

**A STUDY OF THE POWERS OF THE SWAZI MONARCH IN TERMS
OF SWAZI LAW AND CUSTOM PAST, PRESENT AND THE FUTURE.**

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TABLE OF CONTENTS

Acknowledgements

Abstract

Contents

Glossary of Siswati words and phrases

Abbreviations

Table of Cases

Documents

Table of Statutes

Bibliography

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ABSTRACT

The thesis covers the branches of law known as Constitutional law and Customary law. It focuses on the powers of the Swazi monarch, which are based on a combination of the received Western law and Swazi custom. For the purposes of this study, therefore, Swazi law and custom shall be taken to include both the statutory law and the yet unwritten customary law.

Swaziland is black Africa's only remaining traditional monarchy, ruled as it is by the Ngwenyama, an indigenous institution, whose origin is derived from custom.¹ The resilience of this ancient system of government in a continent where modernisation and constitutional democracy among other factors have led to its extinction is phenomenal, particularly because some commentators have described traditionalism in modern Africa as an "embarrassing anachronism."² In Swaziland the monarchy continues to be a vibrant system and the nation is currently engaged in a process of not only codifying the customary law but also of drafting the constitution of the country.³ One of the key areas of concern is the question of the distribution of power between the monarch and the people under the proposed constitution. Traditionalists are of the view that the powers that the King currently exercises should remain intact

¹ Monarchical systems of government are not peculiar to Africa but have existed throughout the centuries in most parts of the world in one form or another. In an introductory comment to the Draft Discussion Document Towards A White Paper On Traditional Leadership And Institutions 11 April 2000:4 the evolution of the institution of the monarchy is traced in the following words: "Traditional leadership is one of the oldest institutions of government, both in Africa and the rest of the world. It predates colonialism and apartheid, and it represents early forms of societal organisation. The rest of the world has gone through eras of monarchical rule of one form or another. That the institution still exists today, even in those countries where it was abolished, such as Uganda, testifies to its resilience."

² Burke 1964:23.

³ The proposed constitution will be the first since the repeal of the 1968 independence constitution on the 12th of April 1973.

as they are a reflection of the Swazi law and custom.⁴ Progressives, on the other hand, are of the view that the current position makes the King an absolute monarch and are thus proposing a change from an absolute to a constitutional monarch. In other words they want some kind of checks and balances in the envisaged system of government.

The study will show that the constitutional evolution of Swaziland and the exigencies of synthesising modern and traditional systems of governance have over the years obscured the true nature of the powers of the monarch in terms of Swazi custom. Thus before we can consider whether the future of the monarchy in Swaziland depends on the harmonisation of modern and traditional systems of governance, it is necessary to revisit the past to determine the powers of the monarch in their embryonic form, for it is from this period that we can extrapolate the powers of the Ngwenyama in terms of Swazi custom.

The thesis has been arranged as follows: The first chapter will review the pre-colonial political system of Swaziland with a view to establishing whether monarchical authority was founded on command or consensus. The various theories, which seek to explain the foundations of the monarchical system of government, will be outlined.

The second chapter will focus on European influence on the Swazi traditional system of government.

⁴ The King himself in the enactment of Decrees has pointed to Swazi law and custom as definitive of his powers.

The third chapter will be an analysis of the powers of the monarch under the 1968 independence constitution.

The fourth chapter will focus on the effect of the repeal of the 1968 independence constitution by the Monarch.

The fifth chapter will focus on the constitutional reforms under the reign of king Mswati III.

The sixth and last chapter focus on proposals for reform.

The research method used was in the main, an analysis of relevant legal principles as contained in textbooks, legislation, journals, the scant case law that is available in this area of the law and other relevant materials. A comparative survey of ancient African kingdoms will be done, with emphasis on those Kingdoms, which later became British colonial possessions. It is hoped that this comparative analysis will help explain the evolution of these traditional structures alongside modern governmental institutions.

CONTENTS

CHAPTER 1: THE ORIGINS OF THE MONARCHICAL FORM OF GOVERNMENT

1.1	Myth, religion and Heredity as constituent elements of monarchical system of government	11
1.1.1	Myth	11
1.1.2	Religion	13
1.1.3	Heredity	16
1.2	The position among the Swazi	18
1.2.1	The Incwala Ceremony	19
1.2.2	The Age-Grade Regiment: Libutfo	20
1.2.3	Kinship and the royal villages	21
1.3	African political systems	24
1.3.1	The balance of power	29
1.3.1.1	The distribution of political authority	30
1.3.1.2	Government by discussion	31
1.4	The hierarchical structure of the traditional Swazi system of governance	33
1.4.1	The King in Council: The Ngwenyama-in –council	33
1.4.2	The Queen mother: Indlovukazi	35
1.4.3	The inner Council: Liqoqo	39
1.4.4	The general Council: Libandla	42
1.4.5	The chiefs	44
1.5	Conclusion	45

2. CHAPTER 2: THE IMPACT OF COLONIALISM

2.1	Swaziland under the Transvaal	51
2.2	Swaziland under British Colonial rule	54
2.3	The entrenchment of traditionalism under Sobhuza II's era	60
2.4	Towards responsible government: the Swaziland Native Administration Proclamation 44 of 1944	62
2.4.1	The Swazi Administration Act No 79 of 1950	65
2.4.2	The Constitutional Committee	68
2.5	The Swaziland Order-in-Council No 5 of 1964	73
2.5.1	Executive authority	73
2.5.2	Legislative Council	74
2.5.3	Judicature	75
2.5.4	Powers and privileges of the Ngwenyama	76
2.6	The first national elections	78
2.7	Conclusion	79

3. CHAPTER 3: THE LEGAL POSITION OF THE MONARCH UNDER THE 1968 INDEPENDENCE CONSTITUTION

3.1	The Constitutional Commission	81
3.2	The constitutional proposals	83
3.3	The provisions of the Swaziland independence Order No 50 of 1968	85
3.3.1	Executive powers	86
3.3.2	Judicial powers	88
3.3.3	Legislative powers	89
3.3.4	Traditional institutions	92

3.4	The interplay between traditional and modern institutions	96
3.5	Reception of constitution by the traditional leaders	98
3.6	Conclusion	100

4. CHAPTER 4: THE REPEAL OF THE 1968 INDEPENDENCE CONSTITUTION BY THE MONARCH

4.1	The repeal of the independence constitution	102
4.1.1	12 April 1973	105
4.2	The legality of the method of repeal	108
4.3	Western law	110
4.4	Customary law	113
4.5	Powers of the Monarch in terms of the King's Proclamation of 12 April 1973	114
4.6	Constitutional developments after 1973	117
4.7	The Tinkhundla system of government: Establishment of the Parliament Order No.23 of 1978	119
4.7.1	The Executive	121
4.7.2	The Legislature	122
4.7.3	The Judiciary	124
4.7.4	Customary institutions	124
4.8	Conclusion	126

5. CHAPTER 5: THE REIGN OF KING MSWATI III: CONSTITUTIONAL REFORM

5.1	The monarchy under the reign of King Mswati III	128
5.2	Constitutional reform in terms of Decree No.1 of 1992	130
5.3	The Tinkhundla Review Commission's Report	133

5.3.1	Reforms to the Tinkhundla system of government	135
5.3.2	The Monarch and Executive Authority	138
5.3.3	The Monarch and Parliament	139
5.3.4	The Monarch and the Judiciary	140
5.3.5	Customary Institutions	140
5.4	Criticism of the Tinkhundla system of government	142

6. CHAPTER 6: PROPOSALS FOR THE CREATION OF A CONSTITUTIONAL MONARCH

6.1	Constitutional Review Commission Report	145
6.2	The power of the Swazi Monarchy: the case for a constitutional monarch	147
6.3	Proposed future Constitution of Swaziland	149
6.4	The King as Ngwenyama	151
6.5	The King as Head of State and Government	154

CHAPTER 1

THE ORIGINS OF THE MONARCHICAL FORM OF GOVERNMENT

When the Ngwenyama repeatedly asserts that he is a traditional monarch and attributes his currently unlimited powers to Swazi custom, it becomes necessary for any study of his powers to commence with an in depth analysis of the origins of the monarchical form of government. The origins of monarchical government can be said to be the true basis of monarchical authority in terms of Swazi custom. This it is hoped will show that the autocratic rule that has come to be associated with the Swazi monarch cannot be traced to the traditional political system, and that pre-literate traditional leaders were regarded as trustees whose authority had foundation on such factors as myth, religion, heredity and Kinship. By way of introduction a brief discussion of these factors shall be embarked upon, which shall be followed by an analysis of pre-literate tribal political systems with particular emphasis on the Swazi tribe. This will be but a brief sketch of the political systems of some of the tribes of Africa particularly the Nguni and does not purport to stand for the whole although certain features are applicable to others.

1.1 Myth, Religion and Heredity as Constituent Elements of Monarchical Systems Of Government.

1.1.1 Myth

The origin of Kingship in most preliterate societies is closely associated with myth. "Myth simply understood has to do with the human attempt to fashion order out of

chaos, to describe the world in such a manner that the parts are interrelated and result in subduing the threatening aspects of human existence.”⁵ This factor is presumably due to the inability of ancient people to give an authoritative account of their early systems of government. Mbiti⁶ describes the association between myth and the foundation of authority in Africa in these words:

“ A lot of religious ideas surround the person and office of traditional rulers. In about every society where they are found, their Kingship or chieftainship is linked to myth and legend with God. It may be said that the first ruler was sent down from the sky by God, or was chosen by God to become King, or appeared mysteriously from God, and so on. For that reason the ruler has names of praise like ‘child of God’, ‘son of God’, and ‘chosen of God’. Such rulers have been or are still found in many countries in Africa such as Ghana, Nigeria, Ethiopia, the Sudan, Uganda, Rwanda, Burundi, Zambia, Republic of South Africa, Lesotho, Swaziland and Botswana. They are often spoken of as ‘divine rulers’, or divine Kings’ or ‘sacral rulers’. The idea is that their office is believed to be chosen and approved by God and in holding it they are like God’s earthly representatives. Therefore they are in effect religious leaders.”

Central to myth therefore was the centripetal role of factors like religion and heredity, which ensured voluntary submission to the authority of the King. “Voluntary compliance is a necessary condition for an effective and efficient social order. Compliance will be voluntary where people believe the social order to be good, right and justified”.⁷

⁵ Smith and Weistubb 1983:119.

⁶ Mbiti is quoted by Mqeke 2001:91.

⁷ Smith and Weistubb op cit at :147.

1.1.2 Religion

Religion is defined by Nafziger⁸ as a practice of ultimate concern about our nature and obligations as human beings, inspired by experience and typically expressed by members of a group or community sharing myths and doctrines whose authority transcends both the individual conscience and the state. "The chief service rendered by religion to law was to teach the common man to submit to authority. By inculcating the belief in the divine origin of law, religion invested the manipulation of force with an aura of sanctity."⁹

The centripetal role of religion in pre-literate politics cannot be fully appreciated without an understanding of how these ancient people perceived their political, economic and social relations. Pre-literate African societies people's worldview was based on the postulate of a world of supernatural powers and on God on who they depended. Because God was far removed from mere mortals the people needed intermediaries to communicate with him. This conception of God is also reflected in the hierarchical nature of most societies in Africa. One writer has put the position thus:

"Above all forces is God, who gives existence and increase to all others. After him come the first founders of the various clans who form links in the chain binding God and man. These occupy a higher rank, so high that they are no longer considered human. Next to them are the so called 'dead' of the tribe who are other links in the chain-or say channels through which the vital force influences the living generation. The eldest of a group or clan is the link between the ancestors and their descendants. The chief, dully appointed and installed according to the traditional

⁸ Nafziger 1999:158.

⁹ Seagle 1941:129.

rules reinforces the life of his people and all inferior forces, animal, vegetable and organic.”¹⁰

By virtue of his link to the founding fathers and by necessary extension to God, there was a belief that the King's powers were derived from God and from the ancestors.¹¹ This divine right of Kings is aptly captured by Figgis¹² in the following passage:

“We still believe and maintain that our Kings derive not their title from the people but from God. That to him only they are accountable, that it belongs not to their subjects either to create or censure, but to honour and obey the sovereign who comes to be so by a fundamental hereditary right of succession, which no religion, no law, no fault or forfeiture can alter or diminish.”

Thus the African King was not just the political head of his people more importantly he was also the spiritual head.¹³ Moreover in some Kingdoms the use of symbols

¹⁰ Smith in MacEwan 1965:66.

¹¹ Kiwanuka 1971:92 observes that rulers world over have always recognised the political value of claiming descent from the gods or of linking their high offices with heavenly powers, because even if such claim did not make them gods, it at least put them above other men.

¹² Smith and Weistubb op cit at:168.

¹³ Although this dual role of the King was the general norm, there were exceptions, among the Buganda for instance, the King did not play a dual role. The only public ritual of tribal unity in Buganda did not affirm a mutual dependence on the King as linked with the tribal god, but instead simply expressed common fealty to the King. According to Carlson 1968:245 the reason for this is that Buganda was a Kingdom established by conquest. The King's selection to the office of Kingship was not based on his sacred descent

and ritual evoked an acceptance of monarchical authority that went beyond the obedience exacted by the secular sanction of force.¹⁴ For instance in Ashanti the sanctity of Kingship was embodied in the golden stool¹⁵. Among the Swazi the *incwala* or first fruits ceremony was one of the public ceremonies by which the King linked the nation to the spiritual world and to God. The significance of this ceremony in Swazi politics shall be discussed in greater at 1.2.1 below.

but instead on his temporal ability to lead his Kingdom. However the foundation of the Buganda tribe itself is testimony of some form of link with God. For an example according to the Ganda oral traditions, Kintu who is looked upon as the founder of the Ganda tribe was said to be the son of Gulu (heaven). The story goes that he came down from heaven with his wife Nambi and brought to earth every living creature, his name came to represent creation itself and became part of Buganda religion.

¹⁴ Religion promoted solidarity and created within the community a sense of belonging and continuity. It was an expression of the accepted norms and values of that given society. It taught community members duties and reciprocities and the norms of social relations expected of them. In addition to that religion provided for specific religious sanctions. Misfortune suffered by members of a tribe was interpreted as a warning from God and from the ancestors to those concerned to look closely into their conduct for the misfortune could be punishment for failure to fulfil their duties and obligations.

¹⁵ McLeod 1981:12 says it is recounted that Osei Tutu, helped by Anokye, the legendary priest fetched the golden stool down from heaven as the symbol and to contain the spirit of the Ashanti nation as a whole. The golden stool according to Ashanti traditions is therefore the stool of the ancestors.

1.1.3 Heredity

A characteristic feature of ancient monarchical systems is that ascension to the Kingship was hereditary. Commenting on the hereditary right to Kingship Figgis¹⁶ says hereditary right is indefeasible. The right acquired by birth cannot be forfeited through acts of usurpation of however long continuance, by any incapacity in the heir or by any act of deposition. So long as the heir lives, he is King by hereditary right, even though the usurping dynasty has reigned for a thousand years.

Accessory to the hereditary principle is the condition that only those with royal blood succeed to the throne. Moleah in this regard explains the significance of blood royal¹⁷ in the following words:

“Those with royal blood, whether chiefs or Kings and members of their families are accepted as descended from originators or founders of the lineage, ethnic group or nation. They are, therefore, up in the hierarchy of forces in terms of descent, and above all others. They are, therefore, possessed of greater vital force and, thus, able to influence all lesser forces. Even more importantly, they are descendants of the most powerful ancestors, capable of the most effective intercession and intervention. This is the essential specialness of those with royal blood. Their place is defined by far more than organisational or administrative requirements.”

Due to strict adherence to the Salic law in most ancient systems, power passed from father to son.¹⁸ Among the Swazi for instance, even though it is the mother's rank in

¹⁶ Figgis is quoted by Smith and Westtub opcit at :168.

¹⁷ Moleah 1993:83.

¹⁸ Salic Law is defined by the Collins Concise Dictionary as a law excluding women from succession to the throne in certain countries.

the harem more than any other single factor that determines the choice of successor, the fundamental principle underlying the selection of an heir is that power is inherited from men and acquired by them.¹⁹ Sir Robert Filmer²⁰ attributes the exclusion of women from the throne to what he refers to as patriarchy, he argues that patriarchy like Kingship had mythological origins. He goes on to say "the evolution of ideologically based patriarchal law as a means to suppress the female would indicate that male domination was, in fact, not part of the natural order from the beginning but a form of control to facilitate social organisation. It was effective because it furnished the two requirements for authority: clearly identifiable criteria for social hierarchy and justification in terms of the natural order. Because it was effective it became universal."

Despite the genealogical restriction of succession to kingship, succession to the throne was not in all instances automatic. The practice of polygyny among most African tribes meant that there was usually a wide range of throne hopefuls to choose from. In Buganda for instance all the sons of the deceased King except the oldest were eligible for succession to the throne, this meant that the heir was not as apparent as was the case in those tribes that followed the rules of primogeniture or those that adhered to the practice that the eldest son of the "great wife" succeeded his father. The task of choosing the successor in most instances fell upon a council,

¹⁹ Kuper 1986:91. According to Marwick: *opcit* at 275 the factors which influence [the council] in their choice are the character and personality generally of the mother and not the personal attributes of the heir himself. He is often a minor at this time. The status of the woman to be Queen mother is of the outmost importance.

²⁰ Sir Robert Filmer 1983:174.

which can be described as a body of Kingmakers. Among the Swazi the King is chosen by a council composed of the male members of the royal family (*bantfwabenkhoṣi*) excluding the sons of the deceased King. The council is in this duty first and foremost preoccupied with the advancement of the public good.²¹ This ensures that the people albeit by proxy are involved in the selection of the heir to the throne and that kin right is reinforced by popular choice.

1.2. The Position Among The Swazi

Apart from the factors mentioned above in Swaziland monarchical authority was reinforced by an interplay of a variety of social factors, all of which mirrored a particular worldview and a corresponding conception of law and government.²² Before the Kingdom of Swaziland assumed its distinctive political character under the reign of Mswati 11 (1840-1868), there were very few devices to establish the ideological hegemony of the king. Swaziland had remained a deeply stratified society and had not changed since the reign of Sobhuza 1, combining the demands of

²¹ The Swazi like other African societies throughout Southern Africa had no fixed laws of succession. "... on occasions [they] were not above ignoring old principles and manufacturing new ones in their place . Thus one hears in the mid-eighteenth century of Magadulela being excluded from succession because he was left handed, and Ndlela being overlooked because he had a younger full brother, both of which have a suspiciously retrospective ring..."Bonner 1983:47

²² Further on these social forces see Marwick 1966:28. See also Seagle: 1947:3 who gives an account of the ancient systems of the near East.

political exclusion at the centre and a wide measure of autonomy outside.²³ This was of course, a recipe for political unrest as the nation was made up of a number of tribes who remained relatively autonomous. Three relevant customary practices, the *incwala* (first fruits ceremony), *libutfo* (the age-grade regiment system) and the establishment of royal villages played a very crucial role in defining the role of the monarchy as a system of government among the Swazi. These support systems will be commented upon fully below.

1.2.1 The Incwala Ceremony

As stated above, one part of the political re-ordering process involved the ritualisation of the monarch during the annual *incwala* (first fruits) ceremony.²⁴ This

²³ According to Bonner opcit at: 33 the situation was not helped by the absence of any real effort on the part of the Swazi leaders to assimilate the conquered groups. He attributes this state of affairs to the fact that for most of Sobhuza 1's reign the Swazi were a nation in arms, the bulk of the population clustered for security in military towns. Thus the conquered groups were expected to provide levies of soldiers and tribute, but in the inner councils of the nation they had little voice at all. It was only during the final years of Sobhuza 1's reign that the semblance of an administrative machinery was established in the conquered territories.

²⁴ The *incwala* or first fruits ceremony used to be held annually by all Nguni chiefs to celebrate the first fruits of the harvest Mswati 11 is said to have stopped all the chiefs under his leadership from holding their own *incwala* ceremonies, thenceforth his was to be the only one to be celebrated in the country. It would seem that this blanket ban did not, however, apply to the King of the Mamba clan as he retained semi royal privileges one of which was the right to continue celebrating his own *incwala* ceremony. Bonner attributes

ceremony was no doubt chosen for the sentiments that it embodies. It is a reaffirmation of the interdependence of the King and the nation not just in agricultural reproduction but also for the national welfare expressed in the people's ritual subordination to the King during the ceremony.²⁵ As alluded to in 1.1.1 above the *incwala* ceremony has a strong mythological foundation. It unifies the nation under the authority of the King and thus provides a strong support system for the Ngwenyama. This creates a sense of political solidarity, which serves to legitimise the position of the monarch.

1.2.2 The Age-Grade Regiment: Libutfo

This is another cultural practice that provided a strong support base for the Swazi monarch. Until the reign of Mswati 11, the army was organised on a local basis. Each chief had his own army, which he could call up when the need for military service arose. Mswati 11 introduced the Zulu system of age grade regiments called *libutfo* in Siswati.²⁶ The objects behind the introduction of the age-grade regiments system were, first of all, to reinforce the military capability of central government at the expense of the periphery. By cutting across kinship groupings, the *libutfo* system disabled the military capability of the individual chiefs while making sure that the Ngwenyama had a strong army at his service. Secondly, to forge a new sense of

the privileges of the Mamba clan to military assistance they gave to Sobhuza 1 during the territorial expansion period.

²⁵ This has to do with the belief system regarding the derivation of governmental power and law in most pre-literate systems. See inter alia Smith and Weistubb op cit at 119, Seagle op cit and Mbiti:1978.

²⁶ The *libutfo* was a system of regiments formed of men of the same age.

national identity centred around the monarch, for in addition to teaching discipline of a military nature, the *libutfo* also served as an institution of political socialisation. It inculcated in the young men a strong sense of national identity and loyalty to the Ngwenyama. According to Hlastwayo²⁷ it was through this system that the authority of the monarchy was to be strengthened and the unity of the nation forged. Crush aptly captures the significance of the *libutfo* in pre-colonial Swazi government in the following words:

“in peace and in war, the regiment system performed the vital role of socialising young men of the non-Dlamini chiefdoms and refugee groups into the new state, cutting across regional and clan loyalties and forging a new national identity which demanded complete allegiance to the Dlamini aristocracy.”²⁸

For young women there was the much less formal reed dance (*umhlanga*), which was nonetheless instrumental in inculcating allegiance to the monarch.

1.2.3 Kinship and Royal Villages

In Swaziland as was typical with most eighteen-century societies blood kinship formed the basis of political association. The association of political organisation with

²⁷ Hlastwayo 1993:55.

²⁸ Crush is quoted by Hlastwayo:55.

kinship groupings established a bond between the between the people and their leaders, which in turn fostered a strong degree of conformity and strong local traditions.

When Mswati 11 took over the reigns of government one of the tasks that he was confronted with was to establish a system that would not only legitimise his ascendancy over the tribes that formed the Kingdom but also receive acceptance from the people in the way that the old kinship ideology had done.

Mswati 11 and his regents were well aware that since the Kingdom of Swaziland had been established by conquest they could not claim descent from a single ancestor and by necessary extension ideological ascendancy. Hence the establishment of royal villages. To facilitate greater control by central government over the periphery, a network of royal villages, which acted as some form of royal bureaucracy, was established in each of the regions. Princes without chieftaincies and headmen appointed by the King as his representatives were dispatched to the outlying areas to oversee royal interests and to check the emergence of any regional alliances that would prove to be a threat to the dominant clan's ascendancy over the other clans. According to Levin²⁹ the origin of the concept of the *Tinkhundla* system of government, which shall be discussed in more detail in subsequent chapters, can be traced to these royal villages.

²⁹ Levin:7. The author defines *Inkhundla* as an open space, usually a meeting place or a courtyard.

Coupled with the system of royal villages was the practice of forging marriage alliances between princesses of royal blood and the *emakhandzambili* chiefs.³⁰ This did not only ensure that royal blood was distributed throughout the nation, but it also meant that a strong bond of union between the King and the various chiefs was established. Moreover in line with the Swazi custom that *inkhosi ayidleli phansi*,³¹ the children born out of these alliances became automatic heirs to the chieftainship. Parallels can be drawn between this practice and the Buganda practice of the Kabaka marrying from as many clans of his subjects as possible to ensure their

³⁰ Loosely translated *emakhandzambili* means original inhabitants. The term is used to distinguish the clans that were found and conquered by the Dlamini when they first came to the territory that is now known as Swaziland from the others.

³¹ What this custom entails in relation to the issue of marriage alliances between chiefs and princesses of royal blood is that, in a polygamous marriage where one of the wives is a princess of royal blood, she automatically becomes the principal wife and her son the heir to his father's estate and therefore the next chief. It would seem that the Dlamini aristocracy did not take kindly to the violation of this practice. Thus Bonner op cit at:32 relates the story of Mgazi the chief of the Maseko tribe to whom Sobhuza gave one of his daughters laMbambotsi to be his wife and to bear the next Maseko chief thereby binding the Maseko much more closely to the Dlamini. The Maseko who jealously guarded their freedom and presumably cherished ambitions of one day being free of Dlamini control made strenuous efforts to avoid this. A village was built for her ten miles from Mgazi's capital, and a Ndzimandze woman was surreptitiously installed as chief wife. LaMbambotsi was deeply offended, she left her village at Kufinyeni to report her situation to the King. Sobhuza's reaction to this was to kill Mgazi and cut most of his regiments to ribbons.

loyalty and to create a strong bond of union between the rulers and the rest of the clans centred around kinship.³²

According to Kuper³³ by the reign of Mbandzeni [1875-1889] the clan was subordinate in the political structure of the nation. The King was King by virtue of his position in the conquering clan. The growth of a nation, oriented towards rank and military conquest, had broken down the territorial basis of the clan. Hence her description of the Swazi nation as a family writ large with the aristocracy as the core of the wider kin.

From the foregoing discussion what emerges is a system of authority founded on an interlocking network of interdependent relationships between the ruler and the ruled and this seems to be an indication of the consensual basis of the pre-colonial Swazi government.

1.3. African Political Systems

Even before the advent of colonialism some African societies had an established system of centralised political authority, an administrative machinery and judicial

³² According to Karugire 1980:13 the political importance of this practice comes into sharper focus when one realises that the rest of the Baganda—that is all Baganda except their ruling house—had rules of patrilineal succession and that every Muganda again with the same exception took the clan of his father. It then becomes clear that the convention of the Kings taking the clans of their mother was political and not primarily a social one—in fact in a purely social context it would have made no sense at all.

³³ Kuper op cit at:114.

institutions in short a government, developed no doubt as one of the means of regulating social behaviour.³⁴ African political formations which are defined by Schapera³⁵ as a body of people who have laws, rules or government in common and recognised territory, emanated from kinship groupings that is why it has been said that the fundamental principle of African social organisation was communalism.³⁶

³⁴ The existence of centralised political institutions in Africa has over the years been the subject of debate among scholars who have come up with a number of academic theories to explain this phenomenon. Speke for instance attributed the existence of such institutions in east Africa to the Hamitites. Monica Wilson 1969:72 believes that the monopoly of trade, which existed in Zululand and not among the Xhosa, is one explanation of why a Kingdom developed among the Zulu and not among the Xhosa who were of the same Nguni stock. On the other hand Kiwanuka op cit at: 92 question whether there is a need for elaborate theories to explain the origin of centralised institutions in Africa.

