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**THE SWAZILAND
COMMISSION ON HUMAN
RIGHTS AND PUBLIC
ADMINISTRATION INTEGRITY**
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PART A. INTRODUCTORY COMMENTARY

1 Introduction

The Swaziland Commission on Human Rights and Public Administration Integrity (SCHR) is based on the Constitution of the Kingdom of Swaziland Act of 2005 (Constitution).¹ Despite its establishment in 2005, the SCHR remains a nascent institution that has not had significant impact in promoting and protecting human rights in Eswatini (formerly Swaziland). It is yet to achieve its vision of being a “relevant and effective commission in a just society in which the principles of human rights and good governance are observed and preserved”.² This could be a result of, among other things, the fact that the SCHR commenced its operations in 2009, which was four years after the Constitution came into effect.

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1 According to section 2 of the Declaration of Change of Swaziland Name Notice (Legal Notice No 80 of 2018), which came into effect on 19 April 2018, “[t]he name the Kingdom of Swaziland is changed to Kingdom of Eswatini”. Section 3 of the Declaration provides that reference in any written law or international agreement or legal document to Swaziland shall be read and construed as reference to Eswatini. The change of name was a unilateral action by King Mswati III.

2 See vision of the SCHR, available at <https://bit.ly/2FUaj4u> (accessed 1 December 2018).

The SCHR must be understood within the context of the Eswatini political system, which has been described as “a very different political experiment, [with] a medieval absolute monarch trying to survive alongside a modern democracy”.³ Eswatini arguably represents one of the most confused systems of government in human history, or at any rate as seen from perspective of an ideal of democracy.

The Constitution states that it (as a constitution) arose from a need “to blend the good institutions of traditional law and custom with those of an open and democratic society so as to promote transparency and the social and cultural development of our Nation”.⁴ However, the system of government remains undemocratic and generally devoid of human rights principles. The reference to “an open and democratic society” and the promotion of “transparency” is misplaced in the context of Eswatini, since these ideals are constantly violated by the authorities: indeed, the Eswatini political system is intrinsically opposed to these human rights ideals. The SCHR is, nevertheless, mandated to promote and protect human rights within this context.

This chapter describes the system of government in the Kingdom of Eswatini, after which it examines the establishment and evolution of the SCHR. It goes on to discuss the nature of the Commission, its context, its mandate and its public accountability.

2 Eswatini’s system of government

According to the Constitution, Eswatini’s system of government a “democratic, participatory, *tinkhundla*-based system which emphasises devolution of state power from central government to *tinkhundla* areas and individual merit as a basis for election or appointment to public office”.⁵ The Constitution provides that “Swaziland is a unitary, sovereign, democratic Kingdom”,⁶ and that it “shall be a democratic country dedicated to principles which empower and encourage active participation of all citizens at all levels in their own governance”.⁷

3 P Fabricius, “Shrugging off an Imported Democracy: Distressing Signs of Return to Authoritarian Roots”, *The Star* (27 April 2001), p 8.

4 Paragraph 5 of the Preamble to the Constitution.

5 Section 79 of the Constitution.

6 Section 1(1) of the Constitution.

7 Section 58(1) of the Constitution. Proclamation 12 of the King’s Proclamation to the Nation, Decree No 12 of 1973 (1973 Decree). For more information on Swaziland, see S Gumedze, “Swaziland”, in C Heyns (ed) *Human Rights in Africa* (2004), p 1580.

In practice, though, the Kingdom of Eswatini remains a non-party state. As a result, the legitimacy and credibility of elections are hampered by the electoral mechanism, which does not permit political parties, and the design of the constitutional powers, which gives the King greater power than the electorate.

It has been argued that “[t]he absence of effective participation of political parties in the political field indicates that political parties in Swaziland remain outsiders in so far as governing the country is concerned”.⁸ This limits space for political inclusion, participation and plurality of opinion.⁹ It has been argued, too, that “[t]he *Tinkhundla* system of government which is devoid of fundamental tenets of democracy remains intact”.¹⁰ The situation will continue as long as the Constitution stays in force. This makes the context within which the SCHR functions one that is hostile to the promotion and protection of human rights. This is particularly difficult because the Constitution does not only provide for a governance system based on a monarch who is above the Constitution but the overriding culture is anti-democracy, anti-rule of law, and anti-human rights.

The Eswatini human rights record remains poor. For example, restrictions on freedom of association and assembly continue. Human Rights Watch reported that in 2018 a protest by the Trade Union Congress of Swaziland (TUCOSWA) about salaries was met by a heavy-handed police force and resulted in serious injuries.¹¹ The Royal Swaziland Police (RSP) violated human rights notwithstanding that the Police Service Act 22 of 2018 makes it a disciplinary offence for officers to use unnecessary force.

Eswatini has recently seen the courts sanction forced evictions that left citizens homeless. It was reported by Human Rights Watch that in April 2018, 61 people in Malkerns were evicted from their homes after 57 years

8 *Ibid.*

9 See the 2010-2015 UNDP Draft country programme document for Swaziland (2011-2015), DP/DCP/SWZ/2, paragraph 7.

10 T Maseko, “Constitution-Making in Swaziland: The Cattle-Byre Constitution Act 001 of 2005”, draft paper presented at African Network of Constitutional Law Conference on Fostering Constitutionalism in Africa, Nairobi April 2007. See also T Maseko, *The Writing of a Democratic Constitution in Africa with Reference to Swaziland and Uganda* (unpublished LLM thesis, Faculty of Law, Peace and Human Rights Centre, Makerere University, 31 October 2005).

11 See Human Rights Watch, “Eswatini (formerly Swaziland) Events of 2018”, available at <https://www.hrw.org/world-report/2019/country-chapters/swaziland#2cb927> (accessed 6 March 2019).

of occupation. In July 2018, 150 other long-term residents were also evicted from a Malkerns' farming settlement. Of concern was the fact that these evictions were carried out without consideration of compensation or the provision of alternative accommodation or other support for the evicted residents.¹² These are but a few examples of the kind of human rights violations which the SCHR is required to address.

