majesty the King and those who are responsible for advising him. As a result, the official opening of the Parliament of Swaziland after the 2003 elections was unlawfully delayed to such an extent that section 30 of the Establishment of the Parliament of Swaziland Order was violated. Two, when the Constitution Bill was being debated by Parliament the Prime Minister who is the head of the executive, delivered a “special message from the Throne”. As it turned out, the so-called special message had the effect of influencing the parliamentary debate on the Constitution Bill.

**Court challenge by way of urgency - a lost opportunity for lack of judicial activism**

Having the above in mind and recognising that organised civil society had been systematically excluded from the process, yet the review of the


Constitutional order for Swaziland was actually initiated at the instance of the demand by the much organised forces in the form of political parties and the trade union movement. The NCA with a view to vindicate effective public participation, thought it appropriate to launch and file an urgent application to have recourse to the court. The relief sought was that, pending the determination of the main application, in which the applicants sought an order that they are entitled to participate in the making of the country’s constitution, Parliament be interdicted and stopped from debating and enacting into law the Swaziland Constitution Bill No. 8 of 2004, without the involvement and participation in the process of its making and adoption, of organised civil society. This was premised on the observation that Parliament was not mandated to enact and adopt the country’s constitution for the reasons alluded to above. The application was heard by the full bench of the High Court which dismissed, surprisingly without expanding its reasoning on why and how section 4 of the 1996 Decree prevented the participation and involvement of organised groupings. In our view this decision is not a regressive step and erroneous in constitutional litigation, it a reactionary decision.

For this reason, it is our opinion that while we demand accountability on the part of the Executive and Legislative arms of government, we have to do the same on the Judiciary. Judgments of the courts must be subjected to honest and credible public scrutiny as a check and balance on how our courts arrive at their decisions. For a long time, we have neglected to do so, yet judgments of courts have a significant effect on the lives of many citizens, especially where a matter pertains to public interest litigation. This leads us to briefly

32 Swaziland Federation of Trade Unions and Others v Chairman of the Constitution Drafting Committee and Others Civil Case No. 3367/2004.

33 Swaziland Federation of Trade Unions and Others v The Chairman of the Constitution Drafting Committee and Others Civil Case No. 1671/2004. This main application pertained to the validity of the constitution-making exercise. It has since been withdrawn and a new application challenging both the process and the validity of the Constitution has been filed.

34 The full bench was composed of the Acting Chief Justice Annandale, Justice Matsebula, Justice Maphalala, Justice Nkambule and Justice Shabangu, the latter two now late.
consider that the manner of appointment of judicial officers as well as members of the Judicial Service Commission (JSC). It is contended that the procedure for the appointment of members of the JSC must be clear, open and transparent so that its composition cannot be put to question. As it is, all members of the JSC are all appointees of the Executive. The new constitution does not make any break from this arrangement as will be shown shortly below. As a result the independence of the judiciary has been heavily encroached over the years.

The cattle-byre Constitution Act 001 of 2005

If one reads the constitutional history of the Republic of Uganda and compare it with that of Swaziland, there are certain similarities on constitutional developments of the two countries, particularly in so far as constitution-making is concerned. The constitutional history of Uganda shows that in 1962 Uganda experienced a constitutional crisis when former President Milton Obote unlawfully repealed the Independence Constitution. He introduced a constitution which was written by himself together with the Attorney-General, he then announced at a Parliament session that members of Parliament would find their copies in their pigeon-holes in the Parliament House. The Constitution famously became known as the “pigeon-hole constitution”.

We have chosen to ascribe the title to the Swaziland Constitution as the “cattle-byre Constitution” because it was supposedly “adopted” by the “people of Swaziland” at the Royal cattle byre. We pause to say have that the loyalty of the people has been abused by those who hold power in Swaziland. It will be recalled that it was at the cattle-byre that the Imbokedvo National Movement (INM) was formed in 1964, it was there that the Independence Constitution was unlawfully repealed and it was there that the 2005