In his view this search for elaborate theories has led scholars to overlook the existence of a no man's land as far as the growth of political institutions is concerned. "This no man's land has never been explored, perhaps because it was too obvious. It goes without saying that underlying all cultures, however primitive, there has always existed the concept of a leader. He may claim to be of royal blood, or to have descended from the gods, or priests may have appointed him." Kiwanuka *ibid*.

³⁵ Moleah opcit at:81.

³⁶ Moleah opcit at:80. The concept of African communalism is explained by Anyawu in the following words: everything in the universe is a life force, that there is a hierarchy of forces that all forces are in constant interaction, that the universe of force is centered on the self, that the self-order and the world order are identical and that the nature of things requires that all things be

Thus the unit of government in most Kingship systems was the homestead, which was itself an administrative and judicial unit.

The chiefs and their various councils, composed of among other members headmen and the clan heads, constituted the next level of government. Busia³⁷ describes the functions of the chief's councils in the following words:

“The members of the chief's council were, in one aspect representatives of the people, in another sense, they and the chief constituted the government. As the representatives of a section of the chiefdom, they were to protect the sectional interests of those whom they represented, and to see to it that the chief did not abuse his power; but as members of the council which had responsibility for the affairs of the whole community they were to help to ensure the welfare of all and to see that the people obeyed and supported the constituted authority.”

At the apex of the political structure was the King-in-Council. Because the focus of the study is on the powers of the King we shall at this point go into a detailed analysis of the rights and obligations of the pre-literate African King. This it is hoped will establish the consensual basis of pre-literate monarchical authority.

The African King everywhere was not just a political figure but he was the axis of his people's political relations, the symbol of their unity and exclusiveness, and the

strengthened and not weakened, that the individual should be seen in light of the whole and that meaning, significance and value depended on that art of integration. The writer goes on to say that the emphasis on the whole should not be taken to mean that these societies negated individuality but that they recognised the individual in a communal context.

³⁷ Busia 1976: 23.

embodiment of their essential values.³⁸ His privileges included among others the right to exact tribute labour and taxes from his people, he could also call upon the various chiefs in his kingdom to provide regiments for his army. He was the legislator, the executive and the administrative head of his community, however these organs of government were not classified as such for there was not the rigid departmentalisation of functions that characterise the western system of governance. The separation of powers as we shall see in the next chapter is one of the legacies of colonial rule. Although the office of the King carried with it a lot of power, these powers were held in check by a number of factors one of which was the balance between authority on the one hand and obligations on the other.

Apart from variations in detail the duties of the pre-literate African King were everywhere fundamentally similar. He saw to it that local segments were administered in a satisfactory manner by their local rulers and intervened to end gross abuse or incompetence.³⁹ Through the chiefs he controlled the distribution of land. It was also his duty to organise religious ceremonies and rituals. He controlled his people's agricultural calendar and in this regard informed them of the suitable time to plant and to harvest their crops. He also performed tasks like the

³⁸ See Fortes and Evans Pritchard 1965:55.

³⁹ The ultimate sanction against a despotic chief was his deposition. Although this was extremely rare it would be resorted to where the chief's conduct was intolerable. Among the Swazi if disciplinary measures taken by the chief's council proved ineffective the people would seek assistance from the Ngwenyama or the Ndlovukazi who had the power to dismiss the chief after an inquiry into his conduct had been made and he was indeed found to be guilty.

establishment of new age-regiments. Among the Swazi and the Zulu for instance men would not marry without the King's permission to the age group as a whole.

The King also had clearly defined judicial functions. Most traditional African societies had a well developed and highly centralised legal system constituted by a hierarchy of courts that spanned from the lowest unit of government, the homestead, to the King's courts. The King's court was in most tribes the highest court of appeal and normally only the King's court could punish serious offences such as witchcraft and murder.

The law enforced by these courts consisted of rules handed down from generation to generation or what can in modern parlance be referred to as custom. For the purposes of this study custom shall be defined as rules of conduct, which are recognised as binding on the members of the community.⁴⁰ The time-tested way of doing things was not easily changed⁴¹. Among the Swazi failure on the part of the

⁴⁰ See Seagle op cit at:12. See also Pillay 1995:8 who says that the level of a community's acceptance of traditional customs is what determines its authoritative status. That is, its binding nature. The writer goes on to observe that custom or customary law is authoritative to the extent that it continues to be accepted by the people and that its nature combines flexibility with the legitimising ideology of immutability.

⁴¹ Gluckman 1969:33 gives us an example that illustrates the importance that pre-literate people attached to custom. The writer says the Zulu quoted a case in which Mpande had to decide against one of his favorites, following the announcement of this decision, Mpande is alleged to have sent men to wipe out the successful litigant's family so as to make it impossible for the decision to be carried out, for he could not violate established laws in favor of his favorite. According to Moleah op cit at:95 to appreciate the restraining weight

King and Queen Mother to adhere to an established custom attracted a fine from his councillors. However, with the approval of the people the King could make new laws.

1.3.1 The Balance of Power

From the brief sketch of the duties of the King it is quite clear that he could not administer his Kingdom without the co-operation of the other members of government. In this regard Fortes and Evans Pritchard observe that:⁴²

“The King’s power and authority are composite. Their various components are lodged in different offices. Without the co-operation of those who hold these offices it is extremely difficult if not impossible for the King to obtain his revenue, assert his judicial and legislative supremacy, or retain his secular and ritual prestige. Functionaries vested with essential subsidiary powers and privileges can often sabotage a ruler’s acts if they disapprove of them.”

For instance the poor communication systems of ancient societies necessitated the development of a system of regional devolution of powers, which meant that the King often had to concede certain privileges to the regional chiefs thereby restricting his authority over the outlying areas. This put chiefs who kept a more direct contact with

of custom and tradition one has to understand how oriented towards the past Africans are. It is in the past that the African finds justification for his actions. The African traces the present from the forefathers, who in turn got it from the ancestors. Tradition is treasured and religiously upheld, and any chief who violates it puts himself in grave peril.

⁴² Fortes and Evans-Pritchard 1940:12.

the people in a position to check the arbitrary exercise of power by the King. Thus if a King abused his power subordinate chiefs were liable to secede or to lead a revolt against him. The delegation of powers to regional chiefs was therefore more than just an administrative mechanism, it could when the occasion demanded be a restraint to the abuse of power by the King.

It was very rare to find an African society where the King in the exercise of his powers acted unilaterally. In most societies the King was obliged to exercise his powers with the assistance of councils representative of the people. These councils in turn ensured that law and custom were protected and guarded against the centralisation of too much power on the King. With reference to Nguni societies Hammond-Tooke⁴³ observes that:

“ the one basic feature of the traditional political system [is], that the chief never ruled on his own but always consulted with a group of councillors. It thus defined a tribal authority as a chief-in-council and laid down specifications for the composition of this body. In the traditional Nguni system every adult male had the right to attend the tribal moots and take full part. Everyone knew what was going on and there was full and constant interaction between the chief and his people. A chief had to be careful of going against the consensus of the tribe and in the past, when there was plenty of land, the ultimate sanction against chiefly despotism was the fear that the dissident group would break away. There are many cases of this in the tribal histories.”

The Nguni council system thus guarded against despotism through the following means:

⁴³ Hammond-Tooke 1964:522.

1.3.1.1 The Distribution of Political Authority

The distribution of political authority, which demanded that those in authority be it, the King or the chief act always in conjunction with their councils was one of the means by which the holders of public office could be held to their responsibilities. The King could not act without the concurrence of his council, "he was always a conservative element, the interpreter and upholder of tradition, seldom a legislator. He was only in rare and sometimes spectacular instances an initiator of social change."⁴⁴ The councils in turn could not act without the King's concurrence for laws and pronouncements were made in his name.

1.3.1.2 Government By Discussion

The concept of government by discussion began at the chief's kraal. Clan heads would meet to discuss matters affecting their community, deliberations would continue until unanimity had been reached even if it took days. At national level every section and every major interest in society was either directly or indirectly represented in the conduct of government in the councils of state. Representation, however, took various forms. For instance among the Zulu and the Swazi every adult male could attend these tribal moots. The Ashanti on the other hand were represented by their chiefs in national assemblies. In most of the Kingdoms that practised indirect representation the chiefs had to obtain the mandate of their own councils before they could commit their people to any major decisions of policy that might be arrived at the King's capital.

⁴⁴ Hammond-Tooke:523.

Thus it can be said that the African King no matter how autocratic he may have appeared in theory was never an autocrat. The tribal system of governance was designed to check any tendency towards despotism. As Fortes and Evans-Pritchard observe:

“institutions such as the regimental organisation of the Zulu, the genealogical restriction of succession to the Kingship or chieftainship, the appointment by the King of his kinsman to regional chieftainship and the mystical sanctions of his office all reinforce the power of the central authority. But they are counterbalanced by other institutions like the King’s council sacerdotal officials who have a decisive voice in the King’s investiture, Queen Mother’s courts which work for the protection of law and custom and control of centralised power.”⁴⁵

Moreover before the continent was divided by definite geographic boundaries the people had the option of seceding from a bad leader. The ruler had a greater need for keeping his people than they had of staying with him, which placed them in a position of strength. Some writers have attributed the people’s strength vis-avis the ruler to the following factors:⁴⁶

- abundance of land
- shortage of people
- dependence of the chief on councillors and people for military support
- rivalry between the chiefs.

⁴⁵ Fortes and Evans Pritchard 1940:11.

⁴⁶ See Mqoke: (1) who quotes Peries. Although this observation was made with reference to chiefly systems it applied to Monarchical systems as well because Kingship is after all an advanced form of chieftainship. See also Carlson 1968: 252.

Like any other system it was, however, not infallible. It could not prevent a ruler from failing to observe accepted practices and becoming a tyrant. Pre-colonial Africa had her fair share of despots. Shaka of the Zulu and the destoolment of Ashanti Kings are indicators of Kingly despotism in Africa.⁴⁷ But it can be maintained that despotism was a violation of the system. A despot could only maintain himself in power through the use of force.

1.4 The Hierarchical Structure of The Traditional Swazi System of Governance

Most of what was said about pre-literate African Kings in 1.3 above applied to Swazi Kings too. What follows is a brief comment on the salient features of the Swazi government structure with particular emphasis on those institutions that restrained the tyrannical exercise of power by the King.

1.4.1 The King-In-Council: The Ngwenyama-In-Council

The pre-colonial Swazi government structure was hierarchically ordered. This hierarchical structure extended from the smallest local unit the homestead, the next level of government was that of chiefs and their councils, at the top of the hierarchy was central government which was constituted by the Ngwenyama-in-council.⁴⁸

⁴⁷ Destoolment is the Ashanti term for the removal of the King/ Chief from office.

⁴⁸ The office of Ngwenyama-in -council was constituted by the Ngwenyama, the Ndlovukazi, the *liqoqo* (inner council) and the *libandla* (general council).

Two sovereigns, the Ngwenyama and the Ndlovukazi ruled over the kingdom and between them exercised the functions divided in Western countries into legislative, executive and judicial functions of government.⁴⁹ They were assisted in the exercise of their duties by two national councils, the *liqoqo* (inner council) and the *libandla* (general council). These councils shall be discussed in greater detail in the discussion that follows below. This was not, however, exhaustive of the monarch's advisory bodies, he also relied on the assistance of the various chiefs for advice on the administration of the various clans that formed the Kingdom.⁵⁰

The Ngwenyama stood at the apex of the political hierarchy and as already indicated all executive, legislative and judicial powers merged in his office. He controlled the distribution of land through chiefs, saw to it that local segments were governed satisfactorily, performed the religious functions that came with his office, he alone had the power of life and death over his people and his was the final court of appeal. Without doubt the office of the Ngwenyama carried with it a lot of power, however

⁴⁹ Kuper:1947:55 observes that between the two there was a delicate balance of power since the administration of the entire country required their harmonious co-operation and conflict between them would pose a threat to the peace and stability of the entire nation.

⁵⁰ The Swazi always say *Inkhosi ibusa ngemabandla*, meaning that King rules in council. Although we have for the purposes of this study singled out the *liqoqo*, *libandla*, and chiefs, there were other bodies with whom the Ngwenyama and the Ndlovukazi consulted in the administration of their people. Among these institutions is that of the senior princes (*bantfwabenkhosi*) who together with the other councilors were the King's advisers and teachers and more important his most fearless critics.

there is unanimity in the view that the Swazi monarch was never an autocrat for the tribal constitution provided for its own checks and balances.

The distribution of political authority provided machinery by which the King could be held accountable to the people. The following structures constituted some kind of checks and balances: the Queen Mother, the councils of state *liqoqo* and *libandla* and the chiefs. A brief comment will be made on each of these structures to demonstrate the extent to which they combined to prevent the abuse of power by the King.

1.4.2 The Queen Mother: Indlovukazi

Although in theory the King appeared to be at the apex of the tribal structure, in practice, the King and the Queen Mother were co-equal, the diarchy, a characteristic feature of Swazi leadership, was the first check to the arbitrary exercise of power by the King.⁵¹ The Ndlovukazi's prerogatives, duties and obligations constituted a

⁵¹ The Swazi attribute the special status accorded to the Swazi Queen mother to nature. According to Kuper:55 Most Swazi informants referred the dual control to umdzabuko (creation). Encouraged further, she says, a number of informants accounted for it in terms of patterns of behavior inculcated by the domestic situation. A mother loves her son and he loves her. With wives it is different, today they love you and tomorrow they hate you and when you think a wife loves you there is jealousy in her heart. Maylam 1986:25, on the other hand, attributes the special position assigned to the Swazi Queen Mother to Sotho influence. He goes on to observe that although the Swazi are classified as Nguni's "their culture is literally cluttered with Sotho borrowings". Ibid

restraint to the abuse of power by the Ngwenyama, which is expressed by Kuper in the following words:⁵²

"Between the Ngwenyama and the Indlovukazi there is a delicate balance of powers, legal, economic, and ritual. He presides over the highest court, and formerly he alone could pronounce the death sentence. But she is in charge of the second highest court, her counsellors may take part in discussions at her son's court, and her hut is a sanctuary even for men sentenced to death. He controls the entire army, but the commander-in-chief may reside at the Queen mother's village. He has his own chosen regiments stationed at his home; she has regiments at the capital under the leadership of princes. He has the power to distribute land; together they work the rain that fructifies the soil. He may take cattle from the royal herds; she may rebuke him if he wastes national wealth. She is the custodian of the sacred objects of the nation, but they are not effective without his co-operation in manipulating them. He represents the line of past Kings; she speaks to the dead in the shrine hut of the capital and provides beer for the libations. He is made great and rejuvenated in the annual ceremony held at her home; she receives special treatment on that occasion and takes precedence over other participants. In all activities they should assist and advise each other, for he is *Inkosi* and she is also *Inkosi*. Together they are spoken of as twins... "

The origins of the Queen Mother's powers in this regard have been traced by some writers to Sobhuza 1's mother Somnjalose Simelane (who was Queen Mother sometime in the eighteen hundreds) who supposedly exercised them to curb the growing arbitrariness of Ndvungunye and Sobhuza 1.⁵³ It was in recognition of her services that these powers were later institutionalised.⁵⁴

⁵² Kuper op cit at: 55.

⁵³ See Kuper op cit at 12-13. According to the writer stories are told of the tyranny of Ngwane's son, Ndvungunye and grandson, Sobhuza 1. They laid

Swazi custom dictated that the Queen mother be fully informed of the activities of the Ngwenyama's government, her *indvuna* kept in touch with the King's village. Moreover she was herself a full member of government and took part in discussions of state policy in *liqoqo* or *libandla* whenever it was found necessary. The King was and is still expected to consult his mother in making decisions on matters of state. According to some accounts when the King was intractable to the wishes of the *libandla*, its members would approach her and beg her to reason with her son and she often succeeded in doing so.

Due to the dearth of literature in this regard no clear examples of the King's deference to his mother's advice can be given. There are, however, some examples in Swazi history of the King's failure to adhere to this customary practice, which are indicative of the contradiction between theory and practice.⁵⁵ From historical

waste the homes of those who dared to flout their commands. Ndvungunye, or it may have been Sobhuza 1, would summon warriors to pluck between their teeth meat impaled on the point of a spear; if blood spurted on the sharp metal he would shout: "who is it that soils the spear of the Lion. Let him be killed. Sobhuza 1's mother, Somnjalose of the Simelane clan, is said to have restrained her son and won for the mother of the Dlamini ruler a special place in ritual and in government". Kuper ibid

⁵⁴ Bonner op cit at:25.

⁵⁵ Sisile the Queen mother during the early years of Mbandzeni's reign is said to have warned Mbandzeni against marrying Somdlalose a woman who had been chosen to marry Ludvonga his predecessor who had died under mysterious circumstances. According to Bonner op cit at 162 Mbandzeni went ahead unconcerned. The extreme foolhardiness of his behavior was brought home when in about 1879 a son was born of the union, and it became

accounts it would seem that the only remedy that the Queen Mother had at her disposal when the King violated an established custom was to reason with him. Be that as it may it would seem that this was a very powerful remedy. For instance Kuper⁵⁶ says men sentenced to death by the King's court could find sanctuary at her hut. This would seem to suggest that even though the King's court was the highest appellate division in the land the Queen Mother could still cause the King's court's decision to be reconsidered. This also suggests that the King's powers in this regard were subject to review. This remedy was backed by the customary practice that obliged the King to respect his mother for where he failed to show respect to his mother or her representatives he was liable to be admonished or even fined by the *libandla*.

What should be noted though is that being a woman in Swaziland's male dominated society the Swazi Queen has always had and still has a natural disadvantage. Vilakazi⁵⁷ argues that although literature put the King and Queen on an equal footing, the position and power of the Queen Mother are in fact derivative. As the wife of the King's father, she acquired the awesome dignity and ritual sacredness of the King's

whispered that Mbandzeni had raised up seed to Ludvonga, and that the baby, Mdzabuko, was now the real King.

Realising the folly of his actions Mbandzeni ordered the death of the baby Mdzabuko and his mother Somdlalose and that of the Queen mother Sisile. Mbandzeni's failure to heed the advice of the Queen Mother led to some kind of civil war that as observed above culminated in the assassination of the latter.

⁵⁶ Kuper op cit at 55.

⁵⁷ Vilakazi 1977: 14.

person. She is first and foremost a wife and all the limitations that apply to ordinary women apply to her as well. For instance Kuper⁵⁸ observes that at *libandla* meetings the Queen Mother rarely spoke. She would at times be referred to by a councillor who reproduced her comment. This would seem to have been due to the custom that women cannot address a gathering of men thus even though she was a member of the *libandla* she could not address it directly.

In practice however, the balance of power between the two rulers seems to have turned on character, there have been instances when the Queen mother has held absolute sway, for instance Sisile who was Queen Mother during Mbandzeni's reign tried to dominate the diarchy. There have also been instances when power was evenly distributed as was the case during Mswati 11's reign when power was evenly distributed between him and Thandile, (Mswati 11's mother and the Queen Mother). The diarchy as we shall see in the next chapter was weakened by colonialism. Thus throughout his reign Sobhuza 11 was to dominate the relationship.

1.4.3 The Inner Council: Liqoqo

The *liqoqo*, which can be likened to the Privy Council, was in essence an extension of the family council (*lusendvo*) and therefore predominantly aristocratic. It should be noted, however, that not every royal kinsman was a member as membership was through election by the King-in-council. The principal qualifications for membership were ability in debate, efficiency in organising work and knowledge of Swazi law and custom. These qualities were of utmost importance since one of the principal

⁵⁸

Kuper opcit.

functions of the *liqoqo* was to assist the King in his dealing with national issues.⁵⁹ According to Kuper⁶⁰ the *liqoqo* discussed among other issues the questions of land, education, traditional ritual and court procedure.

There was no formal method of business, the King could summon any member whose services he required without having to hold regular sessions, thus the *liqoqo* functioned even when it was not formally constituted. The full *liqoqo* was only called upon when important policy decisions had to be made. The aim behind the establishment of this council seems to have been to ensure that the King was responsible to an entity representative of the people for the exercise of his powers on a regular basis.

Membership to the council was for life but was not hereditary. Because of their knowledge of Swazi custom and seniority the members of council were regularly consulted by the King in relation to intricate matters of state.

The fact that the *liqoqo* was an informal body should not be taken to mean that it was any less effective as institutional check to the abuse of power by the King. The counsel they gave is said to have been frank and precise. They openly criticised both the King and the Queen Mother where they felt it necessary without fear of expulsion because membership was for life. Moreover they saw to it that their decisions were

⁵⁹ Due to the fact that the positions of Kingship and chieftainship are hereditary, it is not always possible to choose someone possessed of such skills as ability in debate, efficiency in organising work, and knowledge of law. That is why it is of utmost importance that people with such qualities advise the Ngwenyama and the Ndlovukazi. See Kuper op cit at 69.

⁶⁰ Kuper op cit at: 63.

put into effect. Very often the rulers bowed before the council for if they violated an established custom the *liqoqo* could show their disapproval by fining them.

Although the Ngwenyama and *liqoqo* exercised relatively wide executive powers, they could not summarily deal with issues of national importance.⁶¹ A council representative of the entire nation, the *libandla*, dealt with these matters. In terms of Swazi tradition the people held a higher position than any other entity in government, the powers that the King and *liqoqo* exercised were in practice a trust, which had to be exercised with the approval of the people. The sovereignty of the people was thus an important characteristic feature of the pre-literate Swazi system of government. This position can be contrasted with that of Ashanti, where the King and the equivalent of the inner council the Ashanti *kotoko* seemed to have had more power than the people. Describing the Ashanti *kotoko* Ramseyer and Kuh'ne made the following observations:

"The reigns of government of the Ashanti government are not in the hands of the King, nor does he possess unlimited power but shares it with a council, which includes besides His Majesty, his mother (Asantehene maa), the three first chiefs of the Kingdom and a few nobles of Kumasi. This council is called the Asante *kotoko* or the Ashatee porcupine, which means that like the animal of that name nobody dare touch them. It is this *kotoko* council, which rules the entire Kingdom and deals with the people who must obey, whatever their own wishes or inclinations may be, in the most despotic way.... In important matters all the other chiefs of the Kingdom are

⁶¹ The tendency is for most writers to say *libandla* dealt with issues of national importance without stating what those matters were. It would seem that any matter, which in the opinion of the King required the sanction of the *libandla*, would be classified as a matter of national importance. From historical accounts it would seem that war was one such issue.

called together to discuss the case, but they are sure to vote in accordance with the views of the council, for who dare oppose the kotoko."⁶²

Bowdich,⁶³ who visited Kumasi in 1817 made a similar observation but distinguished between the power that the council had in foreign politics and the power they had in domestic administration. It would seem that they were more powerful in foreign affairs than they were in domestic affairs.

1.4.4 The General Council: Libandla

Due to the fact that the *libandla* was representative of the entire nation it was a very important factor in national administration. Its members included, prominent citizens and their meetings were open to all adult male Swazi's who wished to attend.⁶⁴ Generally, women could not attend *libandla* meetings the only exception to this general rule was when the whole nation was summoned to be informed of the prospect of war. Even then the women would only listen they were not allowed to address the gathering.⁶⁵ The only explanation that can be given for the exclusion of women from *libandla* meetings is the mythological ideology of male supremacy alluded to earlier in this chapter.

⁶² Tordoff:1965:10

⁶³ Tordoff:10

⁶⁴ All the chiefs and their leading councillors, prominent headmen, the Ndlovukazi and the Ngwenyama were members of the *libandla*.

⁶⁵ See Marwick op cit at :267.

The *libandla* was more formally constituted than the *liqoqo* and considered issues referred to it by the King and the inner council as matters of national importance that required the sanction of the people. Thus the King determined the agenda of general assembly meetings. This ancient practice, which persists to this day as will be seen in the chapters that follow, has had a negative impact on the post colonial Swazi state. The King still determines the nature and scope of constitutional changes in the country and liberal democrats have singled out this practice among others as undemocratic.

Due to the elaborate procedure preceding the setting up of a meeting of this nature, it was very rare for the *libandla* to take the initiative of calling for a meeting even though theoretically they could do so. The procedure was for special messengers from the royal villages to be sent to the various chiefs to inform them of the proposed meeting, the chief would then inform the headmen in his principality who would then inform the people. Thus the size of the council and the complexity of the procedure of setting up *libandla* meetings confounded by the poor communication system of the time militated against the frequency of meetings of this nature.

There were no rules of procedure at *ebandla*. Deliberations were characterised by freedom of speech aimed at preventing factionalism by reaching final agreement on any issue. Thus members expressed their opinions freely and discussions would continue until consensus was established, even if it took days. Some political commentators viewed the latter practice as a cardinal principle of African democracy.⁶⁶ When consensus had been established the King would be summoned if he was absent during the debate to ratify the decision and the decision became law. In light of this practice the *libandla* is always referred to as the people's

⁶⁶ Busia op cit at :28.

Parliament and the King referred to as *umlomo longacali manga*.⁶⁷ Where the King violated an established custom the *libandla* could fine him. Marwick⁶⁸ cites two instances of Sobhuza 11 being fined by the *libandla* for certain offences regarded as a breach of Swazi law and custom though what those offences are it is not stated.

1.4.5 The Chiefs

The principal role of the Swazi chief in national affairs was that as a member of the *libandla* he mediated between the rulers and their subjects. In this regard the chief's role was similar to that of the Zulu chief but differed from that of the Xhosa, Pondo and Bemba where allegiance was to a local ruler who in turn would pledge himself to the local authority. So although these political groupings were territorial, they did not become solidarity organisations with independent attachments to local figures. The relationship of the citizen was with the King. And as was the case in Buganda "the relationship of the chief depended on the latter's position as the King's lieutenant."⁶⁹

Despite their limited role in national politics Swazi chiefs acted as an important check to the abuse of power by the King and the *liqoqo*. For instance when Mswati 11 and his regents initiated reforms aimed at the centralisation of power on the Dlamini aristocracy and therefore an assault on local liberties, it was the provincial chiefs' combined efforts at resistance that limited the extent of the whole process. According

⁶⁷ Loosely translated the phrase *umlomo longacali manga* means the mouth that utters no lies. At the end of each *libandla* meeting the Ngwenyama would pronounce laws that had been made by the majority and thus he could not lie.

⁶⁸ Marwick op cit at: 260.

⁶⁹ Apter 1961:87.

to Bonner⁷⁰ they issued an ultimatum to Mswati 11 that the hierarchy of chiefs as a whole would resist any further depredations. It was not until a series of concessions had been made by the royal establishment that a semblance of normality was re-established. The author goes on to say that there are no written records of what these concessions were.

