Justice Locked Out: Swaziland's Rule of Law Crisis

International Fact-finding Mission Report

International Commission of Jurists

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International Fact-finding Mission Report, May 2015

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This report was made possible with the support of the the European Union.

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EXECUTIVE SUMMARY

This report reflects the outcome of an international fact-finding mission to Swaziland convened by the International Commission of Jurists (ICJ), in collaboration with the Africa Judges and Jurists Forum (AJJF), Judges for Judges Netherlands (J4J) and the Commonwealth Magistrates' and Judges' Association (CMJA). The mission was undertaken following the attempted arrest and the impeachment of former Chief Justice Ramodibedi and the arrest of the Minister of Justice, two High Court judges and a High Court Registrar. The mission considers that this latest crisis is part of a worrying trend of repeated interference by the Executive and of the Judiciary's inability to defend its independence, exacerbated by apparent strife within the ruling authorities of Swaziland.

Swaziland's Constitution, while providing for judicial independence in principle, does not contain the necessary safeguards to guarantee it. Overall, the legislative and regulatory framework falls short of international law and standards, including African regional standards. The findings set out in this report demonstrate how the *de facto* lack of independence of the Judiciary's governing bodies and a deficit of safeguards in the impeachment procedure have contributed to the latest judicial crisis.

Moreover, the mission found that some members of the Judiciary have exercised their mandate with a lack of integrity and professionalism. In particular, former Chief Justice Ramodibedi failed to protect and defend the institutional independence of the Judiciary, and played a reprehensible role in undermining both the institutional independence of the Judiciary and that of individual judges in Swaziland. He also presided over, or was involved in the case allocation of, legal proceedings in which he had a personal interest or in which he acted at the apparent behest of members of the Executive, further undermining the independence and impartiality of the Judiciary.

Based upon its independent research, including its consultations with various stakeholders, the fact-finding mission determined that this latest crisis has served to expose already existing divisions within and between the Judiciary and the Executive. The consequence has been an abuse of the justice system to settle political scores, further damaging the independence of the Judiciary in the process.

Overall, the events that triggered the international fact-finding mission are both a reflection of a systemic crisis and potentially a contributing factor to its deepening further. In light of its findings, this report includes the fact-finding mission's recommendations for reform to the Crown, Executive and Legislature, the Judiciary, the legal profession, the international community and civil society, which it considers will strengthen the rule of law, respect for human rights and access to justice and effective remedies in the Kingdom of Swaziland.

1 INTRODUCTION

Since 1973, when Sobhuza II, the previous King of Swaziland, proclaimed to be the 'supreme power in the Kingdom of Swaziland' and to hold all legislative, executive and judicial power, Swaziland has become Africa's last remaining absolute monarchy, and one of the vanishingly few existing globally. King Sobhuza II proceeded to repeal the 1968 Constitution that had provided for a constitutional monarchy and a clear separation of powers. Although a new Constitution containing a bill of rights was adopted in 2005 as supreme law, constitutional rights have not made effective through necessary implementing legislation and are often not respected in practice, or are not interpreted and implemented consistently with regional and international human rights law and standards.

Under the 2005 Constitution, the King remains the hereditary Head of State.[1] Executive authority vests in the King, which he may exercise directly or through the Cabinet or a Minister.[2] Supreme legislative authority[3] vests in the King-in-Parliament, i.e. the King acting with the advice and consent of the Senate and the House of Assembly.[4] While sections 138 and 141 of the Constitution proclaim the independence of the Judiciary, the constitutional and legislative framework does not respect the separation of powers nor does it provide the necessary safeguards for the independence of the Judiciary. In practice, judicial independence is not respected, as set out below in this report.

Swaziland is governed under a dual legal system, comprising both a Roman-Dutch based common law system applied in common law or civil courts and a traditional Swazi law and custom based system applied in Swazi National Courts.[5] The superior courts[6] consist of the Supreme Court (which is the apex court[7] and is composed of the Chief Justice and no less than four Justices)[8] and the High Court (which is composed of the Chief Justice *ex officio* and no less than four Judges).[9] Below the superior courts, there are three levels of Magistrates Courts,[10] and Swaziland also has specialty courts, created by statute and with limited jurisdiction.[11] The Judiciary in Swaziland comprises 12 judges of the superior courts and several magistrates in the lower courts.

Recent events in the Kingdom of Swaziland involved the arrest of two judges of the High Court, a Registrar of the High Court and the Minister of Justice, and an attempt to arrest the then Chief Justice Michael Ramodibedi on various charges

[1] Constitution, S. 4(1).
[2] Constitution, S. 64(1) and (3).
[3] Constitution, S. 106(a).
[4] These bodies are partially elected and partially appointed by the King, see Constitution, S.93-95.
[5] Constitution, S. 252.
[6] Constitution, S. 139(1)(a).
[7] Constitution, S. 146(1).
[8] Constitution, S. 145(1).
[9] Constitution, S. 150.
[10] Magistrates Court Act (amended 2011), S. 16. The jurisdiction of each of these courts is limited by the amount of the claim. Appeal lies with the High Court, see Part VIII Magistrates Court Act for civil matters and S. 85-86 for criminal matters, as well as S. 92 regarding the prerogatives of the Director of Public Prosecution.
[11] The Industrial Court has broad jurisdiction over matters touching upon industrial relations and the employer-employee relationship. Decisions may be appealed to the Industrial Court of Appeals and the High Court reviews decisions of the Industrial Courts, which are appealable in that respect to the Supreme Court. See Industrial Relations Act 2000. Furthermore, the 2011 Small Claims Court Act authorizes the Minister of Justice to establish a Small Claims Court with limited jurisdiction and the 2012 Children Protection and Welfare Act provides for the creation of a Children's Court; no such courts are operational at the date of publication of this report.

related to corruption and the obstruction of justice. These have served to underline once again the fragile and degraded state of the Judiciary, judicial independence, separation of powers and adherence to the rule of law and the capacity for the Judiciary to administer justice fairly and effectively in the Kingdom of Swaziland.