35 Section 113 of the 1968 Constitution as repealed with savings; see also section 3 of the Judicial Service Commission Act 13 of 1982.
37 Matsebula (above) 240.
Constitution was purportedly “accepted” to continue entrenchment of the policies of the INM of giving absolute powers to the Monarch and the curtailment of fundamental rights and freedoms. Having said the above it is important to say that while the Constitution pays respect to the lofty principles of democracy, human rights, rule of law and good governance, such are then watered down by other provisions that give effect to the supremacy of the Monarch, as opposed to supremacy of the Constitution.
Purported democratic ideals in the Constitution

It is fascinating that at least *nine times* the Constitution refers to democratic society. For instance the preamble reads thus in part:

Whereas it is necessary to blend good institutions of traditional Law and custom with those of an *open and democratic society* so as to *promote transparency* and the social, economic and cultural development of our Nation (Emphasis added).

The very first section thereof reads:-

Swaziland is a sovereign, **democratic** Kingdom (Emphasis added).

The Constitution refers to the now generally accepted international standard of “reasonably justifiable in a democratic society”, which appears in sections 22 (2)(d), 24(3)(c), 25(3)(c), 26(3)(b), 56(1) as well as 58(1) and (4). In our opinion the reference to democratic norms, principles, values and standards should not be given a meaning as dictated by the Tinkhundla system of governance, which its fundamental characteristic is to *stifle* full respect for fundamental human rights and freedoms and civil liberties of the individuals. An intention to *suffocate* such fundamental rights and freedoms, particularly the right to engage in free political activity, including the right to form, join and belong to political parties and organisations, appears more fully in section 79 which reads as follows:

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

The irony of this provision is its apparent conflict with section 25(1) and (2) of the Constitution.38 While section 79 stresses the bogus and dubious concept

38 Section 25:

(1) A person shall have the right to freedom of peaceful assembly and association.

(2) A person shall not except with the free consent of that person be hindered in the enjoyment of the freedom of peaceful assembly and association, that is to say,
of individual merit for purposes of election, section 25 seeks to guarantee the right of the citizens to associate and assemble, which in terms of international standards and values, includes the right to form, join and belong to a political party of one’s free and voluntary choice.  

A Constitution without constitutionalism

The essence of having a written constitution is to create and inculcate a culture constitutionalism. But just what is meant by constitutionalism? An old English constitutional lawyer defined constitutionalism as being:

The idea of constitutionalism involves the proposition that the exercise of governmental power shall be bound by rules, rules prescribing the procedure according 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 curb arbitrariness of discretion and 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 (emphasis added).

In line with this position, Zwane writes that “[t]his belief that constitutions provide for limited government was recognised by Wheare and also endorsed by Vile when he stated that “governmental power” should be controlled in order that it should not be destructive of the values it was intended to

39 We will say no more on this because of the reason that this forms part of the arguments that are yet to be made in Court in the matter of Jan Sithole (in his capacity as a Trustee of the NCA and Others v The Prime Minister of the Kingdom of Swaziland and Others Case No. 2792/2006.

40 Lest one is accused of plagiarism, it is important to disclose that the phrase ‘constitution without constitutionalism’ is taken from the lucid work of Okoth-Ogendo, H.W.O, ‘Constitutions without constitutionalism: reflections on an African political paradox’, in Shivji, I.G. (ed) (1991) State and constitutionalism an African debate on democracy 3- 25.

promote”. Hlatshwayo expresses similar sentiments when he says that constitutionalism has as its heart and focus the task of defining or clarifying the lawful limits of political authority and therefore the obligation that individual members of that society owe both to the community and to one another. In this regard, he continues, this requires the identification of a mechanism or instrument through which a balance is to be maintained between the rights of citizens on the one hand and the full extent of political authority reposing in the community on the other hand.

**Separation of powers**

It is now generally accepted that in order for constitutionalism to prevail there has to be separation of powers between and among the three arms of government, that is, the executive, legislature and the judiciary. While it is acknowledged that there can be no total separation, it has been suggested and accepted that the essence of separation of powers is that none of the three arms of government must be so powerful so as to undermine the independence and authority of the other, and consequently influence its operations unduly.