1.5. Conclusion

In this chapter it was established that the Swazi King was never an autocrat and that monarchical rule was founded on consensus. This consensus was attributed to an interplay of a variety of social factors all of which established a strong support base for the monarch as well as contributing to the acceptance of the monarch's authority over the nation. In addition to that the chapter identified various bodies, which constituted some checks and balances to the abuse of power by the King. Sanders⁷¹ aptly captures the nature of tribal government when he says [it] was characterised by a religious feeling, a communal spirit, and a belief in democracy on the basis of government by discussion and consensus.

My concluding remarks will mainly be an analysis of the effectiveness of the institutional restraints discussed above. This it is hoped will be a background to the present writer's recommendations in the last chapter which seeks to answer the question whether or not the future of the Swazi monarch lies in the harmonisation of the western and customary powers of the King and makes a proposal of how this can be done. The analysis will be confined to the activities of the *liqogo* and *libandla* which were as it were the voice of the people in pre-colonial Swazi government and

⁷⁰ Booner op cit at:51.

⁷¹ Sanders is quoted by Mqeke 1997:67.

because the essence of the current political debate in the country centres around the distribution of power between the King and the people.

In assessing the effectiveness of these institutions we rely on the works of Kuper and Marwick who are among the first writers to conduct an in-depth study of Swazi political institutions.⁷² Before attempting an analysis of the institutions the difficulty that the writer encountered in this regard should be mentioned. There are a lot of uncertainties surrounding the exact roles of these institutions in particular the *liqoqo* whose proceedings were confidential.⁷³ One cannot begin to appreciate the role of *liqoqo* without understanding its nature. The *liqoqo* as noted above was essentially an extension of the family council *lusendvo*. In terms of Swazi custom, *lusendvo* deals with family matters that need no outside intervention *tibi tendlu*. The Swazi have a saying that *tibi tendlu atikhishelwa ngaphandle* which means that family issues or secretes which might reflect badly on the family are confined to members of that particular family. It is very unfortunate that this particular feature of the *lusendvo* is also an important characteristic feature of the *liqoqo*, according to Kuper⁷⁴ the people have no say in and do not know of [*liqoqo*] appointments and it would be indiscreet of them to inquire who the members are or their qualifications. There are no regular sessions and no reports on their activities.

⁷² Marwick spent a lot of time in Swaziland and was at some point the Resident Commissioner. Kuper has written and published a lot of books on the Swazi and was Sobhuza 11's official biographer.

⁷³ Marwick op cit at:263

⁷⁴ Kuper op cit at :36.

In light of the above the efficacy or otherwise of the *liqoqo* as an agent of control over the powers of the Ngwenyama cannot be evaluated with absolute certainty. However, from most accounts it would seem that the *liqoqo* was a very powerful body and of the two it would seem that it had the potential of being an effective means to check the abuse of power by the King. Hlatswayo⁷⁵ for instance argues that, the customary requirement that the King should defer to the advice he obtains from the *liqoqo* indicates that he did not hold absolute power. He goes on to say this of the members of the *liqoqo*. “[They were] not just a group of henchmen to aid the King in enacting arbitrary and whimsical designs”.⁷⁶

However the tribal constitution had a few inherent flaws, which to a very large extent contribute to the country's current constitutional problems. The people as represented by the *libandla* rarely took the initiative of calling for meetings since as already indicated both its size and the elaborate procedure of convening a meeting militated against this. That means that these democratic meetings were not frequent, leaving too much power on the hands of the King and his relatives. This state of affairs also denied the people of one of the most important fora for calling upon the nation's authorities to account for their actions. This remains largely the case in present day Swaziland, over the years as will be seen in subsequent chapters the frequency of *libandla* meetings has gone down. While Sobhuza 11 made the effort of calling such meetings at least once a year, under the reign of Mswati 111 meetings of the *libandla* have been few and far in between. Thus it can be said that the lack of accountability, the exclusion of the majority of the people from debates on important policy matters, the concentration of too much power on the aristocracy and nepotism that has come to characterise the Swazi system of governance has its basis on this

⁷⁵ Hlatswayo op cit at:265.

⁷⁶ Hlatswayo op cit at: 265.

customary practice. But this can be remedied and suggestions of remedies will be made in the last chapter.

Moreover the fact that the King and the *liqoqo* determined the agenda and the matters to be considered by the *libandla* has serious implications, for it means that constitutional changes were always at the instance of the King and not the people. It would seem, therefore, that the King's practice of unilaterally determining the nature, and extent of changes in the constitutional laws of the country has its basis on this ancient practice.

Another important point, which deserves consideration, is whether the people had a remedy where the King blatantly violated the constitution. The reign of Mbandzeni will be used to answer this question. According to Bonner⁷⁷ Mbandzeni's persistent act of granting concessions in defiance of his councillor's wishes illuminates an important facet of the practice of Swazi politics as opposed to the political theory by which they were supposed to run. However theoretically unconstitutional it may have been, Mbandzeni could override whatever the consensus had been arrived at in the *libandla*, by refusing to implement its decisions. The writer goes on to observe that "ultimately the only sanction they had was his removal, but since they were reluctant to employ that, the centre of decision making in Swaziland was largely paralysed..."⁷⁸. The author does not however state why the Swazi were reluctant to remove Mbandzeni from office.

The reign of Mbandzeni as can be concluded from the examples given above was characterised by bad governance. That he was not removed from power or that there

⁷⁷ Bonner op cit at: 174.

⁷⁸ Bonner: op cit at; 174.

is no documented instance of him being fined by either the *liqoqo* or the *libandla* highlights an important feature of Swazi politics. It shows the Swazi people's tolerance of bad leadership and their powerlessness to do anything about it. The Swazi never developed the Ashanti system of destooling a bad King nor is there any precedent of the assassination of a King for despotic tendencies.⁷⁹ It would seem, therefore, that the Swazi people left it to the royal establishment or to the system to purge itself of a bad leader. Thus you hear of Somnjalose introducing the powers of the Swazi Queen Mother to curb the growing arbitrariness of Ndvungunye and Sobhuza 1, not the people. Therein lies the clue to Swaziland's current constitutional crisis. No matter how much Swazi people disagree with the royal establishment's actions they are very reluctant to do anything about it, they put so much store in the system's ability to change itself. This lends credence to Miller's⁸⁰ assertion that no law or custom prevented the autocrat from encompassing his ends, and it is only natural that all the much admired hoar ancient customs of the Bantu should as they did, admit in application of an elasticity that made them adaptable to the conditions of government more particularly to their administration by a completely autocratic power.

Having highlighted the limitations of the tribal constitution, it should be pointed out that the system had its merits. It had certain qualities that in the present writer's opinion would lay a solid foundation for any future constitution of the country that seeks to harmonise the dual system of governance in Swaziland. The first one being

⁷⁹ Ludvonga (1868-1872) who is believed to have been assassinated died before he formally ascended to the throne. If indeed there is some truth to the assertion that he was assassinated this was probably due to succession issues than any misconduct on his part.

⁸⁰ Miller is quoted by Marwick op cit at: 252.

the effective system of checks and balances which ensured that the King acted always in council and whose restraining force was backed not only by the King's duty to act always in the best interests of the nation but also by sanctions, that is, a fine.

There is secondly the factor of the rule of law, the King had to act in accordance with the established rules of the tribe, the fine that he risked getting for the violation of an established customary practice indicates that the King was not above the law and that his actions were subject to review by the other members of government. An inference can be made that there were limited instances where the King's actions could not be reviewed by some other institution. Even matters like the passing of a death sentence, that were in theory the King's prerogative could be reviewed. For instance the Queen Mother could reason with him and presumably convince him to reconsider his decision.

It is quite clear therefore that the tribal constitution was relatively democratic and that bad governance was not sanctioned by law but was in most instances attributable to a bad leader. Thus it can be said with absolute certainty that the authoritarian *Tinkhundla* system, which sanctions autocratic leadership and negates the rule of law has no precedent in the pre-literate system of government, but as will be demonstrated in subsequent chapters it evolved as a response to modern influence. In the next chapter we shall see how traditional government was radically altered by colonialism.

CHAPTER 2

THE IMPACT OF COLONIALISM

This chapter will focus on the process of political incorporation, beginning with the period when Swaziland was under the Transvaal Republic, in order to establish the extent to which colonialism affected the powers of the monarch and also highlight the factors that led to the survival of the institution during this critical period. Parallels will be drawn with other African Kingdoms during the same period of colonial rule. The discussion that follows below therefore, traces the powers of the monarch from the period when Swaziland was under the Transvaal Republic to the period when the Kingdom formally came under British rule. The writer will also comment on the role of Sobhuza 11 in the entrenchment of traditionalism in Swaziland.

2.1. Swaziland under the Transvaal

In Swaziland conquest was precipitated by concessions. By the end of his reign, which lasted from 1874-1889, Mbandzeni and his councillors had alienated over half the nation's land to Boer and British concessionaires.⁸¹ Although Boer interests in the

⁸¹ Over the years Mbandzeni and his councillors have been absolved of any wrong doing in this regard, it is obvious that they did not fully comprehend the impact of their actions as is evident in the words of one Swazi (presumably one of the King's councillors) at the time who according to Kuper opcit at 25 said "we hold a feather and sign. We take money, but we do not know what it is for".

The author goes on to observe that the majority of the documents were obviously incomprehensible to the King and his councillors despite the guarantee's attestation in each case that it was truly and duly interpreted. According to Kuper "land grants dealt with principles of tenure shaped in a



territory predominantly centred around farming, in particular, winter grazing rights and British interests lay in mining and trade, more often than not the land and mineral rights granted to these parties by the King overlapped, fanning the inherent antagonism between them. Over the years what had started out as a territorial dispute between concessionaires assumed a political character or what Kuper⁸² describes as a type of economic warfare eventually sanctioned by powerful European governments.

It should be pointed out though that while the Boers and the South African Republic in their anxiety to annex Swaziland had obtained rights, which were essentially powers of government, the British government, on the other hand, had no interest in the territory. It was the individual investors and companies of British origin that wanted Britain to assume responsibility to protect their interests.⁸³ The concession problem culminated in the loss Swaziland's independence to the Transvaal Boers in 1894, a process initiated through a series of conventions entered into by the British and the Boer Republic.

foreign culture, for example, leasehold, freehold, sale, and private ownership which were concepts that did not exist among the Swazi."

⁸² Kuper opcit at 24.

⁸³ The companies involved included the Chambers of Commerce of London, the Forbes Reef Company and the Napootaland Syndicate.

The first of these conventions, known as the Pretoria Convention of 1881, purported to reaffirm and guarantee Swaziland's independence by recognising her status as an independent state.⁸⁴

The second convention of 13 November 1893 allowed the South African Republic with the approval of the British government to negotiate with the Swazi for the control over European affairs in Swaziland. The arrangement was made subject to the condition that Swazi interests and customs would be protected. When the document was presented to the Queen Regent and her councillors they refused to sign it. The Queen Regent sent a deputation to the High Commissioner in Cape Town with a request for British protection. The deputation was unsuccessful. Undeterred by the lack of success the Queen Regent sent yet another delegation to London to appeal to Queen Victoria personally which was also unsuccessful.

Despite Swazi objections Britain and the South African Republic concluded a third agreement, on the 10th of December 1894 whose effect was to pass control of Swaziland over to the South African Republic. In terms of this convention Swaziland became a protectorate of the South African Republic. This protectorate, however, stopped short of incorporation. It would seem that the convention also gave the South African Republic effective control over the internal affairs of the territory. In terms of article 2 of the Convention the South African Republic acquired all sovereign powers over Swaziland and the inhabitants thereof. There was, however, included in the convention a provision that guaranteed the Swazi protection of their laws and customs, so far as the same were not inconsistent with laws made pursuant to the

⁸⁴ This was a way of ensuring that none of them got access to the territory. However, it was not long before the South African Republic tried to renege on the agreement. See Maylam 1986:95.

convention.⁸⁵ The Ngwenyama retained the usual powers of Paramount Chief in so far as they were not inconsistent with civilised laws and customs. This was the usual repugnancy clause that was common in most African states.⁸⁶

Once again the country's traditional authorities refused to sign the convention, unfortunately this time the need to obtain the prior consent of the Swazi had been waived. "Unwilling to suffer the doom of openly rebellious Bantu nations, the Swazi temporarily submitted."⁸⁷ The preceding discussion shows that, Swazi traditional leaders lost control over the affairs of the country long before Britain formally took over the reigns of government and that, as we shall see in the discussion that follows, is what simplified the transition from one colonial power to the next. As Bonner⁸⁸ aptly observes the political and economic subversion of the country by concessionaires had ensured that it could never revert to its previous independent status.

2.2. Swaziland under British Colonial Rule

For a brief period the outbreak of the war between Britain and South Africa meant that the Swazi were left to govern themselves. This was, however, short-lived

⁸⁵ See *Sobhuza v Miller and Others* [1926] 522 [Privy Council].

⁸⁶ This clause was invoked in the trial of King Bhunu by the South African Republic authorities for his alleged role in the execution of Mbaba Sibandze a leading councillor. Following this trial, the two white governments, that is, the British government and the South African Republic drew a protocol that radically curtailed the Ngwenyama's criminal jurisdiction.

⁸⁷ Kuper *opcit* at 28.

⁸⁸ Bonner *opcit* at 207.

because after the Anglo-Boer war Britain assumed control over Swaziland. The Order in Council of 25 June of 1903 formally passed all rights and powers of the South African Republic over Swaziland to the British Crown. Britain pursued the policy of indirect rule, which made provision for two separate administrative frameworks, one based on the western legal-rational model of administration and another based on the traditional Swazi system.⁸⁹

The General Law and Administration Act of 1905 vested administrative authority in the High Commissioner resident in South Africa, while the day-to-day administration of the territory was carried out by a Resident Commissioner. The Ngwenyama retained his traditional control over the tribal political structure and the *libandla* was used to ascertain national opinion on matters of national importance. In local government matters communication between the people and the colonial administration was through the chiefs who were also used to collect taxes. The

⁸⁹ The British were not consistent in the application of their colonial policy of indirect rule, it would seem that expediency determined the policy that would be applied in each one of their dominions. British colonial rule in Swaziland was for the duration of the colonial period to approximate dual rule. This was perhaps the result of the British wanting to have as little as possible to do with the day-to-day administrative issues of the Swazi provided law and order prevailed. This can be compared to their policy in Buganda where the 1900 agreement entered into between the Kingdom of Buganda and the British ensured that the relationship between Buganda and the colonial administration was more on the basis of international law as if they were both sovereign states.

district officials of the colonial administration held regular meetings with chiefs to discuss matters affecting the locals and to attend to any complaints.

The Swaziland Order-in Council of 25 June 1903 vested legislative authority in the High Commissioner, who was empowered to promulgate Proclamations from time to time. These Proclamations were enforced by a police force set up in 1907. Effectively, the Order took away the powers that hitherto vested in the *libandla*. The recognition of Swazi traditional institutions and laws was regulated by section 5 of the Order which made it clear that the British government reserved its right to intervene where native laws and customs were not compatible "with the due exercise of his Majesty's power and jurisdiction or clearly injurious to the welfare of the said natives."⁹⁰ It is obvious that this was some form of repugnancy clause.

When the British assumed control over Swaziland they introduced as the general law the European system already in operation in other parts of the Southern African region under their control, that is the Roman Dutch law.⁹¹ Section 2 of the General Law and Administration Act of 1905 contained the following provisions:

- "(a) The Roman -Dutch Common Law, save in so far as the same has heretofore or may from time to time hereafter be modified by statute, shall be the law in Swaziland.
- (b) Save except in so far as the same have not been repealed, the statutes in force in the Transvaal on the 15th day of October 1904 shall, *mutatis mutandis*, and so far as

⁹⁰ See section 5 of the Swaziland Order-in-Council of 15 June 1903.

⁹¹ See Sanders 1985:47 who says that the imposition of Roman Dutch Common law in the former British colonies of Lesotho Botswana and Swaziland led to their membership in what the late Mr Justice Schriener referred to as the "South African Law Association."

they may be applicable be in force in Swaziland and shall be administered as if the territory was a district of the Transvaal.”

According to Sanders,⁹² initially, the newly introduced general law was meant to be essentially personal, that is to say, to be applicable primarily to Europeans, for social, economic, political and administrative reason although it later enjoyed territorial application. Civil disputes involving the Swazi were to continue to be regulated by the traditional legal system, which was partially reinstated, by section 17 of Proclamation No.4 of 1907 in the following terms:

“Notwithstanding anything in this Proclamation`contained the Paramount Chief and other native chiefs shall continue to exercise jurisdiction according to native law and custom in all civil disputes in which natives only are concerned, provided always that any party to such civil dispute may appeal from the decision of any chief to the Resident Commissioner whose decision shall be final.”⁹³

⁹² Sanders 1985:56.

⁹³ As is evident in the wording of section 17 of Proclamation No.4 of 1907 the legal jurisdiction of chiefs and the Ngwenyama's courts was limited to civil matters and did not extend to criminal matters, which were dealt with by the general law courts.

The retention of two legal systems resulted in legal dualism - a state of affairs that has attracted a great deal of interest among academics⁹⁴. The irony of this legal position is that a Swazi is subject to two legal systems while his non-Swazi counterpart is not.

From this brief account of the colonial constitutional structure it is evident that though British control had the effect of modifying the functioning of the indigenous authorities, it nevertheless, retained the essence of the pre-colonial Swazi governmental structure. To the Swazi people the King remained the Ngwenyama with all the traditional powers that such office entailed. The office of the Ngwenyama was to remain the rallying point of the Swazi nation throughout the colonial period. For instance section 17 of Proclamation No.4 of 1907 clearly stated that appeals from the decisions of any chief were to be made to the Resident Commissioner, in practice, such appeals first went to the Ngwenyama and would only be forwarded to the Resident Commissioner after they had been brought before him.

Moreover legal dualism served to ensure the survival of the institution of traditional leadership in the sense that it gave the Ngwenyama and chiefs a certain amount of control over the tribal legal structure, which, in turn, was used by Sobhuza 11 to entrench traditionalism. Sobhuza 11 and his councillors resisted all colonial attempts at the codification of customary law, which would have rendered it static and therefore unable to adapt to the demands of the new constitutional dispensation.

⁹⁴ According to Nhlapo who is quoted by Sanders 1986:113 the problem that this state of affairs presents is that it was not always clear from a statutory enactment whether or not it purported to affect customary law. The writer goes on to say that there might be support for the view that under the general law a presumption existed against the modification of customary law, at least in respect of enactments, which in their original form were directed to whites.

There can be no doubt, however, that traditional institutions were weakened by colonial rule. Although the British declared that their indirect rule policy sought to avoid interference with Swazi customary law and institutions, the policy was, however, deviated from when it was expedient. For example the British government insisted that the Ngwenyama should drop the title of King and adopt that of Paramount Chief.⁹⁵ The application of customs was limited by repugnancy clauses limiting the application of customary law to the extent of its compatibility with western law. The partitioning of the country, which left only a third of the total area under the control of traditional leaders, created problems of jurisdiction, for it meant that subjects could escape judgement by the chief's courts by simply moving into white areas. Other ripple effects included a decline in the attendance of the *incwala* ceremony and the age grade regiment system. It appeared that the ceremony had lost its meaning and social significance in the minds of the Swazi people⁹⁶. Quite clearly colonialism and modernisation had negative effects on Swazi culture.

⁹⁵ It is interesting to note that despite the British objection to the use of the title "King" in reference to the Ngwenyama, when Labotsibeni (the then Queen Regent) introduced Sobhuza 11 as the successor to the Swazi throne she traced the long line of Swazi Kings past to illustrate that Sobhuza11 was not just a Paramount Chief but King of the Swazi like his forebears. She proudly and emphatically introduced him as the son of Ngwane, the son of Mbandzeni, the son of Mswati, the son of Sobhuza, the son of Ndvungunye, the son of Ngwane, the son of Dlamini all Kings of Swaziland. See Matsebula opcit at 203

⁹⁶ In the words of Matsebula who is quoted by MacMillan 1995: 533 the ceremony was an affair for old men, a few members of *emabutfo* at the royal residence and residents of Ezulwini valley. Another factor that might have contributed to this state of affairs is that between 1898 and 1921- the period between Bhunu's (Sobhuza's father) death and Sobhuza11's installation as

2.3. The Entrenchment of Traditionalism under Sobhuza 11's Era.

One of the outstanding features that characterised the Sobhuza 11's style of governance was the entrenchment of traditionalism to counter the adverse effects of colonialism in Swaziland. What some writers have referred to as the ideology of traditionalism emerged some time between the 1920s and 1930s as a strategy aimed at cultural assertion and most importantly as a way of legitimising and reviving the authority of the country's traditional leaders.⁹⁷ According to MacMillan⁹⁸ the right way of analysing this ideology is to distinguish it from "conservatism", resistance to change, the preservation of old customs and Swazi way of doing things. Of course traditionalism may at times be conservative in the latter sense, but it may also be, and often is, innovative and dynamic. Sobhuza 11's ideology of traditionalism, premised on a process of selection and adaptation entailed putting new content and meaning into old forms and institutions like the age-grade regiment system, the *incwala* ceremony and the *libandla*.⁹⁹

King, the ceremony was suspended. In terms of Swazi custom the ceremony is suspended for the duration of the King's minority. The suspension ends when he is formally ascends to the throne upon the attainment of the age of majority.

⁹⁷ See MacMillan opcit at 643 and Hlatswayo opcit

⁹⁸ MacMillan ibid.

⁹⁹ According to MacMillan opcit at 650 the ideology of traditionalism, which was to be the essence of Sobhuza 11's creed, repeated by himself and his associates on numerous occasions during the following decades, was gleaned from the famous advice of Pope Gregory to Saint Augustine of Canterbury. The Pope is said to have advised Saint Augustine to discard all the bad native customs and retain the good ones.

Just as his ancestor Mswati 11 had used the *incwala* ceremony and the *libutfo* age-grade regiment system to assert royal authority, so did Sobhuza 11. To ensure the people's attendance of the *incwala* and to prevent the disintegration of tribal life the King revived the *libutfo* system. The military function of the *libutfo* had obviously fallen away, therefore, what interested Sobhuza was its function as a method of delaying marriage. He imposed a fine on young men who married without permission.¹⁰⁰

In addition to the above, Sobhuza 11 and his councillors modernised the *libandla* by establishing a much smaller Executive Council of the Swazi National Council (*libandla ncane*) aimed at keeping up with the demands of modern government. The old *libandla*, as demonstrated in the first chapter, was far too large and therefore not geared toward rapid decision making. The new *libandla ncane* was a blend of traditional and modern qualities for while the appointment of incumbents to the Executive council of the Swazi National Council, (*libandla ncane*) was along traditional lines, its personnel were people possessed of both modern expertise like government officials and civil servants and people with knowledge of Swazi law and customs like chiefs¹⁰¹. The establishment of the Executive Council did not, however, mean that the nation would thenceforth be excluded from participating in matters of government. The custom of calling meetings of the full *libandla* on matters of national importance continued as before. In Macmillan's¹⁰² view the "custom" of holding an

¹⁰⁰ The revival of the *incwala* ceremony had to coincide with the revival of the *libutfo* due to the need for young unmarried men to fetch the sacred shrub needed to construct the royal enclosure (*inhlambelo*) during the ceremony.

¹⁰¹ By appointment along traditional lines here is meant the old method where holders of office were appointed by the King and council.

¹⁰² MacMillan opcit at 647.

annual meeting of the *libandla* for a week in July developed sometime after Sobhuza 11's installation.

The factors that contributed to the success of this strategy were first of all the fact that there already existed a royal bureaucracy in all the areas whose specific function was to ensure that royal policies were implemented.¹⁰³ Secondly unlike other states which were composed of various tribes each with its distinct customs the Swazi were homogenous, the nation was made up of a single tribe with one culture. In these states often times cultural practices had to be sacrificed for the much more pressing need for national unity.

2.4 Toward Responsible Government: The Swaziland Native Administration Proclamation No 44 Of 1944

In line with the long-term objective of eventual self-government through a steady expansion in the local composition of administrative bodies aimed at developing a democratic system of government, in 1944 the British government issued the Swaziland Native Administration Proclamation No.44 of 1944.¹⁰⁴ The preamble to the Proclamation clearly stated that this law was aimed at providing for the recognition of native authorities and the definition of their powers and functions in Swaziland.

Section 2 of the Proclamation provided that the Ngwenyama who was styled Paramount chief was the Native Authority of the territory. He was to exercise these

¹⁰³ The royal bureaucracy referred to above is the network of royal villages discussed in ~~the~~ Chapter 1.

¹⁰⁴ This policy was established sometime after world war 11.

powers acting in conjunction with his council according to Swazi law and custom.¹⁰⁵ The Proclamation further empowered the Native Authority to constitute the offices of subordinate native authority and chief over any specified area within the territory with the prior approval of the Resident Commissioner.¹⁰⁶ Effectively, this meant that the Ngwenyama could not appoint or revoke the appointment of a chief or a subordinate native authority without the Resident Commissioner's consent.

The duties of native authorities under this Proclamation were the maintenance of order and good government in their various territories. In the fulfilment of their duties they were to exercise the powers conferred on them by the Proclamation and by Swazi native law and custom that was not incompatible with the due exercise of His Majesty's power and jurisdiction or clearly injurious to the welfare of the natives. They once again had the power to issue orders to be obeyed by the people living within their territories.

The new system of native administration evidently sought to place the control of chiefs and their councils under the Resident Commissioner instead of the Ngwenyama, as had hitherto been the custom. The nation's tribal authorities vehemently protested against what they saw as an erosion of Swazi custom. According to Matsebula¹⁰⁷ they told the Resident Commissioner that they would like to see Sobhuza 11 step down if he tried to co-operate with the government in this matter, rather than seeing their institution eroded. For his part Sobhuza 11

¹⁰⁵ Section 2 of the Swaziland Administration Proclamation No 44 of 1944.

¹⁰⁶ Sections 3 and 4 of the Swaziland Administration Proclamation No 44 of 1944.

¹⁰⁷ Matsebula *opcit* at 195

threatened to abdicate, and for a couple of hours at least Swaziland was without a King.¹⁰⁸

Colonial laws like the Swaziland Native Administration Proclamation No.44 of 1944 contributed to the disintegration of the institution of traditional leadership in most of the former British colonies in Africa. A petition in protest of this trend in Buganda highlights the role of such laws in the weakening of the Kabaka's powers, the petition in part reads:

"The Kabaka occupies a position at present which is tantamount to that of an ordinary Paramount chief of one of the second rate tribes of Africa. He no longer has any power or control over his chiefs and all sundry officers of the Protectorate Government appear to have the right to have direct access to the Kabaka which right was exclusively reserved for the Governor alone. Any order issued to the chiefs by the Kabaka or his government has to be countersigned and approved by the Provincial Commissioner before it can be transmitted to the chief concerned, with the result that the chiefs are beginning to lose their sense of loyalty to their Kabaka. This is the effect of the practice brought about solely by the administrative officers of the Protectorate Government which is entirely unjustified and clearly in conflict not only with the honored traditions and principles of native administration in Buganda but also in the terms and intentions of the Buganda Agreement of 1900."¹⁰⁹

Moreover, such laws created new criteria for qualification for the office of traditional leadership. Over and above the hereditary requirement the appointment of a King or chief would thenceforth be subject to the Resident Commissioner's approval. Commenting on the effects of the Native Administration Proclamation No 61 of 1938

¹⁰⁸ According to Matsebula opcit at 195 it was at a meeting with the Resident Commissioner held to discuss the matter that Sobhuza¹¹ said " I abdicate from now."