3 Establishment and evolution of the SCHR

The SCHR consists of “a Commissioner for Human Rights and Public Administration” and “at least two Deputy Commissioners for Human Rights and Public Administration as may be necessary for the effective discharge of the functions of the Commission”.¹³ According to section 163(1) of the Constitution, the SCHR must have been established “within a year of the first meeting of Parliament after the commencement of this Constitution”. The SCHR was only appointed into office in September 2009, through Legal Notice 143 of 2009.

The unexplained delay in its establishment raises questions about how serious the authorities are in protecting and promoting fundamental human rights in Eswatini. First, the delay was in and of itself a violation of the Constitution; secondly, the delay could not even be challenged, as the SCHR must be appointed by the King, who is immune from any legal process (discussed below).

The SCHR is based in Mbabane, the capital city of the Kingdom of Eswatini.¹⁴ Currently, it does not have any offices in the regions or districts, which makes it inaccessible to the indigent population who live in the Kingdom's remote areas. The offices of the SCHR were initially at eNkhanini, one of the royal places and a place where the wearing of pants by women is strictly forbidden; indeed, Eswatini custom and tradition also prohibit access to women in mourning attire. This basically meant that women in trousers or mourning attire could not enter the premises of the SCHR to lodge a grievance about a human rights infringement; as such, it could be viewed as a direct violation of section 26(1) of the Constitution, which provides that “[a] person shall not be deprived of the freedom of movement, that is, the right to move freely throughout Swaziland”.

12 *Ibid.*

13 Section 163(2) of the Constitution.

14 Mbabane Office Park, Sibeketelo Building.

4 The nature of the SCHR

The SCHR has three concerns: with human rights, with public administration and with integrity. Put differently, it is a human rights commission, a public administration commission and an integrity commission. As a three-in-one entity, the SCHR's mandate on human rights is heavily compromised. Regarding the function relating to human rights, the SCHR is, among other things, empowered to investigate complaints concerning alleged violations of fundamental rights and freedoms under the Constitution.¹⁵ Regarding public administration, it is, among other things, empowered to investigate complaints of injustice, corruption, abuse of power in office, and unfair treatment of any public officer in the exercise of official duties.¹⁶ As regards integrity, the SCHR must receive and consider written declarations by persons holding public office concerning their property, assets or any benefit gained or liability owed by them directly or indirectly.¹⁷

In practice, the Commission operates under the Ministry of Justice and Constitutional Affairs as one of the latter's departments or units.¹⁸ On the reporting lines of the SCHR, in practice it does not have direct access to Parliament, but instead submits its reports to Parliament by way of the

15 Section 164(1)(a) of the Constitution.

16 Section 164(1)(b) of the Constitution.

17 Section 241(1) of the Constitution. The public officers include the following: Prime Minister, Deputy Prime Minister and Minister; member of the King's Advisory Council; Member of Parliament including the Presiding Officers; Chairman and Member of a Service Commission or Board; Army Commander and Deputy Army Commander; Commissioner of Customs; Commissioner of Police and Deputy Commissioner of Police; Commissioner of Labour; Commissioner of Correctional Services and Deputy Commissioner of Correctional Services; Commissioner of Taxes; Justice of the Superior Court of Judicature and all judicial officers; Ambassador, High Commissioner, and Head of Diplomatic or Consular Mission; Secretary to the Cabinet; Commissioner and Deputy Commissioner of the Integrity Commission; Member of the Elections and Boundaries Commission; Attorney-General and Deputy Attorney-General; Head of Ministry of government or department; Director of Public Prosecutions and Deputy Director of Public Prosecutions; Managing Director, general manager and departmental head of a public corporation or company in which the Government has a controlling interest; and in the public service and any other public institution as Parliament may prescribe.

18 The SCHR does not have an independent website and is found only under the website of the Ministry of Justice and Constitutional Affairs.

Ministry of Justice and Constitutional Affairs.¹⁹ This further compromises its independence,²⁰ a point which is discussed in further detail later in this chapter.

The SCHR's mandate on corruption has seemingly been duplicated by the Eswatini Anti-Corruption Commission. Section 164(1)(b) of the Constitution provides that the SCHR shall "investigate complaints of ... corruption ... by any public officer in the exercise of official duties". As if this provision were not sufficient, section 164(1)(e) of the Constitution provides that the SCHR shall "investigate instances of alleged or suspected corruption ... by officials and ... take or recommend appropriate steps, including reports to the ... Director of Public Prosecution". Section 10(b) of the Prevention of Corruption Act of 2006 provides that the Anti-Corruption Unit shall "receive and investigate complaints of alleged or suspected corrupt practices made against any person, and refer appropriate cases to the Director of Public Prosecution". Clearly, these provisions expose the public to forum-shopping, but, thus far, no pronouncement by the courts has been made on this duplication.

The SCHR is supported by a secretariat headed by an executive secretary or chief executive officer, a position currently occupied by Ms Linda Nxumalo, a lawyer. The secretariat is composed of a staff complement of not more than ten. Of these, only four staff members could be considered to be technical staff (including lawyers) who are critical in investigating human rights violations. This falls far short of a secretariat capable of providing effective support to the SCHR, the mandate of which goes beyond the subject of human rights.

4.1 Legal framework

As mentioned, the SCHR is a creature of the Constitution, established in terms of section 163 of the Eswatini Constitution. It is important to note that the Constitution provides that "a person shall not qualify for appointment as Commissioner unless that person qualifies for

19 According to the Ministry of Justice and Constitutional Affairs' website, "The Commission produces an annual report to parliament on the performance of the commission which includes statistics in such form and such details as may be prescribed of the complains received by the Commission and results of any investigations." Available at <http://www.gov.sz/index.php/ministries-departments/ministry-of-justice/human-rights> (accessed 14 December 2018).