A clear and proper reading of the Swaziland Constitution demonstrates in terms that are crystal clear that the people of Swaziland and separation of powers are total strangers that are yet to meet in the Swaziland constitutional order. It must be emphasised that this Constitution must be understood in the context within which it was drafted, so that, it will be recalled that the CRC recommended that the powers of the Monarch must remain intact as provided for under the King’s Proclamation. Indeed this the so-called new Constitution gives effect to that recommendation.

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42 Zwane 12.
43 Hlatshwayo 13.
44 As above.
This is illustrated by the following provisions: While His Majesty the King is the executive authority of the Kingdom, he appoints all the members of the Judicial Service Commission (JSC) so much so that at the very least, not even the Law Society of Swaziland has representation in the appointment of judicial officers! Not only that, His Majesty appoints ten members into the House of Assembly and appoints the majority in Senate. We have argued that the new Constitution does not bring any changes in Swaziland’s constitutional arrangement as established according to the Establishment of the Parliament of Swaziland Order of 1992, save for a very few cosmetic changes. For example, except for the provision for the appointment of the female Members of Parliament, the arrangement is exactly the same as it was under the 1992 Order.

It is our contention that the appointment of members into the Parliament by the King does not augur well for constitutionalism, let alone that His Majesty appoints the majority into the upper House. For these observations it is our conclusion that while absolute separation is not possible, there is no such separation at all in the Swaziland Constitution.

It is also a great deal for concern that whilst it has been shown above that the powers of the King cut across all the three fundamental arms of government, he also appoints members of his Advisory Council. What is sad about this whole arrangement is that individuals who have become unpopular with the general citizenry while serving in government have been appointed to advise His Majesty and the people on whose behalf they claim to so advise have no say on who should be in these advisory structures, nor do the citizens of

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45 Section 64(1) of the Constitution.
46 Section 159(2) of the Constitution.
47 Section 95(1)(b) of the Constitution.
48 Section 94(3) of the Constitution.
49 Section 95(1)(c) of the Constitution.
50 Section 14 on the composition of Senate and 16 on the composition of the House of Assembly thereof.
51 Section 13 of the Constitution.
Swaziland have any power to influence the kind of advice they give, yet they represent “the nation” as the Swazi National Council Standing Committee!\(^{52}\) Now, the dichotomy here is that, while the SNC is the highest policy and advisory body to the nation,\(^{53}\) those who claim to represent the people in the SNSC are not elected representatives of the people as they are not elected and the SNC as convened in terms of Swazi law and custom is devoid of any tolerance and respect for democratic norms and standards when issues affecting the public are discussed.

Here again, while His Majesty the King is the executive authority of Swaziland, he is immune from any legal proceedings both in his private and public capacity, for all things done or omitted to be done by him.\(^{54}\) The difficulty with this is that the Constitution provides that executive authority may be exercised by him directly,\(^{55}\) he has the right and duty to uphold and defend the Constitution\(^{56}\) and that he shall exercise such executive authority in accordance with the Constitution, yet in spite all these it provides:

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\text{Where the King is required by this Constitution to exercise any function after consultation with any person or authority, the King may or may not exercise that function following that consultation.}^{57}
\]

We contend that this is a total reversal of the little constitutionalism this Constitution attempts to introduce. We have already indicated above that the idea of constitutionalism is to limit discretionary power, and accordingly limit or eliminate its abuse thereof. But under the cattle-byre Constitution the executive authority is given so much wide discretion so much so that it

\(^{52}\) Proclamation No. 6 of 2003 of 26 November, 2003 an example is that of the former Prime Minister, Barnabas Dlamini who damaged the integrity of the courts in 2002 the November 28 Statement which resulted in the escalation of the constitutional crisis. Even when the courts called upon him to purge Government’s contempt, he adamantly refused, and yet he now advises His Majesty.

\(^{53}\) Section 232 of the Constitution.

\(^{54}\) Section 11 of the Constitution.

\(^{55}\) Section 64(2) of the Constitution.

\(^{56}\) Section 2(2) of the Constitution.

\(^{57}\) Section 64(4) of the Constitution.
negates the very idea of having a written constitution, and makes the King an absolute dictator without any inhibition. The effect of such uncontrolled executive power has already been demonstrated by the long and unexplained delay in the appointment of the judges of the High Court. This has stifled many constitutional cases and brought to a standstill the effective operation of the courts and if one looks at the Supreme Court of Appeal roll, you shudder to think that there are only a few cases on the roll.