¹⁰⁹ Crawford-Young 1977:209.

and the Native Courts Proclamation No.62 of Lesotho Weisfelder¹¹⁰ says they “asserted the predominance of the colonial authorities over the paramountcy and the chieftainship by making the right to rule contingent upon recognition from the British Commissioner in addition to meeting customary hereditary requirements.”

2. 4.1. The Swazi Administration Act No.79 Of 1950

Dissatisfaction with the Swaziland Native Administration Proclamation No.44 of 1944 led to its replacement in 1950 by a series of Acts, the Swazi Court's Act No. 80 of 1950, the Swazi National Treasuries Act and the Swazi Administration Act No. 79 of 1950.¹¹¹ Although the aforementioned Acts all had an impact on the powers of the monarch for the purposes of this study focus shall mainly be on the Swazi Administration Act No.79 of 1950.

The preamble to the new Act clearly stated that it was aimed at amending and consolidating the law relating to the Administration of Swazi affairs. It amended some of the provisions that the Swazi had objected to in the original Proclamation; like the terminology, for instance the title of the Proclamation was amended. Instead of being

¹¹⁰ Weisfelder 1978: 171. These Proclamations are similar to the Swaziland Native Administration Proclamation No 44 of 1944.

¹¹¹ Commenting on the new law Lord Hailey quoted by Matsebula op cit at 95 observed that “ the agreement of the Swazi was then secured was due to the fact that the Resident Commissioner E.B. Beetham had obtained the sanction of the High Commissioner for the proposals made by him for the revision of the Native Administration Proclamation of 1944, thus removing many of the objections by the Swazi against the terms used in it”.

called the "Swaziland Native Administration Proclamation" it was now to be known as the Swazi Administration Act. Offensive terms like Native Authority and Paramount Chief, Subordinate Native Authority were replaced by Ngwenyama and chief respectively.

More importantly, however, the Act formally restored most of the King's important powers, that, of appointing and revoking the appointment of traditional authorities. It once again placed the control of chiefs and their councils under the latter removing the obligation on the part of the Ngwenyama to seek the prior approval of the Resident Commissioner with regard to such matters.¹¹² These matters were to be regulated by the Swazi law and custom.¹¹³ According to Lord Hailey¹¹⁴ the final arrangements seemed to envisage that the local administration acted less as an agency which can regulate policy in local affairs, than as one which may, on occasion, exercise a veto in certain directions. That the colonial administrators were not happy with the new arrangement was apparent in Lord Hailey's comments where

¹¹² Section 4 of the Swazi Administration Act No.79 of 1950 provided that the Ngwenyama in *libandla* may by Order appoint any person to be chief for any specified area or areas in Swaziland. In exercising their powers under the Act the chief was obliged, at all times, to act in consultation with his *libandla* according to Swazi law and custom. Section 5 of the same Act empowered the Ngwenyama in *libandla* to revoke or suspend any appointment made under section 4.

¹¹³ See section 3 of the Swazi Administration Act No.79 of 1950 which provided that the Ngwenyama and his *libandla* shall exercise the powers conferred upon them under the Act according to Swazi law and custom and that the area of their authority would extend over the whole of Swaziland.

¹¹⁴ Lord Hailey is quoted by MacMillan *opcit* at 649.

he stated his disapproval on the continued unhelpfulness of chiefs on matters of land conservation.¹¹⁵

The Ngwenyama's powers as the ultimate repository of indigenous justice in the Kingdom were restored by the Swazi Court's Act No.80 of 1950. Effectively, the Ngwenyama was empowered to establish Swazi National Courts and to designate their officers at his will and pleasure a position that has continued to this day. These courts were to administer Swazi law and custom albeit with the usual restriction of the repugnancy clause formally introduced by section 11.¹¹⁶

Following this apparent triumph of tradition over modernity Sobhuza 11 intensified his efforts at mobilising nationalist sentiments for the benefit of the monarchy. In 1953 he proposed the decentralization of Swazi administration through a system of local councils called *Tinkhundla*, which were to be based at royal villages (*imiphakatsi*) to be established by the king, whenever and wherever he wished, according to Swazi law and custom. According to Sobhuza 11 "the regional councils would be strategically placed to serve administrative concerns and as rural development mobilisation centers... each *inkhundla* would have its own cadre of officials, who would have both traditional and modern qualities. At the head of each council would be an *indvuna* appointed by the king-in-council who would chair the meetings. The *tindvuna*... would be ex-serviceman who held the rank of non-commissioned officer

¹¹⁵ MacMillan opcit at 649. The writer quotes Lord Hailey as attributing this state of affairs to Sobhuza 11's ready access to Johannesburg lawyers.

¹¹⁶ See the Swazi Court's Act No.80 of 1950.

during world war 11.”¹¹⁷ Throughout the colonial period Sobhuza 11 was to continue to posit *Tinkhundla* as an alternative to the Westminster system of government.

2.4.2 The Constitutional Committee

The late 1950s and early 1960s marked the beginning of a new era in Swaziland’s political history as this period marked the beginning of independence talks. In Swaziland like in most British dominions the path to independence was preceded by the establishment of the Kingdom’s first legislative council.

The initiative of calling for constitutional change was taken by the European Advisory Council (EAC). They envisaged collaboration with tribal authorities to counter the attempts of Pan-Africanist leaders to take control of the post independence state through the formation of a joint advisory council in which both European and Swazi interests would be represented. However, Sobhuza 11 was against the idea of an advisory council.¹¹⁸ He advanced a counter proposal, the creation of a legislative council in which whites and Swazis would have “equal representation” with whites voting for their representatives in Western style while the Swazi chose their representatives in a traditional manner. The Secretary for Colonial Affairs accepted

¹¹⁷ MacMillan opcit at 121.

¹¹⁸ According to Stevens 1963:331-332 Sobhuza 11 saw the idea of a joint advisory council as a derogation of Swazi power, since the Swazi National Council already had legislative and executive powers whereas the Joint Advisory Council would only be an advisory body. Moreover, as the result of the British practice of transforming advisory councils into legislative councils, he foresaw in the end a body elected on the basis of “one man one vote.”

the idea of a legislative council and steps were taken by the Resident Commissioner to set up a constitutional committee.

Around this period of the initial stages of constitutional talks, Swaziland's first political party was formed. The Swaziland Progressive Association (SPA) transformed itself into a political party, called The Swaziland Progressive Party (SPP) under the leadership of John Nquku. The choice of name indicated the party's Pan Africanist orientation and the desire to break away from both colonial and traditional rule. Thus an element of factionalism hitherto unknown among the Swazi was created, for the first time in Swazi history and the people were to be divided along ideological lines. This state of affairs was for obvious reasons antithetical to the survival of traditional leadership and Sobhuza 11 soon made his views on political parties known to the Swazi nation.¹¹⁹

Although the King was opposed to political parties when the Constitutional Committee was appointed, among the representatives of the Swazi Nation there were three members of the Swaziland Progressive Party.¹²⁰ The 26 member Constitutional Committee included representatives of the Swaziland government, (administration) the European Advisory Council, (E.A.C.) the European Combined

¹¹⁹ Sobhuza 11 was against the idea of political parties and blamed the unrest prevailing in Africa during this period to Pan-Africanist ideologies. According to Stevens opcit at 330-31 at a meeting of the SNC Sobhuza attributed the new developments to the influence of foreign political practices that were introduced to undermine the role of traditional institutions such as the *libandla* in the resolution of political issues.

¹²⁰ The Swazi members of the Constitutional Committee were appointed by the King-in-Council.

Executives Association (ECEA) and the Swazi nation (S.N.C.). The outcome of the first meeting of the Committee was the appointment of a working committee consisting of four members of the European Advisory Council, four official members and nine members of the Swazi National Council.

The inclusion of the three members of the SPP in the Constitutional Committee, a potential area of conflict, was to prove detrimental to the success of the constitutional talks. It was not long before there were disagreements among the Swazi members of the Constitutional Committee, no doubt exacerbated by the Ngwenyama's speech of April 1960, prior to the constitutional talks, which purported to be his expectations of the proposed legislative council.¹²¹ Not surprisingly, the traditionalists in the Swazi

¹²¹ In this speech the king made the following points;

- (1) Africa is in turmoil, because the Europeans fear the Africans and try to prevent them from obtaining independence;
- (2) the Africans seek only justice and fair play and have no wish to deprive the Europeans of their rights;
- (3) the Europeans will gain security in Africa not by intensifying white immigration but by educating Africans;
- (4) it is now necessary to find a way to make all people of Swaziland feel secure;
- (5) to achieve this, the Swazi and the Europeans should come together on a joint council;
- (6) they should meet, not on an advisory council, but on a legislative council;
- (7) the Europeans and the Swazi would come together on an equal basis;
- (8) the Europeans would choose their own representatives in the way they are used to;
- (9) the Swazi should choose their representatives in the way they are used to;
- (10) this kind of association will be called a federation in which the number of representatives of each group would not matter;

delegation felt that they had to proceed along that framework, while the SPP members felt that they had to present their party's views. As a result all the meetings of the committee ended in a deadlock because the Swazi members disagreed on a number of vital issues including:

- The question whether they should adopt a partisan approach or speak as representatives of the Swazi National Council.
- The constitutional powers of the King. The SPP members were of the view that the king would become isolated from his people if he became a political figure, and they, therefore, wanted him to be above politics and to be a constitutional monarch.
- The election of members to the legislative council. The SPP was against election through traditional methods as they felt that this would marginalize the educated. They also felt that representation along racial lines would lead to racial conflict and add political domination to the economic domination that white people already enjoyed.
- The SPP was against the idea of the country's mineral rights vesting in the Ngwenyama.¹²²

(11) this federal system is suitable for the association of groups which have not yet reached the same stage of development;

(12) the idea of 'one man, one vote' causes misunderstanding and leads to abuses;

(13) economic integration is necessary to foster a community spirit in Swaziland.

¹²² According to MacMillan op cit at 663 the importance of the issue of minerals lay in the fact that the revenue from the minerals was used to finance the Swaziland Development Fund Tibiyo Taka Ngwane-which under the control of

This difference of opinion soon spilled over to the entire progressive camp. Up until then the SPP led by John J. Nquku, had been the only political party. It now split into three, one section led by Nquku himself, another by Dr Ambrose Zwane and the third by Kingsely Samketi. Two more political parties were also formed, the Mbandzeni Convention Party led by Mzingeli G. Msibi and the Swaziland Democratic Party led by Sishayi S. Nxumalo. Later, the Swaziland Progressive Party, led by Zwane, changed its name to the Ngwane National Liberatory Congress, while some of the other political parties frequently changed leaders. The reason behind the split of the SPP is not known.¹²³ The Ngwenyama declined an invitation extended to him by the British government to try and break the impasse. He indicated that he had no desire to take sides in the matter.

the Swazi National Council, enriched the members of the royal family and the traditional elite.

¹²³ There is speculation that tribal differences among the members may have been the cause. The founder of the party JJ Nquku and its then president was a South African, there was speculation that the Swazi members of the party felt that there were now enough educated Swazis to take his place. They were of the view that since the party now dealt with national problems as opposed to labor issues it was only right that nationals should lead the party. They came up with all sorts of accusations to discredit his credibility as a leader, among others that he was pompous, and that he had mismanaged funds.

2.5. The Swaziland Order-In-Council No 5 Of 1964

The lack of unanimity prompted the British government to impose what they felt was a compromise constitution, through the Swaziland Order-in-Council No.5 of 1964.¹²⁴

2.5.1 Executive Authority

Section 20 vested executive authority in Her Majesty's Commissioner for Swaziland who was appointed by Her Majesty. In the exercise of his functions he consulted with an Executive Council composed of three ex-officio members and five appointed members.¹²⁵ No court of law had the power to enquire into whether or not he had in

¹²⁴ In the end the British administration put forward its own constitutional proposals. According to Matsebula opcit at 237, there was a note which stated that the secretary of state had been obliged to decide on his own responsibility what form the new constitution would take because of lack of unanimity among those who attended the constitutional talks.

¹²⁵ See sections 25 and 28 of the Swaziland Order-in-Council No.5 of 1964. Section 26 further provided that the ex-officio members of the executive council shall be the Chief Secretary, the Attorney-General and the secretary for Finance and Development. According to section 27 the appointed members of the executive council were to be appointed by the commissioner, in his discretion, by instrument under the public seal. In making appointments under section 27 the Commissioner had to appoint one public officer and four people elected or nominated by members of the legislative council.

any matter complied with the instructions that Her Majesty would from time to time give him.¹²⁶

2.5.2 Legislative Council

The constitution established a single chamber legislature comprising twenty-four elected and nominated members; the speaker, four official members (including the Chief Secretary, the Attorney-General, and the Secretary for finance and development and the appointed member of the Executive Council who was a public officer).¹²⁷ The nominated members of the Legislative Council were British subjects or British protected persons who had attained the age of 21 years and were to be appointed by the Commissioner in his discretion.¹²⁸ In making these appointments, however, the Commissioner was obliged to seek the prior approval of the Secretary of State.

¹²⁶ See section 21 of the Swaziland Order-in-Council No.5 of 1964.

¹²⁷ See sections 39 and 42.

¹²⁸ See section 44 of the Swaziland Order-in-Council No.5 of 1964. Included in the aforementioned section was a proviso which stated that "but nominated members of the Council shall only be appointed if, and shall not be appointed unless in the Commissioner's judgement, such appointment was necessary-

(a) to secure representation in the Council of interests or of communities which in his judgement, should be but are not adequately represented in the Council for which purpose he may appoint not more than three nominated members; or

(b) to ensure the continued administration of the government of Swaziland".

The elected members of the Legislative Council on the other hand were elected according to a 30-30-30 formula. That is, 30% was elected by the whites, 30% by the Swazi traditional authorities and 30% by the national poll.¹²⁹ A bill passed by the Legislative Council was not law until assented to by the Commissioner in Her Majesty's name and on her behalf; or until Her Majesty assented to it through the Secretary of State and the High Commissioner signified her assent by notice published in the gazette.¹³⁰

2.5.3 Judicature

The constitution established a High Court, which was the superior court of record in Swaziland. Judges were appointed by the Commissioner in accordance with Her Majesty's instructions.¹³¹ In addition to that fundamental rights and freedoms were protected by Part 11 of the Order-in Council through a bill of rights.

¹²⁹ Section 43(2) provided that: subject to the provisions of this Order, of the elected members of the Legislative Council

- (a) eight shall be persons who are Swazis or Eurafricans and who are certified by the Ngwenyama-in-Council as having been elected in accordance with Swazi traditional methods of election;
- (b) eight shall persons who are Europeans or Eurafricans of whom four shall be elected by voters registered on the roll referred to in this Order as the "national" roll; and
- (c) eight shall be persons of any race, who shall be elected by voters registered on the national roll.

¹³⁰ See section 69 of the Swaziland Order-in Council No.5 of 1964.

¹³¹ See Part 1X of the Swaziland Order-in Council No.5 of 1964.

2.5.4 Powers and Privileges of the Ngwenyama

The office of Ngwenyama remained detached from colonial government. His powers and privileges over government were marginal. He had the right to be provided with copies of all papers submitted to the Executive Council and of the meetings of the Council.¹³² He also had the right to be provided with a copy of all bills. Moreover he had the right to require the Commissioner to reserve a bill for signification at Her Majesty's pleasure unless the Commissioner in his discretion declared the bill urgent.¹³³ Further privileges included immunity from civil proceeding in his private capacity, exemption from taxes (income and property) and immunity from compulsory acquisition of all property owned by him in his private capacity.¹³⁴

¹³² See section 75(1) of the Swaziland Order-in Council No.5 of 1964. Section 75(2) further provided that: The Ngwenyama may by writing under his hand require that for reasons to be specified by him, the Commissioner

(a) shall cause to be considered at a meeting of the Executive Council any matter other than a matter in respect of which the Commissioner is not obliged to consult the Council under the provisions of section 28 of this Order or which relates to the exercise by the Commissioner of the prerogative of mercy; and

(b) shall cause to be considered at a meeting of the Council any advice tendered to the Commissioner by the Council other than advice tendered in regard to the exercise of the prerogative of mercy; and such a meeting shall unless the Commissioner in his discretion, on the grounds of urgency otherwise decides, be held not less than seven days after the meeting at which the advice in question was tendered.

¹³³ Section 76 of the Swaziland Order-in-Council No.5 of 1964.

¹³⁴ Section 78 of the Swaziland Order-in-Council No.5 of 1964.

The one area in which it could be said that traditionalists scored a victory with regard to the powers of the Ngwenyama was in the vesting of land and mineral rights. Although Crown land continued to vest in the Commissioner on behalf of Her Majesty, under the new constitution land designated as Swazi Areas and Land Settlement Areas vested in the Ngwenyama in trust for the Swazi nation.¹³⁵ The same applied to minerals and mineral oils subject, however, to any subsidiary rights and interests, before the appointed day or by the Order-in-Council or any other law in force in Swaziland or otherwise, granted to or recognised as vested in any other person.¹³⁶

As to be expected the constitution was rejected by traditionalists and progressives alike. The Progressives' main objection to the 30-30-30 formula was that it maintained the privileges of the white community and those of the traditionalists. They demonstrated their displeasure by embarking on a strike action. The King and his councillors also objected to the expanded franchise, that is, the fact that under the new law voting would be along party lines and the one man one vote system. A referendum (whose results were ignored by the British administration) conducted by the Ngwenyama showed that the majority of the Swazis rejected the new constitution.¹³⁷

¹³⁵ See sections 98 and 99 of the Swaziland Order-in-Council No.5 of 1964.

¹³⁶ See section 102(1) of the Swaziland Order-in-Council No.5 of 1964.

¹³⁷ According to Potholm: 1966 The plebiscite was in the nature of a warning against the dangers of adopting a constitution, the results were therefore not surprising. The essentially illiterate Swazi electorate were given a choice between the symbol of a lion and the crest of the Royal house (which stood for the rejection of the constitution) and the symbol of a reindeer an unknown

2.6 The First National Elections

Undeterred by the colonial administration's refusal to reconsider the amendment of the constitution the Ngwenyama reacted by forming his own political party, the Imbokodvo National Movement (INM) formed two months before the elections. The party was an alliance between traditionalists and the white community. To avoid accusations of taking sides in the political affairs of the people the Ngwenyama appointed Prince Makhosini as the leader of the INM.

In 1964 amid charges of voting irregularities and intimidation among others the INM won all the national poll seats, effectively neutralising the Pan Africanist movements.¹³⁸ Whether the overwhelming victory of the INM in the national elections

animal in Swaziland (which stood for the constitution). The country's traditional leaders exploited the people's ignorance of the political process in particular the rural masses who were their strongest support base. As de Smith: 237-238 observes where people are ignorant of the political process "...issues can then be presented in a deliberately over-simplified form (which may be the only form in which they can be made intelligible) and social solidarity will be preserved from the disruption which might follow if alternative (and doubtless distorted) versions could be freely circulated by ... ambitious opponents."

¹³⁸ The other parties protested in vain that:

- they had been prevented by chiefs from campaigning in their areas;
- the INM had enjoyed the facilities of the Swazi National Council;
- the INM had obtained votes through threats of banishment and dispossession from Swazi Nation Land;

black South Africans who would have voted for them were

was the product of unfair advantage or the respect, which Sobhuza 11 had acquired over the many years of resistance to colonial rule, was never proved as the British government refused to countenance any complaints as to the unfairness of the 1964 elections. MacMillan¹³⁹ observes, however, that it is reasonable to conclude that traditionalists would have been in no position to exploit the opportunities offered them if it had not been for the deliberate policy of ethnic mobilisation which they had pursued since the 1930s. The writer goes on to say that "it must also be conceded that the highly intellectual and Pan-Africanist position of Dr Zwane was never likely to have much mass appeal."¹⁴⁰

Having beaten the Pan- Africanist groups at their own game the Mbokodvo party, which had been dismissed everywhere as subservient to South Africa disenfranchised all the white South Africans living in Swaziland and challenged the provisions of the 1964 constitution on the ground that they were racist. The party then demanded independence and the designation of the King as the head of state.

2.7. Conclusion

In this chapter, the writer sought to show that the tribal structure though obviously weakened by colonial rule nonetheless retained its pre-literate characteristic features.

disenfranchised unlike their white South African counterparts who favored the INM;

- the identification of the King with the INM had created the impression that those who did not support the INM did not like the King.

¹³⁹ MacMillan opcit at 660.

¹⁴⁰ MacMillan opcit at 661.

This was attributed to a number of factors the main one being the entrenchment of the ideology of traditionalism by Sobhuza 11, a strategy that was to put the nation firmly behind their tribal leader's efforts at resisting all attempts by the European powers at controlling the tribal structure.¹⁴¹ For the duration of the colonial period the powers of the Ngwenyama in so far as traditional matters were concerned remained intact, that is why traditional authorities would later not be associated with the essentially exploitative colonial rule. As Nyeko¹⁴² aptly observes that:

“[To] the Swazi, therefore, the white administrators were clearly separate from the Swazi traditional authorities. Hence it would seem that in the network of relationships brought about by the colonial presence, though Swazi traditional leaders had obviously lost their sovereignty, they were in the happy position of not being directly associated with the colonial administrators. This fact placed them in a position of relative strength in their struggle for survival. For ordinarily in any colonial situation, the indigenous people usually sooner or later come to identify their chiefs, who normally represented the central government of the colonizers, with all the demands and evils of the colonial administrators. This was not the case in colonial Swaziland.”

Concrete evidence of the triumph of the institution of traditional leadership over modernity was the 1968 independence constitution, which shall be the focus of the next chapter.

¹⁴¹ One other factor that could have led to the survival of traditional leadership was that unlike British rule, which for all intents and purposes was unjust, it retained its primitive form of fairness and justice endearing it to the indigenous people. There was also the additional factor of the absence of ethnic division and the failure of the essentially weak opposition parties to gain the support of the majority of the Swazi people.

¹⁴² Takirambudde 1983:216.

CHAPTER 3

THE LEGAL POSITION OF THE MONARCH UNDER THE 1968 INDEPENDENCE CONSTITUTION

When the Kingdom of Swaziland officially attained independence on 6 September 1968 like most former British dominions, it inherited a constitution patterned along the Westminster model. However, due to a number of factors, among which was the fact that traditionalists were in control of the dual system of government, and thus able to negotiate for an enhanced political role for the monarch in the newly independent state, the Ngwenyama emerged relatively powerful at independence. This chapter will therefore focus on how the Swaziland Independence Order No.50 of 1968 accommodated traditional institutions, with emphasis on the powers of the King. We shall first look at the Constitutional Commission and then analyse the provisions of the 1968 independence constitution. The chapter will also look at the interplay between modern and traditional institutions at independence, concluding with the manner in which traditional leaders received the constitution.

3.1. The Constitutional Commission

The Imbokodvo National Movement's victory in the 1963 election was the first step towards the solidification of royal power in post-colonial Swaziland. The next step was the 15 member Constitutional Commission set up to draw the country's independence constitution in 1965. The Commission was composed mainly of INM and USA members and was chaired by Her Majesty's Commissioner, Sir Henry Lloyd, all the members of the Legislative Council were also members of the Constitutional Committee.

The nature and composition of the Committee was itself a victory for the monarch in the sense that it was mandated to actually draft the constitution without consulting the nation on the matter. The decision to limit the number of people involved in this exercise could have to do with the 1963 incident, when Swazis failed to agree on the nature of the Legislative Council. The British administration must have felt that for reasons of expediency the less people involved in the exercise the better. Secondly, in the light of the fact that the INM was Sobhuza 11's brainchild it was to be expected that they would seek to have the role of the King in government clarified or spelt out. The fact that the opposition, which had declared its preference of a constitutional monarch, was left out of the exercise was an added advantage. The presence of representatives of the British administration and the USA in the Committee was no real threat to the INM's aims for they too realised that their future would be much more secure under an INM led government than under any of the more radical Pan Africanist oriented political parties.

Although it cannot be said with absolute certainty, it is quite possible that the position of the King might have turned out differently if the exercise had involved a much broader section of the Swazi community. In Lesotho, for instance, where the Stanford Commission¹⁴³ sought public opinion on, among other issues, the constitutional position of the King, although the matter was not put to popular test, it turned out that the majority of the Basotho population was in favour of a titular head of state. According to Weisfelder they "... cited Bagehot's argument that a ruler of sense and

¹⁴³ The Stanford Commission is a Constitutional Commission that was set up to seek public opinion on the definition and delineation of the powers of state institutions under the independence constitution of Lesotho.

sagacity would want no other right than to be consulted.”¹⁴⁴ Mahao ¹⁴⁵ on the other hand argues that this was a product of the successful strategic positioning of the petit bourgeoisie in the Sotho political landscape who were in favour of a constitutional head of state. This was in spite of King Moshoeshoe 11's efforts at giving heavy representation to those likely to advocate for an enhanced role for the monarch in making appointments to the Commission. The writer goes on to observe that:

“Although ostensibly the principles which would underpin the proposed constitution were distilled from evidence tendered by ordinary Basotho at public hearings, in reality they were fashioned mainly from trade-offs made inter-se by members of the Commission.”¹⁴⁶

3.2 The Constitutional Proposals

Briefly the Swazi delegation's proposals regarding the constitutional position of the monarch were, inter alia:

¹⁴⁴ Weisfelder 1978: 177. In order to appreciate Basotho sentiments on the issue of the powers of the monarch one has to look at their history, in particular, the impact of colonialism. One writer has observed that in Lesotho, colonialism allowed a total recast of patterns of authority and responsibility making it possible for successive monarchs to be more authoritarian. Traditional institutions like the *pitso* and *lekhotla*, which ensured popular participation in government and created an interdependent relationship between the rulers and the ruled, were weakened. Weisfelder opcit at 168.

¹⁴⁵ Mahao1997: 172.

¹⁴⁶ Ibid.

- That the Ngwenyama be designated the king of Swaziland not just a paramount chief.
- That the role of the Ngwenyama and key traditional institutions be clarified.