20 See paragraph 16 of Report of the Joint Promotion Mission to the Kingdom of Swaziland by Commissioner Pansy Tlakula and Commissioner Solomon Dersso, 7-11 March 2016. Adopted during the 60th Ordinary Session of the African Commission on Human and Peoples' Rights, held 8-22 May 2017 in Niamey, Republic of Niger.

appointment as judge of the superior courts".²¹ The process of appointing the members of the SCHR is, arguably, not competitive, transparent and open. In practice, the suitability of the commissioners, including their competence and relevant professional experience, is not a consideration. Furthermore, their appointment is not subject to open and transparent scrutiny by Parliament or even the general public. This speaks volumes when one considers the fundamental rights and freedoms to be promoted and protected by the Commission.

The Constitution provides for the protection and promotion of fundamental rights and freedoms.²² Section 14(2) provides that:

[t]he fundamental rights and freedoms enshrined in this Chapter shall be respected and upheld by the executive, the legislative and the judiciary and other organs or agencies of government and, where applicable to them, by all natural and legal persons in Swaziland, and shall be enforceable by courts as provided in this Constitution.

The Constitution enshrines the following human rights: the fundamental rights and freedoms of the individual;²³ protection of right to life;²⁴ protection of right to personal liberty;²⁵ protection from slavery and forced labour;²⁶ protection from inhuman or degrading treatment;²⁷ protection from deprivation of property;²⁸ equality before the law;²⁹ right to fair hearing;³⁰ protection against arbitrary search and entry;³¹ protection of freedom of conscience or religion;³² protection of freedom of expression;³³ protection of freedom of assembly and association;³⁴ protection of freedom of movement;³⁵ rights and protection of the family;³⁶ rights and freedoms of women;³⁷ rights of the child;³⁸ rights of persons with

21 Section 163(4) of the Constitution.

22 Chapter III.

23 Section 14 of the Constitution.

24 *Ibid*, section 15.

25 *Ibid*, section 16.

26 *Ibid*, section 17.

27 *Ibid*, section 18.

28 *Ibid*, section 19.

29 *Ibid*, section 20.

30 *Ibid*, section 21.

31 *Ibid*, section 22.

32 *Ibid*, section 23.

33 *Ibid*, section 24.

34 *Ibid*, section 25.

35 *Ibid*, section 26.

36 *Ibid*, section 27.

37 *Ibid*, section 28.

38 *Ibid*, section 29. See also section 31 on the abolition of the status of illegitimacy.

disabilities;³⁹ rights of workers;⁴⁰ right to administrative justice;⁴¹ and property rights for spouses.⁴²

4.2 The independence of the SCHR

The question of the independence of the SCHR must be understood in the context of Eswatini's political landscape. Suffice it to say that, although not yet in force, the Human Rights and Public Administration Bill of 2011 (the Bill) seeks to provide for the independence of the Commission, and states that it "shall be independent in its performance of its functions and shall not be subject to the direction or control of any person or authority".⁴³

The appointment of the members of the SCHR by the King (on the advice of the Judicial Service Commission) in terms of section 163(3) of the Constitution presents a challenge for three reasons. First, the independence of the SCHR is compromised inasmuch as the Judicial Service Commission, upon whose advice it is appointed (by the King), is appointed by the King.⁴⁴ Secondly, the fact that the SCHR is itself appointed by the King presents yet another challenge as it cannot exercise its independence, in the true sense of the word.

Thirdly, Eswatini's governance is characterised by a culture of interference by the country's leadership. The African Commission on Human and Peoples' Rights noted that the Government of Eswatini has a history of interference in oversight bodies and that for the SCHR to function appropriately, its enabling law should be enacted.⁴⁵ This law is currently in a form of a bill, namely the Human Rights and Public

39 *Ibid*, section 30.

40 *Ibid*, section 32.

41 *Ibid*, section 33.

42 *Ibid*, section 34.

43 Clause 24 of the Human Rights and Public Administration Commission Bill, 2011.

44 The Chief Justice (the Chairman of the JSE) is appointed by the King in terms of section 153(1) of the Constitution; the two legal practitioners of not less than seven years' practice and in good standing are appointed by the King in terms of section 159(2)(b) of the Constitution; the chairman of the Civil Service Commission (who is a member of the service commission) is, in terms of section 173(3) of the Constitution, "appointed by the King on the recommendation of a line Minister or any other authority as may be provided in this Constitution or any other law"; the two persons are appointed by the King in terms of section 159(2)(d).

45 See paragraph 174 of the Report of the Joint Promotion Mission to the Kingdom of Swaziland by Commissioner Pansy Tlakula and Commissioner Solomon Dersso, 7-11 March 2016. Adopted during the 60th Ordinary Session of the African Commission on Human and Peoples' Rights, held 8-22 May 2017 in Niamey, Republic of Niger.

Administration Commission Bill of 2011. It is submitted that the promulgation of the Bill will not necessarily address the challenges associated with the independence of the SCHR.

4.3 Appointment procedure

As previously stated, the Constitution provides that members of the SCHR shall be appointed by the King on the advice of the Judicial Service Commission.⁴⁶ The SCHR consists of six members, that is, the commissioner and at least two deputy commissioners “as may be necessary for the effective discharge of the functions of the Commission”.⁴⁷ As noted too, the King also appoints all the members of the Judicial Service Commission.