Indeed if the High Court is being suffocated, then the Supreme Court will be rendered irrelevant and only remains a white elephant. Of late constitutional cases are also being frustrated by the referral to the full bench which in itself is such a cumbersome arrangement to constitute, and the NCA case\(^58\) has been waiting forever to be set because the full bench has taken so long to be constituted, hence justice long delayed is actually justice denied. The urgent Police Union\(^59\) as well as the Correctional Service Union\(^60\) cases is facing the same fate.

**The battle in the courts continues**

The NCA perceives the process leading to the enactment of the Constitution as flawed and defective, and for that reason has found it appropriate to seek the intervention of the courts. On Monday 7 August 2006, the application to challenge both the process and the contents of the Constitution was filed in the High Court\(^61\) and served on the government represented by the Prime Minister. Without going into much details, suffices to say that the application is premised on two fundamental legal issues: Firstly, the NCA will pray that

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\(^{58}\) Referred to above Case No. 2792/2006.

\(^{59}\) *Khanyakwezwe Alpheus Mhlanga and Swaziland Police Union v Commissioner of Police and Others* Case No. 341/2006 filed at the High Court as an urgent application in February.

\(^{60}\) *Swaziland Correctional Service Union v Commissioner of Prisons and Others* Case No. 764.2006 also filed sometime in February as an urgent application and awaits a date of hearing.

\(^{61}\) Civil case No. 2792/06 above.
the Constitution of Swaziland Act 001 of 2005 be declared null and void, of no force or effect on the ground that it was not accepted by His Majesty the King and all the people of Swaziland as envisioned by paragraph 2(e) of the 1973 Proclamation, as read with section 80(2) of the 1978 Order as already alluded to above. Secondly, it will be prayed that the Constitution be declared null and void and of no force or effect on the ground that the constitution-making process was initiated by decree, yet His Majesty the King did not have the power to make law by decree, and thirdly, it will be argued that the Constitution of Swaziland is null and void and of no force or effect on the ground that the CRC and the CDC misconstrued the provisions of section 4\(^{62}\) of Decree No.2 of 1996 in that they prevented and/or prohibited the applicants and other organised groupings\(^{63}\) from participating in the process yet a proper construction of the section does not support the approach of the CRC.

In the alternative, it will be contended that section 25 of the Constitution which provides for the right to associate and assembly must be interpreted to mean that the people of Swaziland have a right to join, form and belong to political parties and organisations of their own free will and choice, and they have a right to engage in free political activity, including the right to participate in free and fair genuine elections without hindrance and harassment by the Government and its agents. That political parties have a right to be part of any mechanism, structure and/or institution that will manage, organise, govern and run national elections be they the 2008

\(^{62}\) The section 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.

\(^{63}\) See note 69 below on the proposition that public participation indeed must not only focus on the participation of the individual, but also on the role of organised civil society organizations and other organized bodies.
elections or any other in Swaziland (here we long proposed for the establishment of an Independent Electoral Commission as opposed to the executive appointed Boundaries and Election Commission).

It will be contended that Swaziland is not an island on her own, there can be unique Swazi democracy as others want us to believe. Democracy has been well defined and the Constitution pays respect to such universally acknowledged and noble ideals. The time has long come for the people of Swaziland to enjoy full fundamental rights and freedoms without any unreasonable restriction, discrimination or distinction. We can think of no reason why the people of Swaziland deserve less, and continue to be discriminated and dominated by one clan group on the basis of tradition, custom and culture.  

Here is an example, in 1995 the Republic of Uganda adopted a “no-party” system under the then Movement Political System. The then Chairman of the Uganda Constitutional Review Commission (now the Chief Justice of Uganda Justice Benjamin Odoki) was invited by the CRC. The Movement system was exactly the same as the Tinkhundla system in that it did not allow Ugandans to compete for political office along political parties. Although political parties were not absolutely banned, they were restricted their national offices so that they were prohibited by law, from establishing party structures in the rural areas and throughout the country. Only the Movement structures were

64 The Swazi political arena has for long time been dominated by the Dlamini tribe, hence the Prime Minister of the country has since independence been a Dlamini. They do not only claim to have a legitimate ownership of the country, but one Prince Masitsela Dlamini is on record having said that they as Dlaminis are closer to God. This can never be true since the World War Two it has been accepted that the basis of authority is free and democratic elections through which citizens elect their own leaders and that no group of people have the divine right to govern over others without their free consent.