That these proposals were later to be accommodated in the Westminster style independence constitution of 1968 provides concrete proof of the Swazi delegation's success in the constitutional talks.¹⁴⁷

Among the Swazi there is a popular belief that the departing British imposed the 1968 independence constitution on the nation. In fact as we shall see in chapter 4 this was one of the reasons for its repeal in 1973. The extent to which it can be said that it was imposed is not clear, because the involvement of Swazis in the Constitutional Committee (through their duly elected Parliamentary representatives) and the subsequent implementation of their proposals in the final constitutional document, all these factors suggest that the constitution was a product of negotiations. Gower argues that the criticism levelled against Britain for imposing her strange brand of Parliamentary democracy on her colonies is unfounded.¹⁴⁸ He

¹⁴⁷ According to Booth: 68, the Swazi delegation was aided by a bit of luck. In March 1964 the Queen's Commissioner, Sir Brian Marwick who had consistently opposed their proposals and suggested the adoption of a one-man, one-vote constitution was replaced. His successor was Francis Lloyd, proved to be more solicitous in every way to the furthering of the INM's aims.

¹⁴⁸ Gower 1967:16. In support of this argument the writer relies on de Smith 1964:68 who expresses the view that the Westminster model has been the most sought after of Britain's exports to the Commonwealth. It has been demanded partly because it is familiar to colonial politicians, partly because they genuinely admire the way it works in Britain, partly because they have sometimes been told that they lack the political maturity to operate it

goes on to say that they could have had a different sort of constitution if they had wanted it and makes an example of Zambia who asked for and got an independence constitution not on the Westminster model. To this is added the fact that in some instances the Westminster model was adapted to accommodate the political peculiarities of the states, which adopted it. A notable example is the very complex independence constitution of Uganda, which was quasi federal despite the fact that the Westminster model is essentially unitary. What can be said with absolute certainty though is that the 1968 independence constitution of Swaziland was modelled on the Westminster model.

3.3. The Provisions of The Swaziland Independence Order No. 50 of 1968

Before discussing the specific provisions of the constitution, it is necessary to clarify the concept of Westminster model. In this regard we use a definition by de Smith¹⁴⁹ who says in its widest sense [the term Westminster Model] may be understood to comprise all the main features of the British constitution. In its narrower sense the Westminster model can be said to mean a constitutional system in which the head of state is not the effective head of government; in which the effective head of government is the Prime Minister presiding over a Cabinet composed of Ministers over whose appointment and removal he has at least a substantial measure of control. Since the study is about the powers of the monarch our main concern is with the narrow sense of the Westminster model that is the role of the monarch under the Westminster style independence constitution.

effectively, partly because it makes for very strong government if a single party is dominant.≡

¹⁴⁹ de Smith opcit at 77.

3.3.1 Executive Powers

The 1968 independence constitution created a constitutional or limited monarch. Section 79 of the Swaziland Independence Order No.50 of 1968 vested executive authority on the King. In the exercise of his functions under the constitution, and any other law the King was guided by section 85(1) which obliged him to act in the accordance with the advice of the Prime Minister or a Minister acting under the general authority of the Cabinet.¹⁵⁰ This obligation, however, did not extend to functions expressly exercisable by the King in his discretion or where the constitution stated that he was to act in accordance with the advice of any person or authority other than Cabinet.¹⁵¹

In practice, however, executive authority was distributed between the King, the Prime Minister and Cabinet. Effectively, the King only had *de jure* and not *de facto* executive power, which was exercised by the Prime Minister and Cabinet in his name. The executive powers of the monarch under the 1968 independence constitution, no doubt a legacy of the Westminster model, mirrored tribal government in at least one respect, that is through the concept of limited monarch, which as we

¹⁵⁰ The appointment of the Prime Minister and the Cabinet of Ministers was governed by section 80(3) of the Swaziland Independence Order No.50 of 1968 which provided that: AThe King acting in his discretion, shall appoint as Prime Minister the elected member of the House of Assembly who appears to him best able to command the support of a majority of the members of the House and shall, acting in accordance with the advice of the Prime Minister, appoint other Ministers from among the elected or appointed members of either chamber.

¹⁵¹ See section 85(2)(a)(b)(c).

saw in the first chapter was one of the fundamental principles of pre-colonial Swazi government. What was totally alien was the diffusion of executive power between the King and Cabinet, this created an area of potential conflict where for instance the relationship between the King and Cabinet was not a harmonious one. Nwabueze¹⁵² says conflict is necessarily to be expected in an arrangement whereby executive authority is vested in one person and exercised by another. It is a wholly unnatural arrangement. The reason why this inherent conflict has been held in check in Britain is that the position of the monarch is the result of her constitutional evolution, which Nwabueze¹⁵³ sketches in these words:

"The monarch once embodied in himself the entire sovereign power of the state, which he exercised at his discretion as a personal ruler. The government was his in every sense of the word, and he was synonymous with the state. He possessed and exercised over his ministers, other public servants and subjects generally, a power that was at once absolute and complete. Allegiance was owed to him personally, and he could destroy; elevate and honour whom he pleased. This position of sovereign power and majesty had created a definite pattern of relationship between himself and his ministers, and between himself and his subjects generally, a relationship which imposed upon the ministers conformity with certain norms of propriety in their behaviour towards him. These norms of court manners accorded him veneration, respect and courtesy. In the course of centuries of constitutional evolution, the monarch has lost his personal discretion in the exercise of sovereignty. In law, sovereign power still reposes in him, the government is still his own, but he no longer governs personally, most of his powers having devolved upon elected ministers, yet these ministers still regard themselves, as of old, as the Queen's ministers, and the government which they administer as Her Majesty's government.

¹⁵² Nwabueze 1973 :56.

¹⁵³ Nwabueze opcit at 56-57

This is no mere formality. The pattern of relationship has remained unchanged, and is still characterised by the same attitude of reverence, respect and personal allegiance.”

What those who drafted the constitution, therefore, failed to consider was whether this system obviously well suited for Britain, could function as well not just in Swaziland but in the other countries that emerged as monarchies at independence. The sentiment behind bestowing de facto executive power on the Prime Minister at Westminster is understandable, that is, to ensure that the people have a choice in governmental leadership even if their choice of head of state is limited by the hereditary principle that governs succession to the throne (it should be noted that this is not the only reason for this arrangement). The problem was that the evolution of the powers of the monarch in Swaziland had not reached the stage whereby the King would be content with being just a titular head of state.

3.3.2 Judicial Powers

The King's judicial prerogative lay in his power to make appointments. The executive appointment of judges is yet another Westminster style stipulation, for Britain unlike the United States does not have a strict system of separation of powers, that is why “it has been said that in England judicial independence is maintained in spite of rather than because of the rules governing appointments.”¹⁵⁴ In Swaziland an independent Judicial Service Commission in accordance with whose advice the King was to act in judicial matters ensured the independence of the judiciary so essential for the rule of law.¹⁵⁵ Worthy of note is that the constitutional limitations placed on the

¹⁵⁴ Gower opcit at:25.

¹⁵⁵ The Judicial Service Commission was composed of the Chief Justice who was its chairman, the chairman of the Public Service Commission and a

King could not be enforced in any court of law thus excluding the possibility of judicial review where the King for instance failed to act in accordance with the advice of the Judicial Services Commission or Cabinet in the exercise of his powers.¹⁵⁶ This ouster clause is one of the important legacies of colonial rule. It will be recalled that Her Majesty's Commissioner enjoyed a similar privilege.

3.3.3 Legislative Powers

The 1968 independence constitution established a Westminster style Parliamentary Democracy. It established a bicameral legislature the House of Assembly and the House of Senate.¹⁵⁷ This effectively abolished the 1963 unicameral legislature.

member appointed by the King acting in accordance with the advice of the Chief Justice from among persons who held or had held high judicial office. See section 113 (1) of the Swaziland Independence Order No.50 of 1968. The order further provided that in the exercise of its functions under the constitution the Commission would not be subject to the direction or control of any other person or authority. In this regard see section 113 (10) of the Swaziland Independence Order No. 50 of 1968.

¹⁵⁶ See section 85 (5) of the Swaziland Independence Order No.50 of 1968 which states that:

(A) Where the King is required to act in accordance with the advice of or after consultation with any person or authority, the question whether he has in any matter so acted shall not be called in question in any court of law.

¹⁵⁷ The House of Assembly was composed of twenty-four elected members, see section 40(2) of the Swaziland Independence Order No.50 of 1968. In addition to the popularly elected members, section 40(1) empowered the King to nominate six members making the total number of members of the House of Assembly thirty. The House of Senate was constituted by twelve members,

Although the rationale for a second chamber is unclear it would seem that its main function was the delay of legislation. In other countries the second chamber is meant for the accommodation of society's diverse social interests. In Britain for instance, the second chamber is meant to accommodate aristocratic interests, the independence constitution of Nigeria established a second chamber for the accommodation of traditional leaders, hence the title House of Chiefs. Both Houses of Parliament accommodated the various interest groups in Swazi society.

Royal prerogatives in relation to the legislature included the Westminster style power to summon, prorogue and dissolve Parliament and give royal assent to bills, so that the power to make laws was that of the King and Parliament.¹⁵⁸ In addition to that the King had the power to make appointments to both Houses after consultation with such bodies, as he considered appropriate. Here the King appointed people who by reason of their special knowledge or practical experience were able to represent economic, social or cultural interests not already adequately represented in Parliament; and were, by reason of their particular merit, able to contribute to the good government of Swaziland. The order, however, provided that the power of appointment was not be exercised to deprive the party or coalition of parties, which had majority, that majority in Parliament.¹⁵⁹

six of whom were elected by the House of Assembly and six appointed by the King. See sections 39 and 38 of the Swaziland Independence Order No.50 of 1968.

¹⁵⁸ See sections 58-59 and section, 62, of the Swaziland Independence Order No.50 of 1968.

¹⁵⁹ See the proviso to section 42 and section 38(6) of the Swaziland Independence Order No.50 of 1968.

The Order was not, however, explicit on whether a King's appointee's role in Parliament was to represent the King's interests and whether he could revoke their appointment if they acted contrary to his wishes. In the case of *Malapo etal v Seeiso*¹⁶⁰ where the High Court of Lesotho, in its capacity as the Constitutional Court, had to consider whether Mosheshoe¹¹ had the right to dismiss his nominees to the Senate for voting against his wishes, it was held that although the constitution conferred authority on the King to nominate eleven senators at his discretion, he was not bestowed with corresponding authority to revoke their membership to the senate during the life of the Parliament.

Although the Parliament established by the Independence Order of 1968 was supreme, its sovereignty was limited by section 62¹⁶¹ which provided that the power of the King and Parliament to make laws for the peace, order and good governance of Swaziland would not apply to the matters specified in schedule 3 which would continue to be regulated by Swazi law and custom. The section further provided that the written consent of the Swazi National Council had to be sought in the event that laws had to be made in relation to these matters. The matters referred to here are:¹⁶²

- The office of the Ngwenyama.
- The office of the Ndlovukazi (Queen Mother).
- The authorisation of a person to perform the functions of Regent for the purpose of section 30 of this constitution.
- The appointment, revocation of appointment and suspension of chiefs.

¹⁶⁰ CIV/APN/9/1966.

¹⁶¹ Swaziland Independence Order No.50 of 1968.

¹⁶² Schedule 3 to the Swaziland Independence Order No.50 of 1968.

- The composition of the Swazi National Council, the appointment and revocation of appointment of members of the Council, and the procedure of the Council.
- The *incwala* ceremony.
- The *libutfo* (age-grade regiment system).

3.3.5 Traditional Institutions

Section 62,¹⁶³ gave formal recognition to traditional institutions, that is, the office of the Ngwenyama, and its support institutions, like the Ndlovukazi, liqoqo, *libandla* and chiefs. Presumably, the traditional prerogatives that went with the office of the Ngwenyama,¹⁶⁴ that is, executive, legislative and judiciary powers were also reinstated since the Order did not clearly define the office of the Ngwenyama, it merely provided that it would continue to be regulated by Swazi law and custom. The Ngwenyama's powers were further augmented by section 85¹⁶⁵ which released him from the traditional obligation of acting in accordance with the advice of his councils. The section provided that:

“(4) where the King is required by this Constitution to exercise any function after consultation with any person or authority other than the Cabinet. He shall not be

¹⁶³ Swaziland Independence Order No.50 of 1968.

¹⁶⁴ The designation of the King as ANgwenyama≅ in matters of Swazi custom instead of AKing≅ as he is referred to throughout the constitution could be construed as a way of reinstating the traditional prerogatives that went with the office.

¹⁶⁵ The Swaziland Independence Order No.50 of 1968.

obliged to exercise that function in accordance with the advice of that person or authority.

(5) where the King is required by this Constitution to act in accordance with the advice of or after consultation with any person or authority, the question whether he has so acted shall not be called in question in any court of law.”

This created for the first time an area of Swazi political life where the King was not responsible to the people as represented by traditional councils and institutions that had hitherto acted as checks to the arbitrary exercise of power by the Ngwenyama giving credence to the argument that the Swazi King was never an autocrat. Moreover, by formally recognising the Swazi National Council acting either in *liqoqo* or *libandla* the Order created two competing systems of government, that is modern and traditional government; for as established in the first chapter, the councils were not just advisory bodies, they constituted a system of governance with its own political hierarchy. What further compounded the issue was the uncertainty created by section 135¹⁶⁶ which provided that:

“Save as otherwise provided in this constitution, the Swazi National Council, which consists of the Ngwenyama, the Ndlovukazi, and all adult male Swazis, shall continue to exercise its function of advising the Ngwenyama on all matters regulated by Swazi law and custom and connected with Swazi traditions and culture; and shall exercise such functions either in *libandla* or *liqoqo*, as the case may be, in accordance with Swazi law and custom.”

Swazi tradition and culture as was demonstrated in the first chapter extended to political matters and was not confined to mere social issues. The advice that the

¹⁶⁶ Swaziland Independence Order No.50 of 1968.

councils of state gave to the King sometimes resulted in the establishment of new laws. Section 135 can be construed as having revived the pre-colonial law making powers of the *liqoqo* and *libandla*, thereby created two legislative bodies, that is Parliament and by implication the Swazi National Council, without really clarifying how the two were to work together, and without stating which system would take precedence over the other in cases of conflict. Although it cannot be said with absolute certainty, it would seem that the Swazi National Council had an upper hand in the sense that while the constitution clearly stated that Parliament's powers would not extend to matters of Swazi law and custom, the Order did not place similar restrictions on the jurisdiction of the Swazi National Council. Presumably the King could legislate in *libandla* as he had traditionally done on the same matters as Parliament. The creation of an alternative legislative avenue could prove quite useful where the relationship between the King and the government of the day was not a good one.

Quite clearly the fusion of the two systems into one was very minimal and this becomes clear when looking at how the independence constitutions of other African states accommodated traditional interests. We will in this regard focus on the independence constitution of Uganda which, though modern, incorporated elements of tribal government. This is not to say, however, that there was complete integration of the two systems of government. The federal states, formed in the main out of the different tribal groups within the state of Uganda each had their own government that is, a ruler, Executive Council of Ministers and a Legislature. For instance, in terms of the constitution of Buganda¹⁶⁷ the Kabaka was a constitutional monarch, he ruled with a council of Ministers or Cabinet that was responsible for the conduct of his government. Cabinet's responsibility was enforceable by a vote of no confidence in

¹⁶⁷ See the first schedule to the Uganda (Independence) Order in Council, 1962.

the lukiiko (Buganda's Legislative Assembly) in much the same manner as other cabinet systems under the Westminster model, the difference being that the Council of Ministers was not necessarily selected from the lukiiko, which selected them.¹⁶⁸ The Kabaka's rights with regard to government included the Westminster style right to be fully informed on all-important matters of government. In addition to that where he acted, it was normally at the recommendation of some person or authority. "Although there was no general requirement in the constitution that the kabaka must always act on the advice of his Ministers, as there is with regard to the President of Uganda, but this point is provided for by convention."¹⁶⁹

The federal states enjoyed the same exclusive but limited, reserved legislative power, except the Kingdom of Buganda, which had relatively wider powers than the other states that were, however, only exercised over Buganda. The Ugandan constitution balanced the authority of central government and the federal states by clearly stating the limits of the two, each federal state had certain provisions entrenched by the constitution of Uganda that could only be altered by the legislature of that particular state. The rulers of the states and the constitutional heads of the districts were equally eligible as candidates for election to the office of President and Vice President. In fact Uganda's first president was the Kabaka of Buganda. These measures ensured that the inevitable conflict between the functions of national government and those of the various federal units or traditional institutions was contained.

¹⁶⁸ It should be noted that although the Council of Ministers was formally appointed by the Kabaka they were in fact selected by the Lukiiko.

¹⁶⁹ Morris1966:127.

The Independence constitution of Swaziland thus created a legally untidy dual system, complicated even further by the lack of clearly formulated rules for guidance in matters of conflict. In practice, however, there were no real problems. The two distinct systems worked reasonably well together aided, no doubt, by the fact that not only was the government of the day formed by the INM, but also because once again the INM had won all the electoral seats in Parliament. With no official opposition to impede government's policies the government and the King used the opportunity to entrench traditionalism.

3.4 The Interplay between Traditional and Modern Institutions

In analysing the interplay between traditional and modern institutions at independence reliance will be placed on the work of Proctor¹⁷⁰ who conducted a study on the behaviour of members of the first Parliament of Swaziland from the 1st of May 1967 to the 13th of March 1972. The writer observes that due to the fact that all the members of Parliament owed their seats to the traditional aristocracy and were in fundamental agreement with them on almost all policy matters their behaviour corresponded closely to the norms of the indigenous political system.

Members of Parliament adhered to the traditional concept of acting in the interests of the nation as a whole and not just those of their various constituencies encouraged no doubt by Sobhuza 11 who frequently made statements to the effect that "Swazi custom also indicated he maintained, that members of Parliament should be concerned primarily with the interests of the entire nation rather than with those of particular regions or groups."¹⁷¹ Parliamentary sessions resembled those of

¹⁷⁰ Proctor 1973:273.

¹⁷¹ Proctor opcit at: 276-277.

traditional councils, they were informal, members were allowed to make their submissions at a leisurely pace, and attempts to restrict discussions were frowned upon as being against Swazi custom.¹⁷²

Most importantly, it was quite obvious that the views of the Swazi aristocracy carried great weight. On several occasions ministers sought to win support for a disputed Bill by informing the house that it had been approved by the King and Council, in spite of the Westminster type stipulation in the standing orders that the name of the king should not be used for the purpose of influencing the House.¹⁷³ This was invariably enough to settle the matter. Parliament worked very closely with the Swazi National Council as it framed legislation. Some Bills were initiated by the council and others referred to the Council for discussion and approval before being introduced to parliament, "it is impossible to determine precisely how often this practice was

¹⁷² According to Proctor *opcit* at 281 the Speaker once pointed out that the House of Assembly had spent over an hour dealing with only five questions and noted that the House of Commons disposed of forty two per hour on average; but the Attorney General's proposal to save time by limiting the number of supplementaries to two was withdrawn after encountering strong objections. It will be recalled that the procedure at *ebandla* was that members would debate until consensus was reached and at times these debates would last for days on end because members would be allowed to speak uninterrupted. This norm was violated in exceptional circumstances.

¹⁷³ The Liquor licence (Amendment) Bill of 1967 is a perfect example of this practice. Complaints were voiced by Members of Parliament when the bill was under consideration because government had evidently decided to grant a monopoly to a certain brewery before securing the necessary legislation. The bill was passed only after the Members were informed that Sobhuza 11 had already given assurances to the company.

followed, and with what effect, but it was clearly not limited to bills affecting Swazi law and custom as required by the constitution."¹⁷⁴ This might be due to the fact that the constitution failed to set boundaries for the scope of Swazi custom.

3.5. Reception of the Constitution by Traditional Leaders

While Sobhuza 11 was content with the new government and Parliament, the same cannot be said of the constitution. The King's speech of the 25 April 1967 was a reflection of his attitude towards the new constitution. In it he highlighted the following key issues:

" The oath which I have taken today refers to the constitution of the protected state which I am pledging on your behalf to preserve, protect and defend. It is the tradition of all African Kingdoms that their kings are leaders as well as kings. This is also true of Swaziland. Some have taken this dual capacity as dictatorship. I would also like to assure you here and now, that in our kingdom the king both leads and is led by his people. I am my people's mouthpiece. This leads me to another point, which I have emphasized time and again. I refer to co-operation and unity of the people without which there can be no peace or progress. If the people are divided into camps to the extent of undermining one another, such a state is doomed to catastrophe, no matter how good or wise the leader may be. Demagogues of the world too often under the cloak of liberty and democracy have successfully undermined the spirit of unity and co-operation in a nation and have set one group against the other only in the interest of gaining one brief day of power for themselves. When they succeed, they trample upon the very fundamental human rights, which it is our duty to protect. I consider myself very fortunate that I have been blessed with the full co-operation and

¹⁷⁴ Proctor opcit at 281.

support of all my people. With this heritage, I have no doubt that Swaziland will grow from strength to strength to take its rightful place among the nations of the world."¹⁷⁵

The King was obviously not happy with being reduced to a figurehead under the new constitution. Although the independence constitution placed him at the top of both systems of government; he was well aware that his control over modern government depended on the INM remaining in power. There was no guarantee that a government led by any of the more radical Pan Africanist oriented political parties would allow him the privileges he enjoyed under the INM led government.

The King was also not pleased with the fact that the new constitution allowed the multiparty system, a common sentiment among most traditional leaders. Even the constitution of Buganda which for all intents and purposes modernised traditional institutions, fell short of incorporating political parties. The election of members into the lukiiko, for instance, did not depend upon political party organisation.¹⁷⁶ According to Boloro¹⁷⁷ Sobhuza 11's distaste for political parties accounted for the nomenclature of "movement" rather than "party" for his political organisation. Few African leaders saw any real solution to the problem of nation building in the confrontational party politics of the Western world preferring Nyerere's brand of African socialism on the grounds of its consonance with the traditional political ideas of pre-colonial Africa where the elders had talked things through under the shade of a

¹⁷⁵ Matsebula op-cit at 244.

¹⁷⁶ The elected members were returned from single-member constituencies delimited by the Electoral Boundary Commissioner.

¹⁷⁷ Boloro opcit 208. The organisation referred to here is the Imbokodvo National Movement.

big tree, aiming at unanimity rather than confrontation.¹⁷⁸ It would seem that African leaders could not countenance the concept of a standing loyal opposition, which was totally alien to the African experience. Moreover the conception that opposition could be loyal was contrary to the experience in most African states prior to independence. The colonial regime which was invariably authoritarian, had not allowed organised opposition to function as it would normally do in any Parliamentary democracy. Thus the antipathy displayed by most of these leaders towards political parties could be blamed on the colonial experience.¹⁷⁹

3.6. Conclusion

In this chapter we saw how the strategic positioning of traditionalists in the political landscape led to the triumph of tradition over modernity. This, as alluded to earlier on in the discussion, was due to a number of factors; the first being the victory of the INM in the 1963 elections which ensured that they would be included in the constitutional talks that led to the birth of the Swaziland Independence Order No.50 of 1968, coupled with the exclusion of the progressive forces from the same Commission. Secondly the victory of the INM in the subsequent independence election that ensured that traditionalists controlled both halves of the dual system established by the independence constitution. All these factors led to the solidification of the powers of the Swazi monarch at independence.

The Ngwenyama was an exception to the trend then prevalent in Africa, where most king's lost political power at independence; already at the top of the traditional political hierarchy, at independence the Ngwenyama simply took over the other half

¹⁷⁸ Atmore1994: 267.

¹⁷⁹ Gower opcit at 61.

of the diarchy as head of state under the modern arm of government. As long as the status quo prevailed there was harmony albeit an unstable one between the two systems. In the next chapter we will see how the victory of the NNLC in the Mpumalanga constituency led to the repeal of the independence constitution.

CHAPTER 4

THE REPEAL OF THE 1968 INDEPENDENCE CONSTITUTION BY THE MONARCH

In Swaziland as elsewhere in the continent where the British legacy of Westminster-style constitution was inherited, the independence constitution was precipitously repealed. As observed in the previous chapter, the harmony between traditional and modern institutions was an unstable one, dependent on the traditionalist's control of the dual political structure. As will be seen in the discussion that follows the victory of the Ngwane National Liberatory Congress in the Mpumalanga constituency, making it the first opposition party to gain electoral seats in Parliament was to lead to the repeal of the 1968 independence constitution. In this chapter focus will be on the effect of the King's Proclamation of 12 April 1973 on the powers of the monarch. The discussion will commence with a look at the repeal of the independence constitution before going into the nature of the government established by the Proclamation; the last part of the chapter will focus on constitutional developments after 1973.

4.1. The Repeal of the Independence Constitution

The repeal of the 1968 independence constitution in 1973 came as no surprise, as Sobhuza 11 had expressed his dislike of it at its inception. The repeal was prompted by among other things the outcome of the case of *Bhekindlela Thomas Ngwenya v The Deputy Prime Minister And The Chief Immigration Officer*.¹⁸⁰ What appeared to be a simple case of disputed citizenship was in fact a much more complex political issue that had to do with the traditional establishment's dislike of the concept of multi party politics. Briefly,

¹⁸⁰ 1970-1976 SLR 123 (Court of Appeal).

the facts of the case are as follows. The appellant was elected as Member of Parliament for the Mphumalanga constituency in the general election of May 1972. His election was challenged on the grounds of disputed citizenship, on the 25th May 1972, within a week of his election, the appellant was served with a deportation order and was actually deported to South Africa where it was believed he hailed from. Ngwenya made an application to the High Court to have the deportation Order set aside. After hearing oral evidence the High Court found that the appellant was a Swazi citizen by birth and set aside the deportation order.¹⁸¹ On the 14th November 1972 an Act called the Immigration (Amendment) Act No.22 of 1972 was passed in the ordinary bicameral way. This Act added a new section to the Immigration Act No. 32 of 1964. The new provision established a Special Tribunal, which would thenceforth have sole jurisdiction over matters of disputed citizenship, and Ngwenya's matter was referred to the Special Tribunal by the Chief Immigration Officer for determination.¹⁸² The appellant's attorneys challenged the validity of the amendment Act and its applicability to the appellant's case in the High Court, this application was, however, dismissed.¹⁸³ The appellant's attorneys then successfully

¹⁸¹ See *Bhekindlela Thomas Ngwenya v The Deputy Prime Minister 1970-1976* SLR 88 (High Court)

¹⁸² See section 2 of the Immigration Amendment Act No.22 of 1972.