The qualification for a deputy commissioner of the SCHR is that he or she must be of high moral character and proven integrity, and must possess considerable experience and demonstrated competence in the conduct of public affairs, or be of high calibre in the conduct of public affairs.⁴⁸ Currently, there are five deputy commissioners. The first Chairperson of the Commission was a former Minister of Justice and attorney-at-law, Reverend David Matse, who was previously appointed to the Eswatini cabinet and later relieved of his duties after he failed to adhere to instructions to fire a former High Court judge. The current Chairperson, Sabelo Masuku, is a practising attorney and does not work for the Commission on a full-time basis.⁴⁹

The current deputy commissioners are Princess Sidvumolesihle,⁵⁰ Chief Mawandla Gamedze,⁵¹ and Pastor Phumelele Thwala. They are all part-time commissioners. A prominent traditional healer-turned-pastor of

46 Section 163(3) of the Constitution.

47 Section 163(2) of the Constitution.

48 Section 163(5) of the Constitution.

49 Masuku is the son of a former Deputy Prime Minister and now a regional administrator for the Shiselweni district of Eswatini. See B Dlamini, “DPM Declares His Assets ... to His Son”, *Times of Swaziland* (10 February 2012), available at <http://www.times.co.sz/News/72366.html> (accessed 5 December 2018).

50 This is a daughter of the late King Sobhuza II and a half-sister of reigning King Mswati III.

51 The only known credentials of Chief Mawandla are that he is a chief of Phonjwane area in the Lubombo region.

the Church of Nazarene, Reverend Grace Masilela, was also a deputy commissioner but later resigned.⁵²

It is important to note that none of these commissioners underwent a public interview for his or her appointment. The process of appointing these individuals to the SCHR was not transparent, competitive and equitable, which raises serious concerns about the body's integrity and competency. Indeed, a scan through the credentials of the commissioners shows that they are individuals who are generally loyal to the monarchy and hence uncritical of the status quo. It is also in serious doubt if they have a thorough knowledge of human rights. In fact, only the current chairperson, Mr Masuku, and Pastor Thwala are known to be lawyers. The sole justification the then Minister of Justice and Constitutional Affairs, Ndumiso Mamba, gave for the composition of the initial members of the SCHR was that "the other individuals represent[ed] a cross-section of local society including gender".⁵³

Clause 25 of the Human Rights and Public Administration Commission Bill of 2011 provides that the SCHR:

shall be competent in every respect to protect and promote human rights in Swaziland in the broadest sense possible and to investigate human rights violations on its own motion or upon complaints received from any person, class of persons or body.

The presence of a traditional leader on the SCHR presents a challenge, in that in some instances Eswatini law and custom are in conflict with human rights norms. The same is true of the presence of religious ministers, whose beliefs may not necessarily be in agreement with some (if not all) human rights norms and standards. On the face of it, the SCHR is an entity which in its composition is arguably not comprised of competent individuals.

4.4 Financial autonomy

The SCHR has not been effective over the years due to capacity and

52 Rev. Masilela only had a qualification in theology. See Nhlanhla, "Amazing 28-Year-Old Writes St 5 Exam", *Times of Swaziland* (1 July 2012), available at <http://www.times.co.sz/News/77103.html> (accessed 23 December 2018).

53 S Magagula, "Human Rights Commission Launched", *Swazi Observer* (5 September 2009), available at <https://bit.ly/2NqkvYO> (accessed 18 December 2018). The requirement of "representation from a cross-section of local society" is not a constitutional requirement for the composition of the SCHR.

financial constraints. It was previously referred to as a “white elephant”.⁵⁴ By the end of 2011, more than two years after the appointment of the commissioner, it was still in the process of recruiting its secretariat.⁵⁵ The Commission pleaded poverty in undertaking a less-than-thorough study for a poorly drafted report seeking to cover the period 2007-2010, which was prepared for the Office of the High Commission for Human Rights’ Summary of Stakeholders Information.⁵⁶ In this report, the role that the Commission played in ensuring promotion and respect for human rights in Swaziland was non-existent. Instead, the report was largely descriptive and relied heavily on secondary sources.⁵⁷

Although not yet in force, the Human Rights and Public Administration Commission Bill of 2011 provides for the funding of the SCHR. Article 21(1) of the Bill stipulates that the funds of the Commission shall consist, first, money appropriated from the Consolidated Fund;⁵⁸ secondly, any donations, grants, bequests or loans made by any person or organisation or any government of any country to the Commission;⁵⁹ and, thirdly, any other monies that may vest in or accrue to the Commission, whether in terms of this Act or otherwise. Currently, the SCHR does not have a budget, at least officially. It is still under the Ministry of Justice and Constitutional Affairs.

5 Mandate of the SCHR

The mandate of the SCHR is two-pronged. The first part of the mandate is mandatory and the second is non-obligatory.

5.1 Obligatory mandate

First, the SCHR shall “investigate complaints concerning alleged violations of fundamental rights and freedom under the Constitution”.

54 See The Nation, “Human Rights Body Turning into a White Elephant” (February 2012), available at <http://www.theswazination.com/Interview-February-2012.html> (accessed 12 December 2018).

55 See Submissions for OHCHR’s Summary of Stakeholders Information Presented by the Swaziland Commission on Human Rights and Public Administration/Integrity – Swaziland, October 2011, available at <https://bit.ly/2J319EK> (accessed 12 December 2018).

56 *Ibid.*

57 The Commission acknowledged that this was due largely to financial constraints.

58 This money is earmarked for the salaries and allowances payable to members of the Commission and the recurrent administrative expenses of the Commission.

59 These can only be received with the approval of the minister.

Secondly, it shall “investigate complaints of injustice, corruption, abuse of power in office and unfair treatment of any person by a public officer in the exercise of official duties”. Thirdly, the SCHR shall:

investigate complaints concerning the functioning of any public service, service commission, administrative organ of the government, [or] the Armed Forces in so far as the complaints relate to the failure to achieve acceptable delivery of services or equitable access by all in the recruitment to those services or fair administration by those services.