65 Article 19 of the African Charter on Human and People’s Rights which Swaziland rectified in 1995 provides:  

All peoples shall be equal; they shall enjoy the same respect and shall have the same rights.
Nothing shall justify the domination of a people by another.
allowed to do so which gave President Museveni an unfair advantage over other political groups. Pressure for political pluralism mounted and only ten years after the adoption of the 1995 Constitution, Uganda had to do a complete overhaul of the constitutional order when it had to return to multiparty democracy and amend the Constitution so as, to open up the democratic space which since 1989, when President Museveni took over power, his Movement Political System monopolised power through the “individual merit’ idea now entrenched under section 79 of the Swaziland Constitution. This is a lesson that we need not postpone the inevitable.

The Tinkhundla regime must not be allowed to continue to oppress the people pretending that the “overwhelming majority”\(^{66}\) of the people have recommended that Tinkhundla must continue as a system of government for Swaziland. Such cannot be true as evidence is plenty that the coming about of the constitution-making process was as a result of the fact that the legitimacy and effective governance of Swaziland under the Tinkhundla regime came under severe pressure and criticism from the people through organised groupings.\(^{67}\)

**Need for genuine democratisation of Swaziland**

The NCA believes that the people of Swaziland have been cheated through the constitution-making process of Prince Mhlalengangeni, Prince Mangaliso and indeed the Constitution as drafted by the Prince David led arbitrarily appointed CDC and purportedly enacted by Parliament. Is it not surprising that since 1973, all the established constitutional commissions have been led

\(^{66}\) This overwhelming majority phrase is to be found in the CRC report. However, we are not told of the numbers that formed such overwhelming majority and in the court application to set aside the Constitution, the government opposes an order for the filing of the record of the CRC so as verify whether its findings and recommendations are indeed supported y the people’s submissions.

by members of the Royal family? And is it not surprising that all of them came to similar conclusions and recommendations, that is, Swaziland must remain a “no-party” state even as the whole world is experiencing a wave of democratisation? It is the view held by the NCA that pressure must be mounted on the ruling authority to bring about genuine constitutional transformation that will benefit the majority of the people of Swaziland as opposed to a process that has been largely manipulated and intended to entrench the interests of those in power today.68

The NCA challenges all reasonable citizens of Swaziland that a better life for all Swazis will only come with a constitutional order where those who hold political power are fully accountable to the people, where there are strong and independent institutions to ensure respect for the genuine will of the electorate and where the institutions of government are reasonable separated from each other so that the rule of law as opposed to the rule of man will prevail.

A nation in regression

The NCA believes that Swaziland is a nation in regression. It will be recalled that the 1972 constitutional crisis came about as a result of the Ngwane National Liberatory Congress (NNLC) having one three seats in Parliament and Imbokodvo National Movement (INM) was aggrieved. Zonke Khumalo, then Deputy Prime Minister did not hesitate to issue a deportation order against Bhekindlela Thomas Ngwenya,69 one of the three NNLC members who had one in the 1972 elections. We do have no doubt in our minds that INM


Keeping a charter created by the authoritarian regime, with all the non-democratic “baggage” this entails, including the so-called “reserve domains” (i.e. areas of state power left under the control of the authoritarian forces) and highly stringent and difficult to amendment procedures. As mentioned, Chile is the most clear-cut of such cases.
continues to govern Swaziland, and the appointment of Dr Khumalo into the Citizenship Board speaks volumes about the Kingdom being a nation in regression. What is important to note is that while Dr Khumalo was Deputy Prime Minister, INM attempted to amend the Immigration Act by creating a tribunal which was to have exclusive jurisdiction on matters of citizenship. This is the tribunal which is now headed by Dr Khumalo established by section 56(1)\(^70\) of the Constitution. How far back can we go as a people?