¹⁸³ In dismissing the application the High Court held, *inter alia*, that the provisions of the Immigration (Amendment) Act No.22 of 1972 clearly indicated that it was the intention of the legislature that as from the date of the promulgation of the Act the tribunal was to be the only body having jurisdiction to decide questions of disputed citizenship. That the Immigration (Amendment) Act was not intended to deprive any citizen of entrenched or indeed any rights of citizenship whatsoever, but that the special tribunal was established to adjudicate on an issue of citizenship only where there was doubt as to

appealed against the High Court's decision to the Appeal Court (the highest appellate division in Swaziland). In allowing the appeal, the Appeal Court held that the provisions of sections 43, 51(1) and 56(1)(c) of the Constitution Act No. 50 of 1968 expressly granted jurisdiction to the High Court to determine whether a person elected to the House of Assembly was a citizen of Swaziland. It was held further, that the exclusive jurisdiction given by the Immigration (Amendment) Act No. 22 of 1972 to the Special Tribunal took away the High Court's jurisdiction, and that although altering the substance of section 56(1)(c) of the Constitution, it had not been passed by a joint sitting of the Senate and the House of Assembly as required by section 134 of the constitution. The Court of Appeal accordingly held that the Immigration (Amendment) Act No.22 of 1972 was void.

The court's decision created a constitutional impasse which fuelled a desire to change the Westminster-type constitution which had been lying dormant for years; due for the most part to the fact that notwithstanding the existence of opposition parties from 1968 to 1972, the impact of these parties on the post colonial Swazi polity had hitherto been inconsequential. The INM held all the electoral Parliamentary

whether or not a person belonged to Swaziland. It was held further, that apart from the legislature's inherent right to establish adjudicating bodies other than court's of law, the establishment of such bodies was contemplated by section 10(10) of the Constitution Act No. 50 of 1968 which clearly envisaged the establishment of a tribunal with power sole to adjudicate on matters which would ordinarily be within the jurisdiction of the High Court and that there was nothing to suggest that rights of citizenship were to be excluded from the operation of section 10(10)(b) of the Constitution. For these reasons it was held that the establishment of the Special Tribunal was *intra vires* the constitution and that it was therefore competent to adjudicate on the issue whether or not the applicant belonged to Swaziland.

seats. Moreover the power of appointment given to the Ngwenyama ensured the dominance of Parliament by traditionalists. From the 19th to the 24th of March 1973 a general meeting was held at the Lobamba national byre and one of the resolutions taken at the end of this meeting was that the time had come to do away with the independence constitution. Consequently a meeting of the Swazi National Council (*libandla*) was called for 12 April 1973.

4.1.1 12 April 1973

On the 12th April 1973 two separate meetings of constitutional importance that were to culminate in the abrogation of the country's constitution took place simultaneously. One meeting was held in Parliament¹⁸⁴ and the other at Lobamba, the country's traditional capital, both meetings were to end at Lobamba. In Parliament, the then Prime Minister, Prince Makhosini, introduced a motion in both Houses of Parliament sitting separately, which, *inter alia*, raised the following issues, that the independence constitution had proved to be the direct cause of many difficult and sometimes insoluble problems in that:

- as a result of a number of provisions introduced into the constitution as safeguards, there was a significant derogation from the sovereign powers of legislation which would normally vest in His Majesty and the Houses of Parliament;
- many unwarranted restrictions were placed on the executive powers of Ministers and of the King-in-Council resulting in the incapacity of the executive

¹⁸⁴ Technically two meeting were held in Parliament because this was not a joint session; they have been grouped together to illustrate the fact that the resultant constitutional amendment was sanctioned by both the traditional and modern arms of government.

to govern the country properly without encountering irksome and completely unjustified obstacles;

- it permitted particularly undesirable political activities bordering on the subversive and completely foreign to and incompatible with, the normal and peaceful way of life of the Swazi's;
- the accumulated effect of the network of provisions derogating from the sovereign powers of the legislature and the executive rendered the constitution an ineffective instrument for the peace, order and good government of the country;
- the constitution contained an intricate system for the entrenchment of the offending provisions which was wholly impracticable and effectively prevented Parliament from amending the constitution. It was also an imposition on a free and independent state of a set of restrictive conditions, which did not apply to the British Parliament itself.

Following the reading of the motion both Houses of Parliament resolved that the constitution was unworkable and called upon His Majesty-in-Council to consider ways and means of resolving the constitutional crisis. The Parliament of the Kingdom of Swaziland thus placed itself entirely at the disposal of the King-in Council. In the meantime, the Swazi National Council met at the royal kraal "but this meeting was not traditional, it was unique and had to deal with political matters only. Hence it was not held inside the traditional byre but in front of the main entrance."¹⁸⁵ At this meeting the Swazi nation, as represented by the *libandla*, unanimously resolved that steps should be taken to remove obstacles from the constitution and bring it in line with the aspirations of the Swazi people.¹⁸⁶ This is where they so conveniently were

¹⁸⁵ Matsebula opcit at 258.

¹⁸⁶ For a detailed comment on the meeting see Matsebula ibid.

when the Members of Parliament dramatically approached them, "...walking solemnly in a single line. The Prime Minister was balancing on his bald head the big book containing the constitution of Swaziland the very volume that was handed to Sobhuza 11 on 6 September 1968. The Prime Minister handed the document over to the King and said: your Majesty, your Parliament has found it impossible to work under this unworkable constitution."¹⁸⁷

Before the King could make his pronouncements on Parliament's resolution councillor Sifuba on behalf of the Swazi National Council, thanked the Members of Parliament for their bold action and expressed the nation's support for the report. Sanctioned by both Parliament and the Swazi National Council the King repealed the independence constitution.¹⁸⁸

The reasons for the repeal of the constitution given by the King were substantially similar to those given by the Prime Minister in the motion that he had read earlier on that day to both Houses of Parliament. Briefly the King said:¹⁸⁹

- That the constitution had failed to provide the machinery for good government and for the maintenance of peace and order;
- That it caused unrest, insecurity, dissatisfaction and hindered progressive development in all spheres of life;
- That the constitution permitted the importation of highly undesirable political practices which were incompatible with the way of life of the Swazi's and thus designed to disrupt and destroy the indigenous methods of political activity.

¹⁸⁷ Matsebula opcit at 266

¹⁸⁸ See section 3 of the King's Proclamation to the Nation of 12 April 1973.

¹⁸⁹ See section 2 of the King's Proclamation to the Nation of 12 April 1973.

Here Sobhuza¹¹ was alluding to political parties, labour unions, who were prone to work stoppages and political activism and the judiciary. There was a perception that the judiciary was playing an obstructionist role that was unacceptable to the traditionalists.

4.2. The Legality of the Method of Repeal

From the onset it should be noted that the legality of the method used to repeal the constitution was never challenged in any court of law. This was due to the following reasons: first of all it will be recalled that when the idea of a constitution was first introduced in 1963, it was overwhelmingly rejected by the Swazi people especially the rural masses who form the majority of the country's population. It could be that the people had been biding their time until they could finally be rid of something that they had not wanted in the first place.

Secondly, with the declaration of a state of emergency, the King also assumed preventive detention powers. Preventive detention is a very common method of squelching political dissent.¹⁹⁰ The King assumed these powers by virtue of paragraph 2 of the King's Proclamation to the Nation, which stated that:

¹⁹⁰ See also Howard¹⁹⁸⁶: 152 who sees preventive detention as the chief weapon used against political dissidents in Commonwealth Africa.. [it] is a practice by which people are detained allegedly to prevent their committing anticipated crimes of violence, subversion or treason. The individual is normally detained for an indefinite period, with no possibility of trial. Although he is formally entitled to be told of the charges against him, these are usually couched in very general terms. He may have no right at all to appeal, or he may have the right to have his case sporadically reviewed by a non-judicial tribunal with very limited powers.

"for a period of six months from the date hereof, the King-in-Council may, whenever they deem it necessary in the public interest, order the detention of any person subject to any conditions they may impose for any period of time not exceeding sixty days in respect of any one order. Any person released after such detention may again be detained as often as it may be deemed necessary in the public interest. No court shall have the power to enquire into or make any order in connection with any such detention."¹⁹¹

It is worth noting that among the first casualties of this new law were two of the NNLC's Parliamentary representatives, Ambrose Zwane and Bhekindlela Ngwenya. It would seem therefore that the preventive detention measure was meant to silence the opponents of Sobhuza 11. The detainees were also denied the right to a due process.¹⁹² That most of the post-independence leaders could get away with the practice of preventive detention was due partly to the fact that the rule of law unfortunately never really enjoyed legitimacy in the eyes of the African people who viewed it with suspicion. In most of the newly independent states the judicial process was associated with colonialism and imperialism. The people resented the way in which it usurped the role of the chiefs and the elders whose role it was to make political and legal decisions in society. In a country like Swaziland where the people still held tenaciously to their time honored beliefs and customs, the problem was more acute. Realising this, the country's traditional leaders manipulated the

¹⁹¹ See King's Proclamation of 12 April 1973.

¹⁹² Gower opcit at 86-87. According to the author the excuse always given for resorting to preventive detention was we know these chaps are plotting but we cannot prove it in a court of law. The author goes on to observe that preventive detention is one of the legacies of colonial rule, in his view preventive detention was necessary for the success of British rule in most of their former colonies.

association of the rule of law with colonialism and imperialism for political gain, that is, to cripple the role of the judiciary as a check to the abuse of power. The legitimacy of judicial review in Africa was further undermined by the fact that in most instances the court personnel was during the period after independence foreign.

Lastly, there was the ominous threat of force posed by the newly formed National Defence Force, which had been trained and armed in South Africa. It was widely asserted at the time that the formation of the National Defence Force just prior to the Decree stemmed from royal uncertainty over the political reliability of the police. The acceptance of both the King and Parliament's conduct could, however, be seen as a demonstration of the triumph of traditionalism over modernity or perhaps an indication of the popularity of the monarchy in comparison to the British legacy of Parliamentary democracy and the Western legal tradition of the rule of law. It should not, however be assumed that the entire nation was in support of the King's actions for there were, for example, occasional labour strikes and teacher- student boycotts especially in the late 1970's which were an indication of discontent with the status quo.

In assessing the legality of the method used to repeal of the kingdom's independence constitution due regard should also be paid to the dual nature of the Swazi system of governance, that is, the imported Westminster style system and the customary law.

4.3 Western law

Most writers have described the repeal of the constitution as a *royal coup d' etat*. Matsebula¹⁹³ disagrees and points out that the King acted in the interests of the

¹⁹³ Matsebula opcit at 261.

Swazi people. The writer is here probably alluding to the fact that the Ngwenyama's action was sanctioned by the people both at *ebandla* and in Parliament.

In terms of section 134 (1)¹⁹⁴ the constitution was to be altered by the introduction of a bill, expressly providing for the alteration of the constitution in a joint sitting of the Senate and the House of Assembly. If the bill contained provisions for the alteration of any specially entrenched provisions it was to be submitted to a referendum held in such a manner as may be prescribed by an Act of Parliament. In the referendum the bill had to get the support of not less than two thirds of the majority of the votes cast before being submitted to the King for assent.¹⁹⁵

In terms of the provisions of the 1968 independence constitution, therefore, the repeal of the constitution in this manner was illegal, corrupt and unconstitutional. Parliament in complete disregard of the constitutional laws of the country allowed itself to be manipulated by the Prime Minister for a purpose for which it was not intended. For as Seidman¹⁹⁶ observes, the most obvious aspect of common disregard for legality, is the widespread corruption that permeates the fabric of most African states. Corruption is the negation of legality, for it implies that the state structure is being used for purposes irrelevant to its intended function.

¹⁹⁴ Swaziland Independence Order No.50 of 1968. See also sections 134 (1)(b) (c) and(d) of the same Order.

¹⁹⁵ See section 134 (e) and (f) read together with schedule 1 of the Swaziland Independence Order No.50 of 1968.

¹⁹⁶ Seidman1968: 27.

The King himself made the following comment in apparent justification of the action he had taken, "there is no constitutional way of effecting the necessary amendments to the constitution, the method prescribed by the constitution itself is wholly impracticable and will bring about that disorder which any constitution is meant to inhibit."¹⁹⁷ We will now consider whether the method set out in the independence constitution was indeed impracticable.

The practicability of following the constitutional method should be considered against the background of the political climate at the time. Judging by the support that the Prime Minister's motion seeking the King-in-Council's assistance in repealing the constitution received in both Houses of Parliament, there would not have been any problems in getting the bill passed by a joint sitting of the Senate and the Assembly.¹⁹⁸ They were not faced with the predicament of the BNP of Lesotho for instance, which resorted to extra constitutional methods in amending the independence constitution because political fragmentation militated against its emergence as the sole dominant force in the National Assembly. Their support outside Parliament was not as strong because the last election had shown that the NNLC was gaining more support. It would seem, therefore, that government sought to avoid a referendum. They were not so confident of the popularity of their decision to the nation as a whole.

¹⁹⁷ See section 2 (d) of the King's Proclamation to the Nation of 12 April 1973.

¹⁹⁸ The Imbokodvo National Movement still held the majority of the electoral seats in Parliament, in addition to that the appointed members were in the main appointed by the King that is except for the six Senators who were elected by the House of Assembly.

If anything the method used to repeal the independence constitution proves that respect for the rule of law involves more than just legally enforceable constitutional restraints to the abuse of power by the executive and the legislature. Gower¹⁹⁹ captures the essence of the rule of law in the following words: "its essence, perhaps is the acceptance of the idea that however politically charged an issue may be, legal processes have a part to play and should be observed; that constitutional changes should be effected by proper legal procedure and that it is ultimately for the courts to determine whether that procedure has been observed".

4.4 Customary law

Another corollary issue to this argument is the position of custom, which the independence constitution had not supplanted. It will be recalled that the independence constitution reinstated the powers of the Ngwenyama which he was to continue to exercise in terms of Swazi law and custom, therefore, one of the grounds on which the legality of the repeal of the constitution can be justified is in terms of the customary law, in particular the custom of *kwembula ingubo*.²⁰⁰ This custom provides among other things that where a particular issue aggrieves the nation or an individual they can appeal to the Ngwenyama-in-Council for the resolution of the matter in a manner, that is, in their view in the best interests of the nation. From this perspective the King would appear to have merely been discharging his customary duties and to have acted legally. However, one cannot help but speculate at the implication of the site of the meeting, one wonders why the country's traditional leaders decided to hold this particular meeting at the entrance of the royal residence instead of inside the royal kraal as is always the case with *libandla* meetings. It is not clear whether they

¹⁹⁹ Gower: 24.

²⁰⁰ Literally translated *kwembula ingubo* means to lift the King's blanket.

were not certain about the legality of their act and did not want to besmirch the sanctity of the royal kraal with controversy.

In retrospect the manner in which the constitution was repealed can be said to have been the direct result of the domination of the political machinery by one party. As was observed in the previous chapter, the Westminster model makes for a very strong government if one party effectively dominates Parliament, for it means that the opposition will be kept out of important policy issues. It can therefore be said that the Parliamentary democracy established by the independence constitution enabled the INM, which enjoyed an overwhelming majority in the country's legislature, to pass an illegal motion unchecked by the opposition. The presence of the three NNLC members would have made very little impression in so far as their being able to effectively oppose the motions was concerned.

4.5 Powers of the Monarch in terms of The King's Proclamation Of 12 April 1973

The separation of powers in so far as it related to the powers of the monarch was abolished as the King announced his assumption of supreme power taking over all legislative, executive and judicial powers.²⁰¹ This could perhaps be seen as a return to the pre-colonial position where the office of the Ngwenyama combined all these functions.

Although the king would for the time being, exercise his executive and legislative powers in collaboration with a Council constituted by Cabinet Ministers, nothing in the Proclamation obliged him to act in accordance with their council. Moreover the

²⁰¹ See section 3 of the King's Proclamation to the Nation of 12 April 1973.

distribution of executive power between the King and Cabinet came to an end and as such the King was both the *dejure* and the *defacto* head of government.

The independence judicial structure was retained albeit with a few amendments to bring it in conformity with the Proclamation. Judges and judicial officers continued to carry out their duties²⁰². However, paragraph 7 of the Proclamation constrained the independence of the judiciary by abolishing the Judicial Service Commission, any reference to the Commission in the sections of the independence constitution that were saved from repeal was to be construed as if it was not referred to. The importance of a JSC lies in that it is one of the key methods by which the independence of the judiciary is safeguarded. The implication of its abolition on the powers of the monarch was that where previously he was obliged to act in accordance with the advice of the JSC in matters such as the appointment of judges (except for the Chief Justice) the Proclamation freed him from such obligation, and allowed him to act unilaterally in the exercise of those duties.

By contrast the Proclamation had very little impact on the traditional arm of government. Paragraph 10 reinstated section 135 of the Swaziland Independence Order No.50 of 1968, subject to the deletion of the words "save as otherwise provided in this constitution". Therefore, the Swazi National Council, which consisted of the Ngwenyama, the Ndlovukazi, and all adult male Swazis, continued to exercise its function of advising the Ngwenyama on all matters regulated by h Swazi traditions and culture. The SNC continued to exercise these functions either in *libandla* or in *liqoqo*, in accordance with Swazi law and custom. The distinction between traditional and modern government was maintained and no attempt was made to harmonise the two.

²⁰² See paragraph 1 of the King's Proclamation to the Nation of 12 April 1973.

The Proclamation therefore, created another sphere of authority in which the King was not responsible to any representative institution in the country. According to Boloro²⁰³ the end result of the events of 12 April 1973 was to enable the King to complete the full circle of transforming himself from a formal constitutional monarch with relatively broad executive powers, to an absolute executive monarch unbridled by the limitations of any constitutional provisions. The assumption of Decree powers weakened the one remaining institution that had the legal authority to check the abuse of power by the King - the Cabinet, it will be recalled that traditional institutions had long been weakened by the 1968 independence constitution. The Council of Ministers was no more than a body of functionaries maintained for political expediency, as they could not compel the King to act in a particular manner. This was affirmed by section 4(3)(b) of the Legislative Procedure Order of 1973 which was enacted soon after the Proclamation. The latter conferred on the King the power to veto legislation proposed by the Council of Ministers where he considered this appropriate.

The Swazi monarch was an exception to the trend in most African states at this time. Some of the African King's who had emerged as constitutional monarchs at independence lost their power during this period. Article 118 of the constitution of Uganda of 1967 abolished the institution of traditional or cultural leaders specifically singling out that of Buganda. Wamala²⁰⁴ refers to the Ugandan constitution of 1967 as a good example of a deliberate attempt at breaking the tribal system of

²⁰³ Boloro opcit at 209

²⁰⁴ Wamala: 322. Commenting further on the 1967 constitution of Uganda, the writer observes that it was outright republican and unitarist despite Uganda's semi-monarchical and plural character. It also sought to centralise political power in the hands of central government. It was felt that the devolution of

governance. The Lesotho Order-in Council No.51 of 1970 turned Moshoeshoe 11 into a mere figurehead by conferring full executive authority on the Prime Minister. His participation in political matters was further curtailed by the Office Of King Order No. 51 of 1970, which obliged the King to subscribe to an oath in which he would undertake to obey the Order and all other laws of Lesotho. An excerpt of the Order reads:

"I will discharge my duties in such a manner as to preserve the character of the monarchy as a symbol of the unity of the Basotho Nation and that I will accordingly abstain from involving the monarchy in politics or with any political party or group."²⁰⁵

4.6 Constitutional Developments after 1973

In September 1973, the king appointed a Royal Constitutional Commission (RCC), whose mandate was to determine the views of the cross section of the Swazi nation on the fundamental principles on which the constitution should be based having regard to the history, culture, way of life of the Swazi people and the need to harmonise these with modern principles of constitutional law. For an international perspective the Commission toured countries like Kenya, Tanzania, Uganda, Malawi, Britain, Denmark and Switzerland to study their constitutions.

At the end of this exercise the RCC recommended that a bicameral legislature comprising the Houses of Senate and Assembly should be re-established and that Swaziland should be declared a no party state with the Swazi National Council as the

power to the regions tended to accentuate tribal differences, which destroyed national unity.

²⁰⁵ Mahao opcit at 13.

only policy making body.²⁰⁶ To implement the RCC's recommendations, the King appointed yet another Commission called the Constitutional Advisory Committee (CAC). This Commission was mandated to review the RCC report and to see to it that it took into account the aspirations of the Swazi people. At the end of this review process the Commission was to submit to the King their advisory opinion as to the suitable future constitution for the Kingdom. On the 22nd of March 1977 the King summoned the nation to the Lobamba royal kraal where he told the people that the CAC had submitted its report to him and that the report had revealed the difficulty of formulating a constitution. He further stated that the report was being studied by experts who, would in due course, advise him. "However, the King warned [the nation] to be patient as rushed decisions often crash and do not succeed."²⁰⁷ Unfortunately the CAC report was never made public.

In 1978 significant changes were made to the country's constitutional laws, through the Establishment of the Parliament of Swaziland Order No.23 of 1978 in terms of which King Sobhuza¹¹ introduced for the first time the *Tinkhundla* system of government. By this Order the King initiated the long process of selecting and adapting western institutions and practices that could be co-opted into the traditional system of governance.²⁰⁸

²⁰⁶ See Matsebula opcit at 265.

²⁰⁷ Ibid.

²⁰⁸ The extent to which these constitutional changes were in complete conformity with the aspirations of the nation as a whole in the absence of the report is somewhat doubtful. As Khumalo 1996:5 aptly observes, the significance of this Commission cannot be properly and fully determined in the absence of any final documentation of its conclusions and recommendations. He goes on to say, however, that there are grounds from which it can be inferred that the

4.7 The Tinkhundla System of Government: Establishment of The Parliament Order No.23 Of 1978

Perhaps in line with the people's recommendation to the Royal Constitutional Commission that Swaziland should be declared a no-party state and that the bicameral legislature created by the repealed independence constitution should be re-established, the country's constitutional laws were amended. It will be recalled that throughout the colonial period Sobhuza¹¹ had posited *Tinkhundla* as an alternative to the Westminster style system of governance. Finally rid of the independence constitution the King proceeded to entrench the traditional system of local councils into the Kingdom's political structure, through the Establishment of the Parliament Order No.23 of 1978.

Through the Order, the *Tinkhundla* effectively became electoral vehicles.²⁰⁹ Each *Inkhundla* elected two people to represent it in the eighty member Electoral College which was, in turn, responsible for the election of the forty elected members of the

changes brought about in 1978 were a result of the activities of the Commission. What can be said with certainty is as Boloro: 209 observes that the reestablishment of Parliament was based on consultations with the SNC and the RCC report.

²⁰⁹ Although the Establishment of the Parliament Order made no attempt to define *Tinkhundla*, we shall use a definition by Levin opcit at 6 who says *Tinkhundla* were regional authorities over a number of chiefs on average 6-10, each chief brings his own committee who constitute the *Inkhundla* council. The definition is made in the past tense because the concept of *Tinkhundla* has over the years been redefined.

House of Assembly. The King's control over the electoral process was ensured by section 6 which provided that the *Indvuna* of each *Inkhundla* was to be a King's appointee who held office at his pleasure and on such terms as the King deemed fit. The significance of the *Indvuna Yenkhudla*, in so far as he ensured the King's control over the electoral process becomes clear when one looks at his functions, which included the supervision of the electoral process. He was, of course, assisted by the members of the Electoral Committee.²¹⁰ The procedure to be adopted at the nomination or election of delegates to the Electoral College was conducted under the authority of the *Indvuna Yenkhudla*.²¹¹ Thus unlike Mswati 11 who maintained royal control over the peripheral chiefdoms by dispersing his wives to reside in these areas, under Sobhuza 11 aristocratic control was maintained by the *indvuna* of the *Inkhundla* who was in each case his appointee.

The *Tinkhundla* system of government established after 1973 was partly based on the democratic concept of representation and partly on the traditional royal prerogative in government. The electoral process and the new Parliament harmonised the traditional and modern systems of government in the sense that it retained the modern principle of popular election in the election of delegates to the Electoral College but the elections were conducted in an open traditional manner.²¹²

²¹⁰ See section 15 of the Establishment of the Parliament Order No.23 of 1978.

²¹¹ See section 18 of the Establishment of the Parliament Order No.23 of 1978.

²¹² The electors simply filed past the gate of the candidate of their choice and the candidate through whose gate the greatest number of electors passed was declared elected. In addition to that the system retained the no party nature of tribal government to ensure that the candidates represented no particular constituency, but the interests of the nation as a whole.

The election of members to the House of Assembly unlike at the *Inkhundla* level, was by secret ballot but the entire process was traditionally supervised by the King's appointees. Parliament was, and still is constituted by both popularly elected members and members appointed by the King who is a traditional leader.

The structural arrangement of national government established by the independence constitution was maintained in the sense that the three organs of government, that is, the executive, legislature and judiciary were retained.

4.7.1 The Executive

In essence the executive powers conferred on the King by the 1973 Decree were retained. Executive authority continued to vest in the King.²¹³ In matters of government the King was to be advised by Cabinet although, he was under no obligation to act in accordance with its advice. This was in spite of the fact that the Cabinet itself was collectively responsible to Parliament for the advice it rendered to the King.²¹⁴

²¹³ See section 69 of the Establishment of the Parliament Order No.23 of 1978.

²¹⁴ See section 72. The cabinet consisted of the Prime Minister and other ministers appointed by the King in terms of section 70. In making cabinet appointments the King was released from the obligation of acting in consultation with some other body or institution, section 70(3) merely stated that all Ministers were to be appointed by him. It will be recalled that under the 1968 independence constitution in the making of such appointments he was obliged to act in accordance with the advice of the Prime Minister.

It would seem though that the advisory function of Cabinet did not extend to Decree powers, for no law explicitly provided for the King to be advised by any institution in the exercise of his Decree powers. Consequently between 1978 and 1982 the King's Decree powers were unfettered, that is until 1982 when the *liqoqo* was transformed into the Supreme Council of State whose function was to advise the King on all matters of state.²¹⁵ Even then the King was not obliged to act in accordance with any advice rendered to him by the *liqoqo*.

4.7.2 The Legislature

Legislative competence under the Establishment of the Parliament Order No.23 of 1978 was very complex. The bicameral Parliament through bills assented by the King had the power to make laws in the same manner as they had under the independence constitution.²¹⁶ However, the Order created another legislative sphere

²¹⁵ See section 4 (2)(b) of the King's Proclamation (Amendment) Decree No.1 of 1982. There are some doubts as to the transformation of the *liqoqo* into the Supreme Council of state. Matsebula op cit at: 300 argues that Sobhuza did not designate *liqoqo* as the Supreme Council of State, this designation was coined later by the Minister for Justice. He goes on to say in issuing the Decree the King had intended to modernise the *liqoqo* through the appointment into it of people who were legally trained, economists, people versed in Swazi culture and chiefs, one from each of the four pivotal areas of the Kingdom.