Fourthly, the SCHR shall “take appropriate action for the remedying, correction or reversal of instances specified [above] through such means as are fair, proper and effective”. Fifthly, it shall “investigate instances of alleged or suspected corruption and the misappropriation of public monies or property by officials and to take or recommend appropriate steps, including reports to the Attorney-General or the Director of Public Prosecutions or the Auditor-General”. Sixthly, the SCHR shall “eliminate or foster the elimination of corruption, abuse of authority or public office”. Finally, the SCHR shall “promote and foster strict adherence to the rule of law and principles of natural justice in public administration”.

5.2 Non-obligatory mandate

The SCHR may investigate any matter that falls under its obligatory mandate as follows: first, where a complaint is duly made to the Commission by any person alleging that the complainant has sustained an injustice as a result of a fault in administration; secondly, where a Member of Parliament requests that the Commission investigate the matter on the ground that a person or body of persons specified in the request has or may have sustained an injustice; and thirdly, in any other circumstances in which the commissioner, in good faith, considers that the Commission ought to investigate the matter on the ground that some person or body of persons has or may have sustained an injustice.

5.3 Compliance with the Paris Principles

Since its establishment, the SCHR has arguably been a lame duck insofar as the promotion and protection of human rights in Swaziland is concerned. The Commission is still not accredited by the International Coordinating Committee of National Institutions for the Promotion and Protection of Human Rights (ICC), which raises the question of its compliance with the Paris Principles. Only those Human Rights Institutions that comply with the Paris Principles may apply for accreditation to the ICC. The Paris Principles list the requirements for

independence and the broad mandate of National Human Rights Institutions (NHRIs).⁶⁰ In terms of the Paris Principles, the key elements of the composition of a national institution are its independence and pluralism.

The SCHR falls short of these key requirements for several reasons. Currently, it operates in the absence of an enabling statutory law.⁶¹ Eswatini drafted the Human Rights and Public Administration Commission Bill in 2011, which is aimed at operationalising the constitutional provisions establishing the Integrity Commission. According to Langwenya, once the Bill is finalised by Parliament, it will ensure that the Commission can meet all its strategic objectives.⁶² This argument is yet to be tested.

5.4 Monitoring domestic human rights violations

While the SCHR is obliged to “investigate complaints concerning alleged violations of fundamental rights and freedoms under this Constitution”,⁶³ it is, however, barred from investigating a “matter relating to the exercise of any royal prerogative by the Crown”.⁶⁴ This means, therefore, that if a matter relates to a violation of human rights associated with the exercise of any royal prerogative by the Crown, the Commission cannot undertake any investigation relating to it. This is so despite the fact that the Commission is, at least on paper, “independent in the performance of its functions and ... [not] subject to the direction or control of any person or authority”.⁶⁵

Even though the independence of the SCHR is guaranteed by the Constitution, it remains a myth. The Constitution does not provide for any

60 National Institutions for the Promotion and Protection of Human Rights, 20 December 1993. A/RES/48/134, available at <http://www.un.org/documents/ga/res/48/a48r134.htm> (accessed 18 December 2018).

61 This is in contradistinction to the South African Human Rights Commission (SAHRC), which is established by section 181(1)(b) of the Constitution of South Africa, Act 108 of 1996, as one of the state institutions mandated to strengthen constitutional democracy. Section 184(1) of the Act provides that “[t]he South African Human Rights Commission must – a) promote respect for human rights and a culture of human rights; b) promote the protection, development and attainment of human rights; and c) monitor and assess the observance of human rights in the Republic”.

62 M Langwenya, *Swaziland Justice and the Rule of Law: A Review by AfriMap and the Open Society Initiative for Southern Africa*, Open Society Foundations (March 2013), p 73.

63 Section 164(1) of the Constitution.

64 Section 165(3)(c) of the Constitution.

65 Section 166 of the Constitution.

oversight mechanism for the functioning of the Commission. In other words, the Constitution is silent on the question of which authority the Commission is supposed to report to regarding its functions. The fact that it is appointed by the King suggests that the only authority to which it is implicitly obliged to report is none other than the appointing authority, that is, the King.⁶⁶

5.5 Receiving and dealing with complaints and petitions

The SCHR has a standard form in which a complainant can detail a complaint or petition. In the form, the complainant sets out the rights in the Constitution which are or were violated. The complainant also states the relief sought for the violation. The matter is then handled by the SCHR accordingly. It must be noted that the absence of a dedicated website for the SCHR deprives the general public of an understanding of the process it follows in handling complaints or petitions. The complaint mechanism should be clear and allow the public to monitor complaints submitted to the SCHR.

As part of its mandate, the SCHR has been involved in court proceedings for the purposes of protecting human rights. In *The Commissioner on Human Rights and Public Administration/Integrity & Another v Umbane Limited and 2 Others*,⁶⁷ the SCHR brought an interlocutory application on behalf of Sofi Dlamini and Others (second applicants) for the stay of execution of an order of the Supreme Court that directed their eviction of the second applicants from a farm in the Manzini district. The eviction order was granted in favour of the first respondent, Umbane Limited. The SCHR approached the Court on the ground that the eviction order was executed in an inhuman and degrading manner. The SCHR argued that this constituted a violation of fundamental human rights and freedoms. A counter-argument was made that the SCHR was seeking a remedy that was fundamentally an alteration of a Supreme Court judgement, which rendered the proceedings vexatious.

The Court ruled against the SCHR. It held that it had wrongly interpreted section 18 of the Constitution, dealing with the protection from inhuman and degrading treatment; this section, the Court maintained, was crafted with reference to the protection against torture or punishment in a

66 Section 163(3) of the Constitution. This is in contradistinction to the SAHRC, which is accountable to the National Assembly and obliged to report to it its activities and performance of its functions at least once a year. See section 181(5) of the Constitution of the Republic of South Africa, Act 108 of 1996.