**Conclusion**

The NCA is of the view that how a constitution is made matters as much as its contents.\(^71\) An undemocratic process cannot give birth to a democratic constitution. The Swaziland Constitution gives testimony to this observation. It has been suggested by others that no constitution is perfect. Our own view is that the proponents of this argument deliberately choose not to recall that while it may be said that no constitution may be perfect, such is because a constitution must be a product of consensus and negotiations, and no party may come out and be the absolute victor. A constitution which is a product of genuine consultation has to satisfy the aspirations of the participants. The

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\(^69\) Ngwenya challenged his deportation order and the case is reported as *Bhekindlela Thomas Ngwenya v The Deputy Prime Minister and the Chief Immigration Officer* 1970-76 SLR 123.

\(^70\) The section reads:

In this contention we have the backing of some scholars among them van Beek (as above at 75) who says that:

Constitution-making is, of course, the ultimate political act. In transitions it performs a key role in drawing the proverbial line in the sand, between the ancient regime and the new democratic dispensation. And, as Philippe Schmitter has pointed out, *almost as important as the product a Constitution finally embodies, is the process by which it comes into being*. The tension that results from the need to have certain “rules of the game” in place by “kick-off” time (i.e. by the time of the first founding election of the transition: in South Korea in 1987, in Chile in 1989, in Poland in 1992, in South Africa in 1994) and then time it takes to come up with a suitable constitutional charter has often led to the “interim Constitution” solution.
cattle-byre Constitution should satisfy the test of perfection since it perfectly satisfies the desires of those who crafted it and who had a fixed mind to entrench the Tinkhundla regime. In this since it serves perfectly well the proponents of the Tinkhundla system of government.

In our contention, while it may be said that no constitution is perfect, we want to argue that perfection may be found from consensus. It is in consensus that a genuine constitution may find the way to perfection for such perfection is born out of authorship. No matter how bad a constitution may be, if the majority of the stakeholders feel they were part of the process of its making, then they will own it, and it is the authorship that ownership comes from and

On my way to this conference I stumbled across an interesting book by Skjelten, S (2006) A people’s constitution: public participation in the South African constitution-making process, the author writes at 26:

For South African transformation to succeed, a democratic culture and an understanding of law as a societal framework had to be developed. The final constitution needed to be a living document that South Africans could own. In order to achieve this, the constitution-making process had to facilitate participation by the public.

And writing about public participation the author states at 33-34 that:

The CA (1994b) believed that ‘public participation’ did not only involve the public in so far as canvassing was concerned, but extended to placing matters ‘before the public for their consideration’. The CA administration therefore defined ‘public participation’ as an interactive process, in which ‘we would be obliged to not only canvass the views of the public at the submission stage of the process, we would also be obliged to place at least those matters of great contention before the public prior to finalization. The CA noted that that there would be two distinct categories in public participation; civil and the broader public. Civil society was defined as ‘those members of the public represented by organized formations’. The ‘broad public’ was defined as members of the public not belonging to organized structures or civil society groupings. Thus a public participation programme was developed to ensure, as expressed in a CA management committee document, ‘that the process of constitution-making enjoys credibility and the final Constitution legitimacy. Credibility and legitimacy are central to the creation of a national environment where people owe allegiance to the Constitution’.
Indeed, ownership will give the document a sense of perfection and legitimacy. This is the kind of constitution that we aspire for, a constitution through which we will see the *perfection of our labour, of our contribution, of our thinking and through which we can see our justice*. The can be no perfection in a constitution that has been imposed. If the argument that the independence Constitution was illegitimate because it was imposed on the people of Swaziland because it was handed down by the departing British imperialists, then the same argument applies with equal force to the Swaziland Constitution of 2005 which has been imposed by the ruling Tinkhundla regime.

Others have suggested that the Constitution presents a window of opportunity. We do not think so. We seek to have the right to craft the country’s democratic constitution without intimidation and without fear under a free and enabling environment. What we contend is that this Constitution actually presents a window of opportunism. I have not seen except in Swaziland, one democratic and constitutional state where the Head of State and the head of the executive arm of government summons the legislative assembly, those who claim to independently represent the interests of the electorate, to his or her residence so that they account to him personally what they do in their capacities as MPs! This confirms the observation that the Imbokodvo National Movement (INM) which is otherwise the King’s party is still in power and the King remains the party’s clandestine chairman.