²¹⁶ A House of Assembly comprising of fifty members, forty of whom were to be elected by the electoral college and ten appointed by the King. The House of Senate comprising of twenty members, ten of the members were to be elected by the House of Assembly and the remaining ten appointed by the King.

for the King, that of legislation by Decree which he could exercise unilaterally or at least independent of Parliament.²¹⁷ In addition, the proviso to section 80(2) created the impression that the King's power to legislate by Decree were somewhat superior to the ordinary legislative process because Decrees could be used to alter the King's Proclamation of 12 April 1973, an instrument which is effectively the constitution of Swaziland. This was further confirmed by section 5 of the King's Proclamation (Amendment) Decree No.1 of 1982 that clearly stated that the Proclamation could only be amended by Decree published in the gazette.²¹⁸ To further compound the issue of legislative competence, the King was empowered to issue Orders-in-Council which have the same force of law as Acts of Parliament.²¹⁹

This complex issue of legislative competence in the Kingdom, which persists to this day, raises concerns, which were articulated by Douglas Lukhele in his capacity as Attorney General in 1979 in the following words:

"... As principal legal advisor to the King and government, I again advise against the situation that was created by the Establishment of Parliament Order in 1978, whereby Parliament on the one side may legislate by Acts and the King on the other side by Orders-in-Council on identical subjects. This will lead to a conflict between Acts of Parliament and Orders-in-Council...which conflict is difficult if not impossible to solve

²¹⁷ Section 80(2) of the Establishment of the Parliament Order No.23 of 1978.

²¹⁸ See also Professor Dlamini v The King Appeal Case No. 41/2000.

²¹⁹ Section 4 (2)(a) of the King's Proclamation (Amendment) Decree No.1 of 1982 redefined an Act of Parliament to mean an Act of the Parliament of Swaziland established by law including an Order-in-Council.

and may also lead to the practice of using the King to legislate by Orders -in- Council whenever it was felt that Parliament will not pass a certain Act.²²⁰

4.7.3 Judiciary

The independence of the judiciary essential for the survival of the rule of law was further limited by section 3 of the King's Proclamation (Amendment) Decree No.1 of 1982 which provided, inter alia, that in the exercise of his judicial functions the King was to be advised by the Minister for Justice, who, in effect, took the role of the Judicial Service Commission. Thus this level of executive interference in judicial matters seriously affected the separation of powers upon which the independence of the judiciary rests.

4.7.4 Customary Institutions

The following key customary institutions continued to be regulated by Swazi law and Custom:²²¹

- the office of Ngwenyama;
- the office of Ndlovukazi;
- the authorisation of a person to perform the functions of Regent for the purposes of section 30 of the repealed constitution;
- the appointment, revocation of appointment and suspension of chiefs;

²²⁰ Levin opcit at 10. Such a warning coming from Douglas Lukhele was somewhat ironic because he is on record for supporting the infamous motion that led to the repeal of the independence constitution in his capacity as senator in 1973.

²²¹ See the King's Proclamation (Amendment) Decree No.1 of 1981.

- the composition of the Swazi National Council, the appointment and revocation of appointment of members of the Council and the procedure of the Council;
- the *Ncwala* ceremony;
- the *libutfo* regiment system.

The implications of keeping these traditional institutions distinct from the formal governmental institutions were dealt with at length in the preceding chapter. Significant changes were made to the *liqoqo* and the Swazi National council thus demonstrating the flexibility of Swazi custom. Section 4 (2)(b) of the King's Proclamation (Amendment) Decree No. 1 of 1982 transformed *liqoqo* from an informal group of traditional advisers into a formal statutory body. The new *liqoqo* was mandated to advise the King on all matters of state, which meant that their advisory duties were no longer to be confined to customary matters but extended to matters of government as well. This provision formalised the inherent conflict of the advisory functions of *liqoqo* and Cabinet, while the *liqoqo* could encroach on the duties of Cabinet, the latter could not interfere in *liqoqo* matters. This could be seen as a demonstration of the pre-eminence of custom over modernity.

The new Supreme Council of state remained under the control of the King in the sense that thenceforth it would be wholly appointed by the King, unlike under the independence constitution where it was partly elected by the Swazi National Council and partly nominated by the Ngwenyama.²²² They held office at his pleasure and in accordance with such terms and conditions as he determined. This in turn had implication on the security of their tenure in office. The rationale for the concept of life membership in the *liqoqo* as stated in the first chapter was to enable members to

²²² See section 144 (1) of the Swaziland Independence Order No. 50 of 1968.

carry out their duties of advising and criticising the King without fear of expulsion. The King was, of course, not obliged to act in accordance with the *liqoqo*'s advice.

An interesting concession to modernity was made in the composition of the Swazi National Council by section 6(2) of the King's Proclamation No.1 of 1981 to include women. This could be seen as evidence of gender sensitivity.

4.8 Conclusion

The Westminster model no doubt suitable for the United Kingdom was clearly unsuitable for most African states. In Uganda, for instance, the amendment of the independence constitution was justified on the grounds of the necessity of nation building and political stability. The concern for compromise with the four Kingdom states, and the special status accorded the Kingdom of Buganda perpetuated differential treatment that was bound to lead to ethnic conflict after independence. In Swaziland, however, its major shortcoming was that it made the King a figurehead. In Gower's own words²²³ ... a figurehead on the ship of state makes little sense unless, as with Her Britannic Majesty, its nakedness is draped with an emotional aura.

It would therefore have been unrealistic to expect the promised constitution to restore the powers of the monarch as they had been under the Westminster style independence constitution. As the trend in most of the former British colonies showed at this time, most traditional leaders were finding it very hard to remain impotent constitutional monarchs; Moshoeshoe 11's failure to play a dignified rather than effective role led to his being exiled. What could not have been foreseen was that the constitutional amendments would be of such an authoritarian nature. This precedent

²²³ Gower *opcit* at 55.

was no doubt set by the British practice of imposing laws on their colonies, which was not reversed at independence.

What was particularly striking about the constitutional amendments was their creation of a monarch who is not only executive but also absolute, a state of affairs that is unprecedented even by pre-colonial tribal government where there was no separation of powers. The change to executive monarch would have been relatively unimportant if the King in the exercise of his powers was responsible to some other institution. But as we have already established none of the traditional and modern institutions that ordinarily acted as a check to the arbitrary exercise of power by the monarch had any real power to oblige him to act in a certain manner.

The amalgam of traditional and modern government, up to this point limited to the electoral process and the re- establishment of Parliament which resulted in the establishment of the *Tinkhundla* system of government was aptly described by Levin²²⁴ as an authoritarian form of popularism. Quite clearly the repeal of the independence constitution in Swaziland was meant to give more power to the King.

By the late 1980's a lot of people had begun to question this unique system of political participation which was proof enough that the nation was no longer content with the *Tinkhundla* system of government, they used Sobhuza 11's words that the system was an experiment that would be subject to continuous adaptation to meet the nation's demands as they arise against the country's leaders who seemed content with the status quo. In the next chapter we will see how Mswati 111 is currently responding to demands for changes in the system of government and for him to become a constitutional monarch.

²²⁴ Levin opcit at 5.

CHAPTER 5

THE REIGN OF KING MSWATI III: CONSTITUTIONAL REFORMS

In this chapter, focus shall be on how the on-going constitutional transformation process aimed at the harmonisation of modern and traditional systems of governance has attempted to ensure that the King is a constitutional monarch. We consider whether the changes made thus far have been sufficient or not. The discussion will commence with a brief look at the early years of King Mswati 111's reign before going into a detailed analysis of the constitutional reforms that have been made pursuant to Decree No.1 of 1992.

5.1 The Monarchy under the Reign of King Mswati 111

When King Sobhuza¹¹ died, observers were of the opinion that the institution of the monarchy had died with him due no doubt to the popular belief that the survival of traditional leadership in Swaziland was, for the most part, dependent upon his charismatic style of leadership. Indeed before King Mswati 111, his successor, was formally installed as king the observers were almost proven right. For a while following Sobhuza 11's death, the survival of the monarchy seemed doubtful. The first threat to the survival of the institution was posed by the power struggle between the Queen Regent Dzeliwe and the *liqoqo*, which culminated in the deposition of the Queen Regent.²²⁵ There were wide spread rumours at the time that some members

²²⁵ According to Matsebula *opcit* at 303 the *liqoqo* prepared an instrument, which stated that the Queen Regent Dzeliwe would from then on be advised by the *liqoqo* on all matters of state, which she refused to sign. Instead, on the 2nd of August 1983 she summoned the *liqoqo*, the Cabinet and some senior princes

of the *Liqoqo* did not want a new King to be installed.²²⁶ The second threat was the emergence of clandestine political parties in the mid 1980s who were determined to

to Lobamba where she proceeded to dismiss the *liqoqo enbloc* (including Prince Sozisa the Authorised Person, the Minister for Justice, the Attorney General, and Prince Mfanasibili, a very powerful member of the *liqoqo*) despite warnings from senior princes that such an act was contrary to Swazi custom. The elders of the nation reacted to this by removing her from the office Queen Regent. They invoked a custom, which, inter-alia, provides that "a wife is in the final analysis responsible to her in-laws, that is, the family council or senior members of the family who may take steps against her for unseemly or improper action": Matsebula *opcit* at 304. The Queen Regent decided to forego the traditional route and to challenge the constitutionality of her removal from office in the High Court. However, before the High Court could deliver its judgement on certain objections *in limine* a Decree was passed which purported, among other things, to deprive the court of jurisdiction to give judgement on the matter. In the case of *Dzeliwe, Indlovukati and Regent of Swaziland v Prince Sozisa Dlamini, the Supreme Council of State, and Prince Bhekimphi* 1982-1986 SLR, the High Court categorically condemned the Decree, which in its view violated the application of the rule of law in the country. However after careful consideration it was decided that it would not be in the best interests of the nation for there to be confrontation between the courts and government on the matter. Consequently no judgement was delivered.

²²⁶ According to Radipati *opcit* at 256 The aims behind the formation of the Swaziland liberation Movement (SWALIMO) "were to protect the royal family from abuse by Prince Mfanasibili and his cahoots, restore constitutional legitimacy to the throne and ensure the accession of Prince Makhosetive to the throne- a reference to the view that some *liqoqo* members had no wish to see a new king installed.

restore constitutional Parliamentary democracy and by necessary implication to make the King a constitutional monarch.²²⁷

It is for this reason that when King Mswati 111 formally took over the reigns of government in 1986 he was faced with the major task of restoring order in the country. His Majesty not only redefined the powers of the *liqoqo* but also established a tribunal to try the *liqoqo* members who had played a part in the deposition of the Queen Regent Dzeliwe.²²⁸ Having effectively dealt with the *liqoqo* issue he then dealt with the problem of what was seen as clandestine political parties. The issue of political parties culminated in the treason trial of ten suspected members of the People's United Democratic Movement.²²⁹ Following the trial, political parties were once again silenced for a while.

5.2 Constitutional Reforms In Terms of Decree No.1 of 1992

Having restored political stability in the early 1990's King Mswati 111 initiated a process of political or constitutional transformation. The process started with a meeting at the royal kraal reminiscent of the old *libandla* meetings. It was followed by

²²⁷ The political parties included Prince Dumisa's London based Swaziland Liberation Movement (SWALIMO), the Ngwane National Liberatory Congress (NNLC), Ngwane Socialist Revolutionary Party (NGWASOREP) and the People's United Democratic Movement (PUDEMO).

²²⁸ See section 5 of the King's Proclamation (Amendment) Decree No.1 of 1987 and the Tribunal Decree No.2 of 1987.

²²⁹ In the Matter of *The King v Dominic Mngomezulu and Others*, Criminal Case No. 93/90.

the establishment of a Commission named the Prince Masitsela Commission after the prince who chaired it. This Commission conducted *vusela* meetings throughout the Kingdom's *Tinkhundla* centres between September and October 1990.²³⁰ It would seem that the idea of the *Tinkhundla* Review Commission appointed by the King in February 1992 to review the Kingdom's system of governance was borne out of this consultative process.

Through the *Tinkhundla* Review Commission Decree No.1 of 1992, the King appointed a Commission whose terms of reference were, *inter alia*.²³¹

- To study the submissions made by the nation to the Prince Masitsela Commission.
- Receive written submissions and/or hear oral submissions regarding the problems, malfunctions and deficiencies in the electoral procedures established by the Establishment of the Parliament Order No 28 of 1978; and how these could be ratified.
- Report on ways in which customary institutions should and/could be accommodated into the political system in view of their important constitutional and social role in terms of Swazi law and custom.
- Report on the sufficiency of the existing *Tinkhundla* and their geographic limits, and methods as to how the local interests of each *Inkhundla* could best be represented and satisfied within the Houses of Parliament within the parameters of Swazi law and custom.

²³⁰ The literal translation of the word *vusela* is to ask people how they are doing.

²³¹ See section 3 of the *Tinkhundla* Review Commission Decree No.1 of 1992.

- Consider and make appropriate recommendations on any issue, which in the view of the Commission would help promote and sustain the democratic process in Swaziland.

Before going into a critical analysis of the Decree, it should be pointed out from the onset that since the repeal of the independence constitution in 1973, no formal method of constitutional amendment exists. The 1973 Proclamation, effectively the constitution of the country can only be amended by the King by Decree published in the Gazette. The nature and form of any change in the constitutional laws of the country is thus determined by the King.

When King Mswati 111 initiated the transformation process, the general assumption was that the process would extend to the entire constitutional structure of the Kingdom. The terms of reference of the *Tinkhundla* Review Commission as set out in section 3 of the Decree, however, made it clear that the scope of constitutional change would be limited to the electoral process. Although section 3(d) of the Decree somewhat widened the scope of the transformation process by empowering the Commission to consider any other issues which might promote and sustain the democratic process in Swaziland, it was left to the Commissioners to decide what other issues could be included. The Commissioners were wholly appointed by the King.

According to Khumalo²³² the limitations of the review process thus lay in the fact that its mandate largely centered on the electoral system rather than the structure of government. The writer further points out that the terms of reference were structured in such a way that the predominant factor was Swazi law and custom. A further

²³² Khumalo op cit at 8-9.

shortcoming related to the investigation concerning the structural arrangement of the constitution. "The Monarchy, for instance, and its role in the constitution was presumed to be beyond question".²³³

The work of the Commissioners was made all the more difficult by the prohibition of any form of representation in making submissions to it. They had to receive submissions from each and every adult member of the Swazi nation that made submissions and from these determine the views of the majority. In the present writer's view this limitation casts doubts in their findings, for short of a referendum it is very difficult to determine with absolute certainty the views of the majority of the members of the nation.

5.3 The Tinkhundla Review Commission's Report

The following is a summary and an analysis of the people's submissions to the Prince Masitsela Committee and the Tinkhundla Review Commission. The writer's arrangement of the headings is not in any way a reflection of how they appear in the original document. Focus shall be on the recommendations that have a direct bearing on the constitutional structure of the country, in particular the powers of the King.

The *Tinkhundla* system of government received intensive comment. Responses on this form of government, inter alia, demonstrated that its shortcomings lay in its inadequacy to deal effectively with issues of corruption, inefficiency, lack of accountability and nepotism. The system was criticised for undermining the fundamental rights and freedoms of the individual in a way never intended or foreseen by its founder, King Sobhuza¹¹. Despite these shortcomings, the majority of

²³³ Khumalo *opcit* at 8-9.

the presenters, however, felt that the system should be given another chance under new management.²³⁴ Worthy of note is that in the urban areas, particularly in Mbabane, the Kingdom's capital the system received outright rejection. It was thus recommended that:

- There should be a clear national policy on decentralisation, consistent with the nation's economic resources, outlining the chain of command and responsibility within the *Tinkhundla* system, which would lead to sustainable community and regional development and self-sufficiency.
- *Tinkhundla* should be empowered as local authorities. It was felt that there was a need for a law which would clearly define the legal status of an *Inkhundla* and its powers and duties as a local authority.
- The proposed *Tinkhundla* system should be headed by a Cabinet Minister who would be responsible to Parliament.

²³⁴ According to the Tinkhundla Review Commission Report 1992: 26 Amany presenters felt that the system was hijacked and subverted for their own ends by the very persons set up to nurture and develop it. What is particularly striking about the report is that the Commission attributed blame for the failure of the *Tinkhundla* system of government to one man, the then *Indvuna Yetinkhundla*, the late Mndeni Shabalala. The Commission felt that the *Indvuna* had misconstrued his role in various ways thereby causing a great deal of public resentment against the system. It would seem that there was never a clear and official statement of the status of the *Indvuna* other than what he himself said, though how the Commission could see this as the *Indvuna*'s fault and not that of the architect of the system boggles the mind.

5.3.1 Reforms to the Tinkhundla System of Government

As per the Commissions recommendations, a few changes aimed at empowering *Tinkhudla* as local authorities and at the decentralisation of government administration and power so as to ensure the delivery of state services have been made. The head of *Tinkundla* is now the Deputy Prime Minister instead of the *Indvuna Yetinkhundla* and he is responsible to Parliament. Structurally and administratively, each *Inkhundla* is described as the equivalent of a Swiss Canton, or an American State and represents a varying number of chiefdoms.²³⁵ A typical *Inkhundla* is headed by a chairperson called *Indvuna Yenkhudla* who is elected by the people.²³⁶ In terms of section 5 of the Establishment of the Parliament of Swaziland Order No. 1 of 1992 the *Indvuna Yenkhundla* works with *Bucophu*, (*Inkhundla* Committee) the Executive Committee of the *Inkhundla*, which is also elected by the people and is responsible for the proper upkeep and repair of the *Inkhundla* buildings and premises. The Member of Parliament of that *Inkhundla* is an ex-officio member of the Committee.

The statute that established *Tinkhudla* as local councils is not explicit about their exact constitutional role. Section 3 (3)²³⁷ merely states "save as may be provided by

²³⁵ "A Unique Approach to Democracy: The Kingdom of Swaziland's Tinkhudla Representative System of Government." An undated and unnumbered document issued by the Deputy Prime Minister's office hereinafter referred to as "A Unique Approach to Democracy".

²³⁶ Section 4 of the Establishment of the Parliament of Swaziland Order No.1 of 1992.

²³⁷ Establishment of the Parliament of Swaziland Order No.1 of 1992.

an Act of Parliament from time to time, an *Inkhundla* shall perform all such functions as *Tinkhundla* traditionally perform.” What remains is to try and establish the exact role of *Tinkhundla* under the constitutional dispensation established by the Establishment of the Parliament Order No.1 of 1992.

Traditionally *Tinkhundla* were meeting places, the various chieftaincies that constituted that particular *Inkhundla* would meet periodically to discuss issues affecting their particular communities. Moreover, they were one way by which central government maintained control over the peripheral areas. In 1978 as was established in the previous chapter they were transformed into some form of electoral system, aimed yet again at the maintenance of control by the royal establishment over the peripheral areas. The functions of *Tinkhundla* currently include the following.²³⁸

- To implement national and governmental policies at regional level and at *Tinkhundla* level as assigned to them by the Deputy Prime Minister.
- To promote co-ordination and consultation among all governmental and no-governmental organisations within the regions and at the *Tinkhundla*.
- To ensure that government policies, programs and objectives are well communicated to the people at the *Tinkhundla* level particularly those in the current National Development Strategy and the Economic and Social Reform Agenda.
- To identify and initiate priority projects and needs of people living within the regions.
- To engage in numerous activities that may be deemed proper and fit to uplift the economic, health, agricultural and educational standards of their regions

²³⁸ See *ATinkhundla and Development* an undated document issued by the Deputy Prime Minister's office at 4.

and to act so that peace and harmony might prevail throughout the Kingdom of Swaziland.

Quite clearly *Tinkhundla* as local councils still do not have a clearly defined role in the Kingdoms' constitutional dispensation. For instance, while local councils in most countries like South Africa and Uganda are the highest political authority within their area of jurisdiction and have some legislative and executive powers, the *Tinkhundla* have no such powers.²³⁹ Their main focus is community development, that is, economic matters, their political objective of decentralising governmental power and consultation at grass root level is yet to be realised.

Section 3 of the Establishment of the Parliament of Swaziland Order No.1 of 1992 yet again formally entrenches the role of *Tinkhundla* in the Kingdom's electoral system. Candidates are elected directly from their *Tinkhundla* centers to Parliament, this means that the old indirect method of election whereby Members of Parliament were chosen by the Electoral College and not by the people was abrogated. In this regard an *Inkhundla* can be defined as " the common delineated area (constituency) for both local and national government."²⁴⁰ In spite of the fact that the elected Members of Parliament now have a specific constituency to which they are accountable, there is still no mechanism by which the people can enforce this accountability since despite the people's recommendations *Tinkhundla* still do not have the power of recall.

²³⁹ See chapter 6 of the Constitution of the Republic of South Africa No 108 of 1996 and Article 180(1) of the Constitution of the Republic of Uganda of 27 September 1995.

²⁴⁰ "A Unique Approach to Democracy". c.f footnotes 210 and 236 supra.

5.3.2 The Monarch and Executive Authority

Very little has changed with regard to the executive authority of the monarch. Executive authority continues to vest in the King who is in this regard advised by a Cabinet of Ministers, composed of the Prime Minister and other ministers all of whom are his appointees.²⁴¹ In spite of these limitations, the people expressed views on the role of the King in the appointment of Cabinet, which sought to restrain the King's

²⁴¹ This is despite the impression one gets from the people's submissions to the Tinkhundla Review Commission, that they were intent on making Cabinet as democratic as possible within the framework of the Tinkhundla system of government by establishing an electoral basis for office. With regard to the appointment of the Prime Minister for instance, the people proposed:

- that he should be appointed from among the elected Members of Parliament;
- that he should be elected by the Members themselves;
- that he should be nominated by the House of Assembly and appointed by the King;
- that three names should be nominated by both Houses out of which the appointment should be made;
- that the Prime Minister should be elected by all the registered voters,
- that the two Houses in a joint sitting should nominate by secret ballot a person whom they feel should be appointed Prime Minister, the sealed ballot box would then be taken to the King-in Council for consideration in making the appointment.

With regard to the other Cabinet Ministers there were strong views that indicated that the people wanted the Cabinet to be composed of the members of the popularly elected House. Although the Commission was unable to recommend this proposal as a matter of law, it was however, not opposed to it in principle.

powers. The Commission predictably, classified these suggestions as minority proposals. For instance, the people felt that the Prime Minister should appoint his own Cabinet. Another view was that the King should appoint Cabinet after consultation with the Prime Minister, as was the case under section 70(2) of the Establishment of the Parliament of Swaziland Order No.23 of 1978. However, section 50(2) of the Establishment of the Parliament of Swaziland Order No.1 of 1992 imposes no obligation on the King to consult the Prime Minister in making appointments to Cabinet. In terms of the section the Prime Minister's role is merely advisory, effective power in such matters lies in the King.²⁴² Cabinet is still responsible to Parliament for any advice they give to the King. The King is under no obligation to act in accordance with Cabinet's advice.²⁴³

5.3.2 The Monarch and Parliament

The King remains part of the legislative process in the sense that he assents to bills that have been passed by both Houses of Parliament. In addition he retains independent legislative power, in the form of legislation by Decree and Orders-in-Council. Despite proposals that the issue of legislation by Decree should be looked into, nothing has been done to remedy this situation. It is perhaps politically expedient for the King to have a private domain of legislative power in instances where he wishes to pass a law that would not be approved of by the people's

²⁴² The section provides that "in addition to the Prime Minister there shall be a Deputy Prime Minister and such other Ministers of the government as the King may appoint with the advice of the Prime Minister."

²⁴³ Section 52(2) of the Establishment of the Parliament of Swaziland Order No.1 of 1992.

representatives in Parliament. This was clearly demonstrated by the issuing of the infamous Decree No.2 of 2001, the worst piece of legislation since the King's Proclamation of 12th April 1973, notable for its infringement on the operation of the rule of law in the country. Parliament also clearly shocked by the provisions of the Decree denied any knowledge of its origin. That this law was later amended by Decree No.3 of 2001 to remove some of the more offensive sections was not due to a sudden realisation by its architects that it was a bad law, but it was due to criticism from the progressive elements in the country and the international community.

5.3.3 The Monarch and the Judiciary

The King retains the power to make key judicial appointments like the appointment of Judges, the Attorney-General, the Director of Public Prosecutions, the Deputy Attorney-General and the Deputy Director of Public Prosecutions unbridled by the obligation to act in accordance with the advice of the Judicial Service Commission; this limits the independence of the judiciary. In such matters the King continues to act in consultation with the Minister for Justice.

5.3.4 Customary Institutions

It was proposed that customary institutions should be represented in Parliament, and their traditional role strengthened within the political organs of the nation. Consequently, section 14 of the Establishment of the Parliament of Swaziland Order No.1 of 1992, which sets out a criterion for appointments to the Senate, provides that the twenty Senators appointed by the King should include chiefs, *bantfwabenkhosi* and special interests. It further states that the appointment of chiefs to Parliament shall take account of regional interests and shall be made on rotational basis.

Another development has been the revival of the Standing Committee of the Swazi National Council (SCSNC), through Decree No.1 of 1996,²⁴⁴ whose functions are;

- to advise the Ngwenyama on all matters regulated by Swazi law and custom and connected with Swazi culture;
- to advise the Ngwenyama on all matters referred to it from time to time by the Ngwenyama, with a view to ensuring good governance and building a coherent and integrated Swazi nation.

This rather broad definition of the functions of the SCSNC has led to an overlap between the advisory role of the Committee and that of Cabinet, causing friction between the two. Commenting on this issue in a recent interview, the current Prime Minister Barnabas Dlamini, expressed the need for an independent body to inquire into how the relations between Cabinet and the Standing Committee of the Swazi National Council could be regulated to avoid the friction that is inherent in the current position. For instance, the Committee sees it well within the scope of their prerogatives to summon Cabinet Ministers including the Prime Minister to explain Cabinet decisions. This situation is exacerbated by the fact that section 5 empowers the Committee to determine its own rules of procedure.²⁴⁵ This is yet another example of the dominance of traditional institutions over their modern counterparts.

The dual system of governance inherited during the colonial era is now presenting problems of conflict making the harmonisation of the two systems, more compelling. The country's leaders and supporters of the current system seemingly oblivious to

²⁴⁴ Otherwise known as the Swazi National Council Standing Committee Decree No.1 of 1996.

²⁴⁵ Establishment of the Swazi National Council Standing Committee Decree No.1 of 1996.

this problem, are going ahead with reforms aimed at maintaining the status quo. However, despite the upper hand that tradition has over modernity the power of traditional institutions to act as an effective check to the abuse of power by the Ngwenyama has not been revived.

5.4 Criticism of the Tinkhundla System of Government

Finding a perfect constitutional model that will be a reflection of both the Kingdom's rich cultural heritage and the modern principles of democracy will no doubt come about after a lot of experimentation. The *Tinkhundla* system as demonstrated in the preceding discussion has gone through numerous changes presumably aimed at meeting the political aspirations of the Swazi people. However, the transformation process especially with regard to the powers of the monarch thus far, leaves much to be desired. It can be argued and rightly so, that the transformation process has been manipulated by the country's leaders for the purpose of centralising more power on the King. At the root of this issue is the fact that these changes have come about as a reaction to growing demands from the progressives for change not necessarily because the country's leaders who are content with the status quo have seen the need for change. Faced with these demands the traditional establishment has reluctantly adapted the system to accommodate only those alien norms that are not a real threat to the survival of the institution of the monarchy as currently constituted.²⁴⁶ Radipati²⁴⁷ sums up the traditionalist attitude to change in the following words:

²⁴⁶ The *libandla* meeting of 1992 that gave birth to the review process was preceded by pressure from progressives and the international community for Swaziland to democratise her system of governance. It will be recalled that it was only a few days after Alfred Nzo the then Minister for Foreign Affairs in

“if an alien value system (such as Western inspired law and its institutions) is in the nature of mere elaborations to the existing Swazi polity, no significant adjustive problems are likely to arise and the response of the traditional rulers to it is wont to range from neglect to positive tolerance. But where the changes permeate the Swazi milieu, as alternatives to compete with or displace existing Swazi norms and such norms relate to issues or areas of social life which are perceived as being vital for group or elite survival, the reaction to the imposition or influence will be that of hostility and rejection...”