67 (902/2011) [2017] SZHC 211 (4 April 2017).

cruel and degrading manner, and was not applicable to an execution of an eviction order.⁶⁸ Despite this decision, the Court established that the Commission had *locus standi* in the matter and could sue in its name when challenging the validity of a legislation or regulation. The Court further held that the SCHR could institute proceedings through the office of the Director of Public Prosecutions or the Attorney-General.

The SCHR also intervened in response to media reports of violence at polling stations on election day on 21 September 2018. Vehicles of the Elections and Border Commission (EBC) were forced to turn back from polling stations for safety after roads leading to counting centres were barricaded by protesting crowds. After the general elections, the SCHR called upon the EBC to investigate the causes of violence and take the necessary action.⁶⁹ It is not clear, however, why the SCHR could not investigate these matters itself since they concerned alleged violations of human rights.

5.6 The Human Rights and Public Administration Commission Bill of 2011

For purposes of operationalising the SCHR, the Human Rights and Public Administration Commission Bill of 2011⁷⁰ was drafted with the aim of setting out the Commission's powers, functions and responsibilities. It further sets out the procedure to be followed by the SCHR when conducting investigations, and provides remedies available to complainants. The delay in adopting this bill remains a cause for concern. In terms of Article 15(2) of the Bill, decisions of the SCHR would be enforced by the High Court.

The Bill provides for the appointment of an executive secretary of the Commission whose office shall be a public office and whose responsibility involves the day-to-day administration of the SCHR.⁷¹ Of importance is the fact that the Bill provides that “the office of the Executive Secretary shall be held by a person who has experience and shown capacity in a profession or in activities devoted or relevant to public administration and the protection of human rights”.⁷²

68 Judgement was delivered on 4 April 2017.

69 See report at <https://allafrica.com/stories/201809300087.html> (accessed 4 December 2018).

70 On file with author.

71 Clause 17(2) of the Human Rights and Public Administration Commission Bill 2011.

72 *Ibid*, clause 17(3).

The Bill also provides that one of the responsibilities of the SCHR is to “promote ratification by [Eswatini] of any international human rights instrument”.⁷³ Eswatini has ratified a plethora of international instruments that have a bearing on human rights.⁷⁴

6 Public accountability

The importance of the public accountability of the SCHR cannot be overemphasised. The public must know the workings of the Commission and appreciate its role with regard to human rights. In terms of section 168(8) of the Constitution, the SCHR:

shall make annual reports to Parliament on the performance of the Commission which reports shall include statistics in such form and in such detail as may be prescribed of the complaints received by the Commission and the results of any investigation.

6.1 Reporting mechanism

Despite the fact that the SCHR was appointed by King Mswati III on 11 September 2009, there is no report that exists as to how it has exercised its functions in terms of section 164 of the Constitution, at least none that is available to the public. This is not only a violation of the Constitution but a serious indictment of the Eswatini government, which is a proponent of good governance, at least on paper.

It is ironic that the SCHR would find it appropriate to submit a report to the Human Rights Council Working Group on the Universal Periodic Review rather than to the general Eswatini population (as the Constitution provides), whose rights it was established to protect and promote. The National Report (covering the period 2007-2010) submitted in accordance

73 *Ibid*, clause 32(e).

74 These include regional instruments such as the Protocol to the African Charter on Human and Peoples’ Rights on the Establishment of an African Court on Human and Peoples’ Rights; the African Charter on Democracy, Elections and Governance; and the African Union Convention on Preventing and Combating Corruption. The international instruments include the Second Optional Protocol to the International Covenant on Civil and Political Rights, aiming at the abolition of the death penalty; the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights; the Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; the International Convention for the Protection of all Persons from Enforced Disappearance; and the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families.

with paragraph 15(1) of the annex to Human Rights Council resolution 5/1 on Swaziland is also silent on how the Commission has performed since its inception in 2009.⁷⁵ This is cause for concern, particularly due to the fact that human rights violations continue unabated in the Kingdom. According to Langwenya, the reasons for this include:

[t]he absence of an [effective and] operational oversight body on human rights; a lack of awareness on the part of citizens; the fact that pre-constitutional legislation is not in line with the Constitution; the Bill of Rights not yet being fully absorbed into the practices of the public administration; judicial proceedings not always meeting all standards for an independent and fair judiciary; Swazi law and custom, as well as its procedures, not always being constitutional in every aspect; and the absence of a legal aid system.⁷⁶

Among other things, the United Nations Country Team recommended that the capacity of the Commission be strengthened to enable it to deliver on its mandate.⁷⁷ This recommendation is yet to be fulfilled.

6.2 Regular consultation

The SCHR regularly consults with civil society organisations. In particular, it has a good relationship with the Co-ordinating Assembly of Non-Governmental Organisations (CANGO), a membership-based non-governmental organisation (NGO) operating in the Kingdom of Eswatini with a membership base of more than 70 NGOs. This partnership should be enhanced to enable the SCHR to join forces with civil society in combating human rights violations in the country.

7 Conclusion

At the top of the list of functions to be performed by the SCHR is the investigation of violations of fundamental human rights and freedoms under the Constitution. On the question of whether it has carried out this function effectively in the time since its establishment, the answer is no. The Commission is yet to prove itself as a force to be reckoned with in the promotion and protection of human rights in Eswatini. This is largely because of the political landscape within which it operates, one inhospitable to the respect for human rights. A consideration of the call for

75 Human Rights Council Working Group on the Universal Periodic Review 12th Session, Geneva, 3-14 October 2011. A/HRC/WG.6/12/SWZ/1.

76 See note 63, p 73.

77 See Human Rights Council Working Group on the Universal Periodic Review Twelfth Session, Geneva, 3-14 October 2011, p 3. A/HRC/WG.6/12/SWZ/1.

a complete overhaul of Eswatini's political system is beyond the scope of this contribution, yet the matter is an important issue which has been raised in many quarters.

