

251/2002 Lawyers for Human Rights/Swaziland

Rapporteur:

32nd Session: Commissioner Barney Pityana

33rd Session: Commissioner Barney Pityana

34th Session: Commissioner Andrew R. Chigovera

35th Session: Commissioner Andrew R. Chigovera

36th Session: Commissioner Andrew R. Chigovera

37th 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 /I 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 In addition, he repealed the democratic Constitution of Swaziland that was enacted in 1968.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 33 the communication to give the Respondent State one more chance to makes 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 took a decision on the merits thereof.

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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 34 "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 ineffective². For the reasons stated herein above, the African Commission declares this communication admissible.

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.³ 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 fulfil its obligation under the treaty.⁴

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 fulfil 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 149/965 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 human rights violations.⁶ 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 60/91,7 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 225/988 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

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 complainantso rights to freedom of association guaranteed under Article 10(1) of the Charter

37. And Communication 211/989 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

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 129/9410 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.

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 41 the Independence of the Judiciary 11 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 Independence¹² 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’être* 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 power 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.

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 225/98¹³ 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 149/9614 and concluded that 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.

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 Tinkhundla. In Communications 147/95 and 146/96 Sir Dawda Jawara / 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

53. 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 11thMay 2005.