The NCA subscribes to the school of thought that in order to be legitimate, the process leading up to the adoption a constitution must be as participatory as possible of all the major stakeholders; it must be as inclusive as possible; it must be accountable to the people through a transparent mechanism and not controlled by the government of the day and that it must be adopted by a

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74 Zwane (n 1 above) at 8.
body of representatives\textsuperscript{75} of the people duly mandated through a popular free, fair and genuine democratic election.\textsuperscript{76} In our contention, the Swaziland Constitution not being a product of consensus is devoid of any legitimacy and represents a false dawn for the people of Swaziland. It represents the old African “Big Man rule” where African leaders strutted stage, tolerated neither opposition nor dissent, cowing the press, emasculating the courts and stifling universities\textsuperscript{77} and reducing parliament to function merely as a rubber stamp. Indeed, it represents the old-fashioned and outdated one-party regime which has fallen out of disfavour even in Western Europe.\textsuperscript{78}

It has authoritatively been suggested that legitimacy and credibility of a constitution depends now on the adoption of the currently fashionable notions of liberalisation, pluralism, democracy, human rights, rule of law, as well as good governance.\textsuperscript{79} The author goes on to state the painful truth when he writes that:

\textsuperscript{75} This proposition finds support from many constitutional writers and scholars among them Venter, F. (2005) \textit{Constitutional comparison Japan, Germany, Canada and South Africa as constitutional states} who writes that:

A glib, and often repeated answer to the question, is that a constitution is written ands established by a sovereign entity, the people, represented by a constituent assembly. This approach, which achieved its currency through the constitutional philosophy and practice of the French Revolution is founded upon the theory of the social contract as follows at 53:

\textsuperscript{76} Hatchard, J (2004) \textit{et al} (eds) \textit{Comparative constitutionalism and good governance in the Commonwealth: an Eastern and Southern African perspective} 34.

\textsuperscript{77} The University of Swaziland despite claiming to protect academic freedom in its mission statement recently declined to permission to a union of students (Swaziland National Union of Students) who wanted to hold a public debate on the Zimbabwe and Swaziland constitutional crises. It has thus been argued that so long as the University Council is chaired by a Prince, Prince Phinda Dlamini and so long as the country remains a closed society under the Tinkhundla regime, academic freedom will remain elusive.

\textsuperscript{78} Meredith, M (2005) \textit{The State of Africa fifty years of independence} 378-386.

\textsuperscript{79} Arnold, G (2005) \textit{Africa a modern history} 804.
by Thulani Maseko trmaseko@yahoo.com

The return to democracy in the 1990s, where it took place, was fraught with dangers and setbacks, yet the determination of the African masses to bring an end to one-party dictatorships was an encouraging aspect of the continent’s politics, even when victories were subsequently whittled away or overthrown by the old power mongers of the one-party state era.  

The author then says that:

‘Democracy must be fought for everyday’.81

Former President Benjamin William Mkapa82 of Tanzania put it very well on the occasion of his address to the Parliament of Uganda on 24 August 2005 when he said:

We must now create systems of political and economic management that are strong, that are resilient and that are capable of outliving their founders and current leaders.

The weakness of the Tinkhundla system is that it is founded of the vision and thinking of His Majesty King Sobhuza II and as a people and as a nation, we are compelled to cling on to that vision so that we are ruled from the grave as one scholar writes that, ‘[I]t will be argued that adherence to these doctrines and practices has stunted the growth of written constitutions and the development of constitutionalism in Commonwealth Africa’.83

80 As above 820.
81 As above.
The former President of Tanzania continues to say that from the experience of the last few decades, and I would add that from experiences of today, we can attribute most civil wars and cross-border conflicts to the legacies of the policies of bigotry, intolerance and exclusion, hence the NCA’s demand for an inclusive constitutional process.