It is recommended that the mandate of the SCHR be focused strictly on human rights. After all, it is a national human rights institution. Bringing in the other focus areas – of public administration and integrity – simply muddies the waters as far as its human rights mandate is concerned. It is also recommended that there should be thorough reform of the appointment procedure, which renders the Commission ineffective due to the general lack of competence of its appointed members. The fact that the Commission lacks financial autonomy makes it very difficult for it to be effective in meeting its mandate on human rights.

The question of the accessibility of the Commission must be addressed as a matter of urgency. The general public must be made aware of the role of the SCHR as well as of the processes involved in its complaints or petition mechanism. Some of the shortcomings of the Commission would be addressed by the promulgation of the Human Rights and Public Administration Commission Bill. This would also entail implementing a reporting process and, in so doing, improving the SCHR's accountability. Its regular consultations with civil society should be enhanced, which would serve to increase its visibility in the Kingdom.

The need for a functional, effective, independent, accountable, credible and professional national human rights institution in Eswatini cannot be doubted. The SCHR has an extremely difficult path to follow in fulfilling its mandate on human rights, but that path is viable if some of the concerns raised in this chapter can be addressed. The guiding principle should be article 1 of the Universal Declaration of Human Rights of 1948, which underscores the notion that “[a]ll human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood.” Molding a national human rights commission that gives expression to this overarching principle would be a first step in the right direction.

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PART B. SELECTED HUMAN RIGHTS DOCUMENTS AND MATERIALS

B.1 Constitutional framework

The basic framework for the Eswatini Commission on Human Rights and Public Administration Integrity is laid down in the 2005 Constitution. The relevant provisions are set out as follows:

Part 2: Commission on Human Rights and Public Administration

163.(1) There shall be established within a year of the first meeting of Parliament after the commencement of this Constitution, a Commission on Human Rights and Public Administration in this Chapter referred to as “the Commission”.

(2) The Commission shall consist of –

(a) a Commissioner for Human Rights and Public Administration; and

(b) at least two Deputy Commissioners for Human Rights and Public Administration as may be necessary for the effective discharge of the functions of the Commission.

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

(4) Subject to subsection (5)(a), a person shall not qualify for appointment as Commissioner unless that person qualifies for appointment as judge of the superior courts.

(5) A person shall not be eligible for appointment as Deputy Commissioner unless that person –

(a) is of high moral character and proven integrity; and

(b) possesses considerable experience and demonstrated competence in the conduct of public affairs; or

(c) is of high calibre in the conduct of public affairs.

(6) The first persons to be appointed Commissioner and Deputy Commissioner shall hold office for a term not exceeding seven years and five years respectively and may be reappointed for a single term of five years each.

(7) A person appointed subsequent to the first appointment as Commissioner or Deputy Commissioner respectively shall hold office for a term not exceeding five years and may be re-appointed for a single term.

Functions of the Commission

164.(1) The Commission shall perform the following functions –

- (a) investigate complaints concerning alleged violations of fundamental rights and freedoms under this Constitution;
 - (b) investigate complaints of injustice, corruption, abuse of power in office and unfair treatment of any person by a public officer in the exercise of official duties;
 - (c) investigate complaints concerning the functioning of any public service, service commission, administrative organ of the Government, the Armed Forces in so far as the complaints relate to the failure to achieve acceptable delivery of services or equitable access by all in the recruitment to those services or fair administration by those services;
 - (d) take appropriate action for the remedying, correction or reversal of instances specified in paragraphs (a), (b) and (c) through such means as are fair, proper and effective, including –
 - (i) publicising the findings and recommendations of the Commission;
 - (ii) negotiation and compromise between the parties concerned;
 - (iii) causing the complaint and the findings of the Commission on that complaint to be reported to the superior of an offending person or institution;
 - (iv) referring matters to the Director of Public Prosecutions or the Attorney General for appropriate action to secure the termination of the offending action or conduct, or the abandonment or alteration of the offending procedures; and
 - (v) bringing proceedings to restrain the enforcement of any legislation or regulation by challenging the validity of that legislation or regulation where the offending action or conduct is sought to be justified by reference to that legislation or regulation.
 - (e) investigate instances of alleged or suspected corruption and the misappropriation of public moneys or property by officials and to take or recommend appropriate steps, including reports to the Attorney-General or the Director of Public Prosecutions or the Auditor General;
 - (f) eliminate or foster the elimination of corruption, abuse of authority or public office;
 - (g) promote and foster strict adherence to the rule of law and principles of natural justice in public administration;
 - (h) promote fair, efficient and good governance in public affairs;
 - (i) take such other measures incidental to the above as may be prescribed by Parliament.
- (2) The Commission may investigate any matter referred to in subsection (1) in any of the following circumstances –
- (a) where a complaint is duly made to the Commission by any person alleging that the complainant has sustained an injustice as a result of a fault in administration;
 - (b) where a member of Parliament requests the Commission to investigate the matter on the ground that a person or body of persons specified in the request has or may have sustained an injustice;

- (c) in any other circumstances in which the Commissioner, in good faith, considers that the Commission ought to investigate the matter on the ground that some person or body of persons has or may have sustained an injustice.

Powers of the Commission

165.(1) The powers of the Commission shall include the following –

- (a) to issue subpoenas requiring the attendance of any person before the Commission and the production of any document, record or thing required for the investigation by the Commission;
 - (b) to fine any person for contempt of any subpoena or order, or cause that person to be brought by a competent court for the enforcement of the subpoena or order of the Commission;
 - (c) to question any person in respect of any subject matter under investigation before the Commission;
 - (d) to require any person to disclose truthfully and frankly any information within the knowledge of that person relevant to any investigation by the Commission.
- (2) The Commission may during the course of its proceedings or as a consequence of its findings, make such orders and give such directions as are necessary and appropriate in the circumstances.
- (3) The Commission shall not investigate –
- (a) a matter which is pending before a court;
 - (b) a matter involving the relations or dealings between the Government and any other Government or an international organisation; or
 - (c) a matter relating to the exercise of any royal prerogative by the Crown.
- (4) Subject to the provisions of subsection (3) the Commission may investigate an authority that has been established to investigate a matter where in the opinion of the Commissioner the authority is failing to carry out its mandate with due speed.