Under King Mswati 111 *Tinkhundla* are still no more than community development centres that happen to house certain government offices, used for electoral purposes every five years. That the focus of *Tinkhundla* is on economic development rather than politics makes nonsense of the assertion that *Tinkhundla* is a system of government.

There is still no separation of powers as the King who has executive, legislative and judicial powers and retains the power to make all the key political appointments dominates all three organs of government. Despite the establishment of numerous councils to advise the King in the exercise of his powers, both traditional and modern, none of them have the power to compel him to act in accordance with their advice.²⁴⁸

South Africa was in the country presumably about this issue that the *vusela* meetings were initiated.

²⁴⁷ Radipati 1992-1993: 262.

²⁴⁸ Among the King's councils are the Cabinet, the Standing Committee of the Swazi National Council, and the *libandla* established by the Swazi Administration Order N0.6 of 1998.

Over and above that the King is above the law. According to Hlatshwayo²⁴⁹ this lack of effective institutional checks on his powers, does not give the King the right to do as he pleases for the trust placed in him by the people requires him to act always in the public good. Thus in instances where he disregards the advice of any of the institutions that are representative of the people, it should be because the public good requires him to do so. In Hlatshwayo's view the fiduciary duty placed on the King by the people ensures that he acts always in the best interests of the nation and this makes up for the lack of effective institutional restraints. However, the trust placed on the King like the natural law has no more than a moral force and cannot be enforced in a court of law.

The need for effective institutional checks was recently highlighted following the controversy surrounding the real architects of Decree no 2 of 2001 outside of the knowledge of any of the King's councils except allegedly, individual members of some of these councils. The bold admission to the abdication of responsibility by the King is proof enough of the need for effective checks to his power. That the King could say he did not read the Decree that was brought to him for his signature is proof enough that he cannot be trusted to act responsibly in the exercise of his powers. As already established Decree powers are the King's alone therefore if they are misused then the King and not any other government official should be held responsible. In the next and final chapter the writer proposes that the Swazi king should be transformed into a constitutional monarch and further makes a proposal on how this difficult but not impossible task could be achieved.

²⁴⁹ Hlatshwayo op cit at 292.

CHAPTER 6

PROPOSAL FOR THE CREATION OF A CONSTITUTIONAL MONARCH

In this chapter we focus on how the compatibility or otherwise of the institution of the monarchy, with such factors as human rights, the rule of law and constitutionalism in general have made it imperative for it to be transformed to promote modern constitutional democracy. As has been shown in the preceding chapters, the Swazi King has, over the years, become more authoritarian. This trend could be seen during the colonial period reaching its peak at independence, of importance is the manner in which the institutions that traditionally acted as checks and balances were undermined. In the fourth chapter we saw how the passing of The King's Proclamation of 12 April 1973 made the King an absolute monarch unrestrained by any institution in the country, a position that obtains to this day. The discussion commences with a brief analysis of the Constitutional Review Commission's report on the powers of the Monarch, before going into the factors that have made it imperative for the king to be a constitutional monarch and concludes with the writer's proposed future constitution of Swaziland.

6.1 Constitutional Review Commission Report

Hopes that the Constitutional Review Commission will recommend that the King become a constitutional monarch have been dashed by the recent publication of its report. The following is a summary of some of the Commission's recommendations:

- All powers of ruling and reigning over the Kingdom must remain entrenched in the Ngwenyama, according to Swazi law and custom and existing laws.

- The appointment and dismissal of the Prime Minister must continue to vest in the King.
- The King may legislate by Proclamation or Decree when the circumstances warrant that and His Majesty is so satisfied.
- The Ngwenyama must continue to appoint members of the Standing Committee of the Swazi National Council.
- Political parties remain banned.
- There should be regular referenda every five years on some of the topics in the new constitution so as to satisfy the changing needs of the nation.
- The summoning of the nation to *Esibaya* by the Ngwenyama must continue to be done, meetings must be frequent and many in any one year.
- The *Tinkhundla* system of government must continue and be strengthened so it is clear that *Tinkhundla* is a system and not just a government ministry or department.

The Constitutional Review Commission's findings on the powers of the monarch are basically that the majority of the Swazi people want all the Decrees that have been passed since 1973 to be consolidated and entrenched in the proposed constitution of Swaziland.²⁵⁰ If the provisions of the report are implemented as they are, the King will have more power than he currently does.

²⁵⁰ If one thing can be said with absolute certainty this time it is that there is no question that the Commission's report is a reflection of the views of the majority of the people who made submission to the Constitutional Review Commission. This certainty stems from the fact that progressives boycotted the exercise thereby allowing dyed in the wool traditionalists to have the final say in the constitution of the country.

6.2 The Powers of the Swazi Monarchy: The Case for a Constitutional Monarch

That the proposed centralisation of power in the monarch, is sanctioned by the majority of the people who made submissions to the Constitutional Review Commission does not make the status quo acceptable. For indeed bad governments are voted into power by the people as was the case with the apartheid regime of South Africa, but that did not make the system of government right. This persistent centralisation of power in the face of demands that the King become a constitutional monarch is undesirable and in time it might lead to overt or covert civil strife. Left with no legal method to change the system of government, progressive elements within the country might be forced to adopt illegal methods. The spate of bombings targeted at government establishments like the Deputy Prime Minister's offices (the head quarters of *Tinkhundla*) and the building that houses the offices of the *Mahlanya Inkhundla*, not forgetting the bombing of Parliament cannot be overlooked. It is quite possible that there is no political motive behind these acts of terror but coming at a time when progressive groups are becoming more militant in their demands for constitutional change the possibility of there being a political agenda behind the bombings cannot be overlooked.

If truth be told the progressives and traditionalists in the country want the same thing that is for the King to be a limited monarch. What the proponents of these two divergent views are perhaps not in agreement on is the form that these restraints should take. While traditionalists are calling for the revival of traditional restraints such as the people's Parliament (*Sibaya*), progressives want the King to be a constitutional monarch in the Western sense complete with parliamentary democracy and multi party politics. In short a King who will be figurehead and above politics. That is the crux of the constitutional impasse that Swaziland is currently faced with.

The progressive model of constitutional monarch stems from the fact that most of the constitutional innovations supposedly aimed at respecting traditional methods while incorporating modern methods of democratic governance, that have been made thus far have been designed to circumvent constitutionalism and the rule of law and above all give even more power to the King.²⁵¹ The stance taken by the country's traditional leaders on the other hand perhaps stems from Africa's history. In most instances constitutionalism in the Western sense has come at the expense of traditional leadership, the tendency is for constitutions to give due recognition to traditional leaders but deny them a political role as is the case in Uganda. Article 80(c) of the constitution of Uganda of 1995 provides that a person is not qualified for election if that person is a traditional or cultural leader as defined in clause (6) of article 246 of this constitution. The political role of traditional leaders in Uganda is further limited by provisions prohibiting them from joining or participating in partisan politics while they remain traditional leaders, they are further prohibited from exercising any administrative legislative or executive powers of national or local government.²⁵² In countries like Botswana the institution of traditional leadership has been accommodated by the establishment of a House of Chiefs, which means that they

²⁵¹ One has only to look at the laws that have been passed since the commencement of the transformation process, like the Swazi Administration Order No.6 of 1998 and the Establishment of the Parliament of Swaziland Order No.1 of 1992 not forgetting the short-lived Decree No.2 of 2001 and Decree No.3 of 2001.

²⁵² See article 246 of the Constitution of the Republic of Uganda 1995, and article 6 of the same constitution which defines a traditional or cultural leader as a King or similar cultural leader by whatever name called, who derives allegiance from the fact of birth or descent in accordance with the customs and traditions, usage or consent of the people under that leader.

have a political role; as is the case in Lesotho, where the Senate is composed of twenty two principal chiefs and eleven members appointed by the King. However there are very few precedents if any of a monarch in the Swazi sense, black Africa's other monarch King Letsie of Lesotho is no more than a symbol of national unity with very little effective power in matters of government, fuelling the fears of traditionalists that if the King were to be made a constitutional monarch he would become a figure head.

What Swaziland needs therefore is a constitution that will allay the fears of both these parties, a constitution that will respect Swaziland's cultures and traditions and at the same time incorporate the principles of constitutionalism and the rule of law. This is a difficult but not impossible task.

6.3 Proposed Future Constitution of Swaziland

In concluding the study the writer makes a proposal for the reform of the laws that regulate powers of the monarch. The proposal seeks to maintain a healthy balance between the demands for democracy, the rule of law and respect for human rights, on the one hand, and the concerns of traditionalist who want to ensure the survival of Swazi customs and culture on the other hand.²⁵³ In making the proposal the writer

²⁵³

In the writer's opinion the ideal constitution for Swaziland would be one which harmonised the traditional and Western powers of the King, one in terms of which "both strains invigorated and strengthened each other, to build the foundations of a [system] based on the universal values of justice and order..." see Nhlapo1982: 66. In the words of Sydney Mufamadi the South African Minister for Provincial and Local Government: " The call for an African Renaissance therefore is a call for the coming of age of African institutions, and not for a perfect mimicry of the world's powerful societies. After all it is

has experienced the astonishing dearth of comparable systems from which to draw in constructing the envisaged constitutional monarch. This state of affairs can be attributed to a variety of social factors, which existed during the colonial period.²⁵⁴

The writer will rely on the constitution of the Kingdom of Lesotho of the 2 April 1993, which in a way incorporates traditional institutions in a modern constitution, and Westminster Conventions on which the Kingdom's governmental structure is to a very large extent still modelled.

As alluded to above in the writer's opinion the future of the monarch in Swaziland lies in transforming the King from an absolute executive monarch into a constitutional monarch. The concept of constitutional monarch involves the proposition that the exercise of governmental power by the king should be regulated by rules; "rules prescribing the procedure according to which legislative and executive acts are to be performed and delimiting their permissible content".²⁵⁵ This entails setting up a system or a network of effective restraints against the abuse of governmental power by the King.

hard to conceptualize African culture without any reference to the institution of traditional leadership and to custom." See foreword to "A Draft Discussion Towards A White Paper on Traditional Leadership and Institutions" *opcit.*

²⁵⁴ While in most African states national unity was established at the expense of traditional institutions and customs, in Swaziland traditionalism ensured the survival of the institution of traditional leadership.

²⁵⁵ de Smith *opcit* at 106.

The starting point in harmonising the two halves of the king's authority, that is, the King as Ngwenyama and the King as Head of State and Government would be the adoption of a dyarchical constitution. de Smith²⁵⁶ defines a dyarchical constitution as one in which there is a division of governmental competence between two or more authorities in the state otherwise than on a regional basis. This would entail a proper definition of the boundaries of the two competing spheres of authority. As Brazier²⁵⁷ aptly observes it would be a very strange constitution which endowed a head of state with certain rights but which did not allow any indication of the circumstances in which they might be used and the consequences of their use. Indeed this is one of the shortcomings of the Tinkundla system of government, since its introduction in 1978 by the late King Sobhuza II it has failed to clearly delimit the powers of the King as Ngwenyama (customary powers of the king).

6.4 The King as Ngwenyama

Although the Constitutional Review Commission has by implication defined the Ngwenyama to mean head of state and government of the Kingdom of Swaziland, in the writer's opinion the powers of the king as Ngwenyama should be limited to customary matters and should not extend to matters of government.²⁵⁸ This way the

²⁵⁷ de Smith 1989:14. Due to the fact that the office of Ngwenyama constitutes a system of government that has for decades been ostensibly kept distinct from that of head of state and government although both offices converged in the same person they will for our purposes be taken to mean two separate authorities.

²⁵⁷ Brazier 1988:150.

²⁵⁸ These matters would include: the appointment, suspension and revocation of the appointment of chiefs; the incwala ceremony, the libutfo system, the

confusion as to the legislative competence of Parliament on the one hand and the King-in-Council on the other hand would be clarified.²⁵⁹ Moreover the issue of the clash in the advisory duties of Cabinet and the Standing Committee of the Swazi National Council would be solved.

Having said that the writer will now address another major area of concern, that is, the constitutional role of the Ngwenyama's support institutions; the Ndlovukazi, Chiefs, the Swazi National Council (which has taken the place of the libandla) and the Standing Committee of the Swazi National Council (which has taken the role of the liqoqo); which acted as checks and balances to the abuse of power by the Ngwenyama. In the writer's opinion the office of the Ndlovukazi should not be confined to ceremonial matters, as is currently the case. Some of her customary powers should be revived, in particular, the power to review the Ngwenyama's actions. It will be recalled that traditionally, the Queen mother could persuade the Ngwenyama to reconsider his decision where circumstances warranted such intervention.

The writer concurs with the Constitutional Review Commission's recommendation that the Standing Committee of the Swazi National Council should continue advising the Ngwenyama. However, contrary to the Commission's recommendation that the Committee should be independent of the Swazi National Council it is proposed that the Committee should remain the executive body of the Swazi National Council and be collectively responsible to it. However, the customary practice that allows the King

appointment of the King and the Queen Mother, authorization of a person to perform the functions of regent among others.

²⁵⁹

It was noted in the previous chapter that under the current system Parliament and the King-in-Council can legislate on the same issues.

to consult any members of the Council whose advice he requires is undesirable, it would be advisable for the council to act as a collective body in order to avoid the practice of members abdicating responsibility when things go wrong. This way the characteristic ethos of the Swazi people would be preserved and some of the shortcomings of the tribal constitution that were highlighted in the first chapter would fall away, such as nepotism, lack of transparency and lack of accountability.

Like Parliament the Standing Committee of the Swazi National Council should be composed of both appointed and elected members. The King could appoint the appointed members and the rest of the members would be elected by the people. The customary obligation that the King acts always in accordance with the advice of the Council should be revived, as well as the fine that the Ngwenyama attracted when he violated this custom. This way the restraining force of the Standing Committee of the Swazi National Council would not only be effective but also formalised.

The role of the Swazi National Council as the traditional legislature should be revived. This is in line with the people's submission to all the Commissions set up by the King aimed at the democratisation of the Kingdom's Tinkhundla system of government. The Council like the old Libandla would be a forum for public debate on issues of Swazi custom or any matter referred to it by Parliament. The Ingwenyama would once again as was the case in terms of custom be a conservative element, the interpreter and upholder of tradition but not the legislator. The laws made by the Council would still be in his name. This would of course mean that meetings of the Swazi National Council should be held more frequently and communication lines between the Royal Kraal and chiefs be established to facilitate this process. To ensure the effectiveness of this institution the traditional fine imposed by the council on the King for the violations of custom must be retained.

6.5 The King as Head of State and Government

Tempting, as it is to propose that effective executive power should rest in the Prime Minister and Cabinet, as is the case in the United Kingdom and in Lesotho the writer will not do so. The simple reason for this is that as was observed in Chapter four this was one of the major reasons for the repeal of the 1968 Independence Constitution. In terms of Swazi Custom the King rules and is ruled by the people. The major shortcoming of the system is that while the King rules the people, the people do not rule him, in other words, it lacks effective checks and balances to the abuse of power by the King. He is not accountable to any institution in the country.

To bring the powers of the monarch into conformity with the principles of constitutionalism the obligation placed on the King to act always in accordance with the advice of cabinet in the exercise of his executive powers would have to be revived. Cabinet in turn would continue to be accountable to Parliament for any advice rendered to the King. This raises the issue of the composition of Cabinet. The writer proposes that until the Swazi people deem it fit that political parties be unbanned, the House of Assembly from among its members should elect the Prime Minister. Once elected the Prime Minister would then appoint the other Ministers from among the members of both Houses of Parliament. The King's role in this regard would be to bless the appointments. Experience has shown that where the King appoints Cabinet members, they become so preoccupied with pleasing the appointing authority to the detriment of the public good. It follows, therefore that if the appointing authority was the people their representatives would be eager to please the people.

The democratisation of the Kingdom's system of governance would not be complete without addressing the issue of the King's legislative powers. In the writer's view legislation by Decree should be reserved for emergencies and the King should in this

regard act in accordance with the advice of Cabinet. It is very much against the principles of democracy for the constitution of a country to be amended at the whim of the head of state, such powers should vest in the people. The Westminster style provision that empowers the King to be part of the legislative process by assenting to bills brought to him by the legislature should remain. In addition to that Parliament should be empowered to legislate on all issues except customary matters.

A corollary issue to the discussion is that of *Tinkhundla* as centres for political discussion. As was observed earlier on in this chapter, legally *Tinkhundla* are the only forums for political discussions in the Kingdom, however, in practice, such meetings remain banned. In the writer's opinion this function of the *Tinkhundla* should be strengthened so that members of Parliament receive their constituents' views on bills tabled before Parliament.

The last issue regards the rule of law. By rule of law the writer means the powers of the courts of the land to determine the constitutionality or otherwise of the King's actions. The tendency is for constitutions to oust the jurisdiction of the courts when it comes to such matters. For instance section 91(5) of the Lesotho Constitution of 2 April 1993 provides in part that:

“...where the King is required to act in accordance with the advice of any person or authority, the question whether he has received or acted in accordance with such advice shall not be enquired into in any court.”

While such a provision has no great legal implications for Lesotho since the Sotho King is a constitutional monarch and the constitution has numerous safe guards against the abuse of power by the King, the same cannot be suitable for

Swaziland.²⁶⁰ The reason for this is that the King has more power than that which would normally devolve upon a constitutional monarch. Thus where the constitution provides that the King should act in accordance with the advice of any institution or body, where he has not done so the courts should have the power to declare such an act null and void. For indeed if the courts do not have such powers what guarantee is there that the King will hold himself wrong? This aspect of the rule of law would of course have to be reconciled with the custom of *kwembula ingubo* which makes the Ngwenyama the ultimate arbiter in all disputes involving Swazi citizens within the Kingdom, capable even of overruling decisions of the highest Appellate Division in the country. This custom would either have to be abolished to give effect to the rule of law or the circumstances under which it can be used clearly spelt out. Apart from the foregoing, for the establishment of the rule of law in the Kingdom the following issues should be looked into:

- The law should conform to certain minimum standards of justice both substantive and procedural²⁶¹

²⁶⁰ Apart from Cabinet the Sotho King is assisted by among other bodies the Council of State in discharging his functions. See section 95(i)(2) of the Lesotho Constitution of 2nd April 1993 for the composition of his council. Section 95(8) further provides that if the King does not call a meeting of the council for the consideration of any matter on which the advice of the council is required, the Prime Minister shall summon a meeting of the Council of State, failing which any member of the Council supported by not less than seven other members, may call a meeting of the council of State.

²⁶¹ de Smith opcit at 106. Laws such as the Swaziland Administration Order No.6 of 1998, Decree No. 2 of 2001 and Decree No. 3 of 2001, which limit the court's jurisdiction in certain matters. See also *Chief Mtfuso II and Others v Swaziland Government and Others* Civ. Case No. 2685/2000; *Chief Mliba Fakudze and Others v Swaziland Government and Others* Civ Case No.

- A person ought not to be deprived of his liberty, status or any other substantial interest unless he is given the opportunity of a fair hearing before an impartial tribunal.
- The judiciary should be independent. As long as judges of the High Court in particular the Chief Justice is appointed by the King on contract and his tenure of office is insecure the judiciary will not be independent.
- Civil liberties should be buttressed by a bill of rights. The Constitutional Review Commission's recommendation that only those rights and freedoms, which are not in conflict with the Kingdom's customs and traditions, should be incorporated into the proposed constitution of the kingdom is very interesting. It is an open secret that the adoption of fundamental freedoms such as the freedom of association and expression would necessitate the unbanning of political parties, which remain an anathema to the survival of the Tinkhundla system of government. Whether this state of affairs is desirable or not cannot be fully explored in this study, suffice it to say that a bill of rights would act as a restraining influence and maintain the rule of law and respect for individual rights and freedoms. Although the latter exist in the United Kingdom in the absence of a bill of rights, the Kingdom of Swaziland needs effective legal guarantee of fundamental rights and freedoms since the Swazi public has not yet achieved the high level of informed public opinion that the United Kingdom has.

The harmonisation of these two institutions for the purposes of ensuring that the King is a constitutional monarch will only be possible if a suitable environment is created for compromise between traditional authorities on the one hand and progressives on

2823/2000; and *Chief Mtfuso II (formerly known as Nkenke Dlamini) and Others v Swaziland Government* Case No 40/2000(an Appeal Court Decision).

the other. If that is not done this ancient institution will eventually meet the fate of others of its kind in Africa.

In most African states, the institution of traditional leadership has either been so weakened as to be insignificant or abolished due mainly to the fact that it ceased to be responsive to the needs of the people and became a weapon for the violation of fundamental rights and freedoms of the people for personal gain particularly during the colonial period. In Swaziland, the institution was fortunate enough to escape this predicament. In order to appreciate how fortunate the institution of traditional leadership has been and still is in Swaziland, a comparison can be made with the predicament of the institution at the hands of a democratically elected government in South Africa. By way of illustration a brief comment will be made on the South African case of Congress of Traditional Leaders of South Africa v the MEC for Local Government and Housing, Eastern Cape Province, and others 1996 (2) SA 898 (Tk).²⁶²

Briefly the facts of the case are as follows: on the 2nd of February 1993 the South African government promulgated the Local Government Transition Act 209 of 1993, which provided the machinery for the transition from a racially based system of local government to a non- racial system. On the 15th of July 1994 the President acting in terms of section 16 of the Transition Act, issued Presidential Proclamation R129 of 1994 in terms whereof the terms of the provisions of the Transition Act were made

²⁶² According to its constitution the Congress of Traditional Leaders of South Africa is a legal *persona* and membership is open to all traditional leaders and their spouses and children provided that they subscribe to the beliefs, resolutions, aims and objectives of CONTRALESA. Its aims and objectives around the protection of the interests of the institution of traditional leadership.

applicable throughout the national territory of South Africa including those areas which fell within the area of the TBV states. On the 30th June the President, again acting under section 16A of the Transition Act, issued Presidential Proclamation R65 of 1995 in terms whereof he purported to amend the Act by the insertion of part VA consisting of section 9A to 9E. In terms of these sections certain rural local government structures were established, in particular district councils and transitional representative councils.

In consequence of the promulgation of the aforementioned Proclamations, the applicant launched an urgent application for, *inter alia*, an order declaring Proclamation R129 OF 1994 to be unconstitutional, and an order that all regulations and/or directives issued in terms of the Proclamations or any legislation amending the Transition Act, including Provincial Proclamations 18,19 and 20 be declared invalid, and certain other relief in terms whereof tribal and regional authorities would continue to exist and exercise their functions until such time as new legislation had been passed by the competent authority after having been referred to the House or Council of Traditional Leaders in terms of the Republic of South Africa Constitution Act 200 of 1993.

Due to the fact the application was dismissed following argument on points *in limine* raised by the respondent, which were upheld, the court never addressed the nature of the applicant's case on the merits.²⁶³ It would seem, however, that the applicant's

²⁶³ That on the papers the deponent to the affidavit chief Gwadiso, had no authority on behalf of the applicant to institute the application or to depose to the affidavit.

That CONTRALESA had no locus standi to bring the application in that it did not have a direct and substantial interest in the subject matter of the litigation. Held the

essential complaint was that the application of the Transition Act to rural areas in the Eastern Cape deprived traditional leaders of their powers in terms of various legislation which was not specified by the applicant, which powers were in some sense entrenched in the substantive provisions of the Constitution of the Republic of South Africa of 1993. Quite clearly traditional leaders in present day Southern Africa remain deprived of a significant role in national government. It is up to the Swazi royal establishment therefore to use the power that they have not only for the national good but also as an example to other nations within the continent that are trying to create a clearly defined role for traditional leaders, that constitutional democracy and traditional leadership can co-exist

law, as it is stands at present does not permit the bringing of representative class actions save in those circumstances specified in section 7 of the constitution Act. That the court had no jurisdiction to enquire into the validity of certain of the legislation attacked by the applicant.

GLOSSARY OF SWAZI WORDS AND PHRASES

<i>Bantfwabenkhozi</i>	Princes/ Princesses
<i>Bucopho</i>	Inkhundla Committee
<i>Emakhadzambili</i>	The original inhabitants of the territory known as Swaziland
<i>Incwala</i>	first fruits ceremony
<i>Indvuna</i>	headman
<i>Inhlambelo</i>	sacred enclosure erected for ceremonial purposes during the incwala ceremony
<i>Inkhosi ayidleli phansi</i>	a custom which, inter alia, provides that where a princess of royal blood marries a polygamist her son becomes the automatic heir
<i>Inkhosi ibusa ngemabandla</i>	the king rules in Council
<i>Inkhundla/Tinkhundla (plural)</i>	traditional meeting place. <i>Tinkhundla</i> is also the Swazi system of government
<i>Kwembula ingubo</i>	the traditional equivalent of an appeal
<i>Libandla</i>	general council of state
<i>Libandla ncane</i>	executive council
<i>Libutfi / Emabutfo (plural)</i>	age-grade regiments
<i>Liqioqo</i>	inner council of state
<i>Lusendvo</i>	family council
<i>Ndlovukazi</i>	she elephant/ Queen Mother
<i>Ngwenyama</i>	Lion/ King
<i>Sibaya</i>	Kraal
<i>Tibi Tendlu atikhishelwa</i>	

<i>Ngaphandle</i>	family secretes that might reflect badly on the family are not told to outsiders
<i>Umdzabuko</i>	creation
<i>Umhlanga</i>	reed dance
<i>Umlomo longacali manga</i>	the mouth that utters no lies
<i>Vusela</i>	to ask the people how they are doing

ABBREVIATIONS

BNP	Basutoland National Party
CAC	Constitutional Advisory Body
CONTRALESA	Congress of Traditional Leaders of South Africa
EAC	European Advisory Council
ECEA	European Combined Executive's Association
INM	Imbokodvo National Movement
JSC	Judicial Services Commission
NGWASOREP	Ngwane Socialist Revolutionary Party
NNLC	Ngwane National Liberatory Congress
PUDEMO	People's United Democratic Movement
RCC	Royal Constitutional Commission
SLR	Swaziland Law Reports
SNC	Swazi National Council
SPA	Swaziland Progressive Association
SPP	Swaziland Progressive Party
SWALIMO	Swaziland Liberatory Movement

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South Africa

A Draft Discussion Document Towards a White Paper on Traditional Leadership and Institutions 11 April 2000

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