**A suggested wayforward**

We have suggested as a wayforward that the Constitution be referred back and be subjected to debate by an all-inclusive, transparent, representative and democratic constitutional assembly where all stakeholders will make their input as freely and as effectively as possible, within an agreed time frame. But the powers that be are being intransigent about an agreed process that will lead to a popular democratic constitution. We merely are optimistic that the on-going talks between the NCA and the government will yield the desired results even though at this stage we have not been convinced that the government is serious committed to these talks.

It is this kind of intransigent attitude that may eventually lead to a scenario similar to that of Zimbabwe. It is as the result of the concentration of power on the executive and Presidential powers that emasculate the opposition and stifle the press as well as the manipulation of the judiciary that Zimbabwe is

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84 Mkapa above.

85 Following the presentation of a petition to the Prime Minister on 9 October 2006, with a list of demands, the first being that the Constitution lacks legitimacy, credibility and popular support among the citizens of Swaziland government made a last minute attempt and invited the NCA to a dialogue. This was after the NCA had announced that it was going to march to seek audience with His Majesty the King. The ever first meeting between the government and civil society organizations inclusive of the banned political parties, was held on 1 November 2006, but to date no meaningful progress has been made because the government has refuses to enter into a binding Memorandum of Understanding and demonstrate that it has the mandate from the king to engage in the talks earnestly.
So around 1996, we were all in civil society beginning to wake up to the reality of the fact that ZANU PF was up to its ears in the Constitutional egg. When in 1987 Eddison Zvobgo – as those who watched this episode on TV will recall – had made weird cat sounds to embellish his flamboyant introduction of Constitutional Amendment number 7 establishing the Executive Presidency, some of us even got carried away in admiring his poetic skills, and failed to see the enormity of the stink that he was experimenting on the nation. I remember that as I watched his performance on the box that fateful evening, it did not, at least to me as an impressionable 17 year old then, fully emerge that right there before my eyes a monster was being born through Zvobgo’s mouth. Nor did we see that, through our collective silence, we, all of us as a nation, made ourselves the gleeful midwives of this ignominy.

Mutasah continues to say that:

Nor was that the first, nor the last time. As is now common cause, the ruling party had over the years not only conveniently kept intact the legal infrastructure that would help them stifle dissent in post-independent Zimbabwe, they had also, over 17 years of independence by 1997, stamped through Parliament roughly as many amendments, without any national debate of any meaningful sort.

It has been suggested that:

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87 As above at 3.

88 As above.
Here the lawyer is confronted with the reality of political power. Personal rule of the ‘Big Men’ has been the tradition in the ESA states, whether relatively benign – Nyerere, Kaunda, King Mswati III and Museveni, or despotic – Amin, Banda and, in his later years, Mugabe. The Constitution alone cannot act as a brake upon the arbitrary exercise of executive power. As we have seen, in Zimbabwe the Constitution formally obliges the President to act on the advice of his/her Cabinet, but in practice this body acts as a rubber stamp to decisions taken by the President and the ruling party politburo.  

It will be understood that such ‘Big Men’ as Nyerere, Kaunda and lately Museveni finally succumbed to peoples’ demand for democratic governance although in the case of Museveni it can still be argued that the democracy there is still the ‘Big Man democracy’ for just like in Zimbabwe, and indeed Swaziland, the electoral process is a far cry from one that guarantee a free and genuine democratic election due to the fact that the electoral body, is an appendage of the executive as are all the structures created by the Constitution. If democracy must be fought for everyday, then the people of Swaziland have the mammoth task of ensuring that the proposed 2008 national elections be and should only be held if they shall be under a negotiated democratic constitution that will fully guarantee the citizen’s fundamental rights and freedoms, including the right to vote for a political party of one’s own free choice.

89 Hatchard above at 314.

90 Swaziland is expected to conduct national elections in 2008 yet there is a lot of confusion whether such election shall be a multiparty-based or under the Tinkhundla ‘individual merit’ idea given the apparent conflict between section 25 and 79 of the Constitution.

91 Section 90(2) of the Constitution reads:

The members of the Commission shall be appointed by the King on the advice of the Judicial Service Commission.

It will be clear though that all the members of the Judicial Commission are also appointed by the King, so that what we have are members of all the constitutional structures being appointed by the executive, an executive which does not believe in the existence of diverse opinions so that members of opposition parties and other dissenting voices would form a part of these critical constitutional bodies.