Independence of the Commission

166. The Commission shall be independent in the performance of its functions and shall not be subject to the direction or control of any person or authority.

Discretion of Commissioner

167. In determining whether to initiate, continue or discontinue an investigation, the Commissioner shall exercise discretion and in particular and without prejudice to the generality of that discretion, the Commissioner may refuse to initiate or continue an investigation where it appears that –

- (a) the complaint relates to action of which the complainant had knowledge for more than twelve months before the complaint was received by the Commission;
- (b) the subject matter of the complaint is trivial, frivolous, vexatious or is not made in good faith; or
- (c) the complainant has not a sufficient interest in the subject matter of the complaint, unless justified in terms of section 164 (2) (c).

Report of investigation

168.(1) Where a complaint, or request for an investigation, is duly made and the Commissioner decides not to investigate the matter or where the Commissioner decides to discontinue an investigation of the matter, the Commissioner shall inform the person who made the complaint or request of the reasons for not investigating or for discontinuing the investigation.

(2) The Commission may, where necessary, issue an interim report containing such recommendations as it may deem appropriate in the circumstances.

(3) The Commission shall, upon completion of an investigation inform the public officer, person, private enterprise or institution of the findings in writing.

(4) Upon the completion of an investigation the Commissioner shall inform the department of Government or the authority concerned of the results of the investigation and where the Commissioner is of the opinion that any person has sustained an injustice in consequence of a fault in administration, the Commissioner shall inform the department of Government or the authority of the reasons for the opinion and make such recommendations as the Commissioner thinks fit.

(5) The Commission may in the interim report, or in the final report, specify the time within which the injustice should be remedied.

(6) Where the investigation is undertaken as a result of a complaint or request, the Commissioner shall inform the person who made the complaint or request of the findings.

(7) Where the matter in the opinion of the Commissioner is of sufficient public importance or where the Commissioner has made a recommendation under subsection (4) or (5) and within the time specified by the Commissioner no sufficient action has been taken to remedy the injustice, or terminate the offensive conduct then, subject to such provision as may be made by Parliament, the Commission shall lay a special report on the case before Parliament.

(8) The Commissioner shall make annual reports to Parliament on the performance of the Commission which reports shall include statistics in such form and in such detail as may be prescribed of the complaints received by the Commission and the results of any investigation.

Restrictions on matters for investigation

169. The Commission shall not, in investigating any matter leading to, resulting from or connected with the decision of a Minister, inquire into or question the policy of the Government in accordance with which the decision was made.

Vacation of office and immunity of Commissioners

170.(1) The provision of this Constitution relating to the removal of judges of the superior courts from office shall, subject to any necessary modifications and adaptations, apply to the removal from office of the Commissioner or Deputy Commissioner.

(2) A member of the Commission shall have such and like protection and privilege in the case of any action or suit brought against the Commission for any act done or omitted to be done in the honest execution of the duties of the Commission as is by law given to acts done or words spoken by a judge of the superior courts in exercise of the judicial office.

Staff and expenses of the Commission

171.(1) The Commission shall have such staff as shall be appropriate for the effective discharge of the functions of the Commission.

(2) Administrative expenses of the Commission including salaries, allowances and pensions payable to, or in respect of, persons serving with the Commission, shall be charged on the Consolidated Fund.

B.2 Legislative and regulatory instruments

There is presently only the Human Rights and Public Administration Commission Bill of 2011, which is designed to operationalise the Commission established under section 163 of the Constitution.

B.3 Internal rules and regulations

What follows below is a typical form for submitting complaints to the Commission.

COMPLAINT FORM

SWAZILAND HUMAN RIGHTS COMMISSION COMPLAINT FORM

REGION:
CITY/TOWN:
REFERENCE NO: HR/PA/A1 / /2018

PART A. PERSONAL DETAILS

Full name(s) and Surnames:

Nick name(s) if any:

Gender:.....

ID number:

Date of birth:

Age:

Postal address:
Residential address:
Contact numbers: (Work)
(Home)

DETAILS OF ASSOCIATION, ORGANISATION OR ORGAN OF STATE

Full name:

Registration number:

What does it do?.....

Person in charge to talk to.....

Designation of person above.....

Postal address
Telephone number:
Cell number:
Fax number:
E-mail address:

PART B. THE COMPLAINT

1. Date it happened
2. Is it still happening? YES.....N
3. Where did it happen?
 - (a) Place
 - (b) Town/City
 - (c) Region
4. If you know, which right(s) in the Constitution was/were violated or is/are being violated?
.....
.....
5. If you know, the full name(s) and surname(s) of person(s), association(s), organisation(s) or organ(s) of state who violated these rights, please tell us
.....
.....
6. Where can we contact them?
.....
.....
7. If you do not know his/her/its/their names, please tell us anything you do know about him/her/it/them?
.....
.....
8. Did anybody else see or hear what happened?.....
If YES, Full Name(s) and Surname(s).....

How and where can we get in touch with them?.....

.....
.....

(only persons who saw or heard what happened, not those who heard about it from someone else)

9. In your own words tell us exactly what happened (include all information but be as brief as possible)

10. Have you reported the matter to anyone else?.....YES.....NO
If YES, to who? (E.g. police, lawyer).....

11. What outcome do you propose or expect from this complaint? (tell us what you would like to achieve and the relief sought)
.....
.....

12. Do you need an interpreter when attending any proceedings, investigations or hearings at our offices?.....YES.....NO
If YES, the language you speak

13. Please tell us how you heard about the Swaziland Human Rights Commission? (e.g radio advert, newspaper, friend etc)
.....

DATE:

COMPLAINANT