It is against this background that, between 10 and 15 May 2015, the International Commission of Jurists (ICJ) – in collaboration with the Africa Judges and Jurists Forum (AJJF), Judges for Judges Netherlands (J4J) and the Commonwealth Magistrates' and Judges' Association (CMJA) – conducted a fact-finding mission to Swaziland. The main aim of the mission was to inquire into the state of judicial independence in Swaziland in light of the recent events cited.

1.1 Timeline of key events

March 2015 — The Anti-Corruption Commission, headed by the Prime Minister, brought an application for an arrest warrant against Minister of Justice Sibusiso Shongwe before then Chief Justice Michael Ramodibedi, who refused to grant the application on the ground that proper clearance had to be obtained before arresting a serving Minister appointed by the King.

17 April 2015 — Principal Judge of the High Court of Swaziland, Stanley Maphalala, issued warrants of arrest against Chief Justice Ramodibedi and Judge Mphendulo Simelane.

18 April 2015 — Chief Justice Ramodibedi requested Judge Jacobus Annandale of the High Court to review and quash the arrest warrant. Judge Annandale set aside the arrest warrant.

20 April 2015 — Judge Annandale was arrested together with then Minister of Justice Shongwe, High Court Judge Simelane and High Court Registrar, Fikile Nhlabatsi.

An attempt to arrest the then Chief Justice Ramodibedi, failed as he locked himself inside his home. The then Chief Justice remained in his house to evade arrest for 37 days, during which time he was suspended from the position of Chief Justice, while the police remained stationed around his house. The authorities are reported to have tampered with the Internet connection, water and electricity supply. The FFM-SZ was able to meet with Mr Ramodibedi on 14 May 2015, at which point all amenities appeared to be functioning well.

12 May 2015 — The charges against Judge Annandale and Registrar Nhlabatsi were withdrawn, ostensibly because there was insufficient incriminating evidence and also to convert the Judge and Registrar into Crown witnesses in the case against then Chief Justice Ramodibedi, former Minister of Justice Shongwe and Judge Simelane.

18 May 2015 — Then Chief Justice Ramodibedi was formally charged with misconduct and notified of the decision to initiate impeachment proceedings against him by the Judicial Services Commission (JSC). The then Chief Justice challenged the impartiality of the JSC, notifying the Commission of his objections and later filing a

court application to interdict the JSC from proceeding with the impeachment process.

18 June 2015 The Secretary of the JSC notified Mr Ramodibedi of the King's decision to remove him from office as Chief Justice with effect from 17 June, for serious misbehaviour.

As at Dec. 2015 The criminal charges against Judge Simelane, the former Chief Justice and the Minister of Justice have not been disposed of and there is no official indication of whether the charges will be pursued. The former Chief Justice has meanwhile left Swaziland.

1.2 Fact-finding Mission

The International Fact-finding Mission to Swaziland (FFM-SZ) was chaired by Retired Judge Moses Chinhengo (former judge of the High Court of Zimbabwe, High Court of Botswana; ICJ Commissioner). Other members were Judge Tamara Trotman (Judge of the Court of Appeal in the Hague, the Netherlands; chair Judges for Judges), Judge Charles Mkandawire (judge of the High Court of Malawi; former Registrar of SADC Tribunal; ICJ Commissioner; Regional President for CMJA), Judge Professor Oagile Key Dingake (Professor of Public Law, University of Cape Town; judge of the High Court of Botswana), Mr. Otto Saki (Senior Legal Adviser, ICJ Africa Programme), Mr. Laurens Hueting (Legal Adviser, ICJ Law and Policy Office) and Mr. Justice Alfred Mavedzenge (legal consultant, constitutional law PhD Candidate at the University of Cape Town). A more comprehensive description of the team members is attached to this report as Annex A.

The FFM-SZ was initiated by the ICJ. The mission's Terms of Reference are attached to this report as Annex B.

The FFM-SZ consulted with members of the Judiciary and the legal profession, governmental authorities, diplomatic missions, politicians, civil society and academics. A list of interlocutors of the FFM-SZ is attached to this report as Annex C.

1.3 Main findings and report structure

Overall, it is the assessment of the FFM-SZ that the recent events are but the latest symptoms of a systemic rule of law crisis characterized by a lack of respect for judicial independence and violations of human rights. The following were identified as key contributing factors towards this:

a. The Kingdom of Swaziland has a constitutional and legislative framework that does not respect the separation of powers or provide the necessary legal and institutional framework and safeguards to ensure the independence of the Judiciary;

b. The former Chief Justice Ramodibedi failed to protect and defend the institutional independence of the Judiciary;

c. The Executive has failed to respect the independence of the Judiciary; and,

d. The failure to respect the independence of the Judiciary by the Executive and the failure by the Chief Justice to defend the institutional independence of the Judiciary created conditions conducive to abuse of the legal system for personal gain.

This report contains a brief introduction on the current crisis, timeline of events, historical complications surrounding judicial independence in Swaziland, objectives of the Fact Finding Mission and its methodology and sources of information. This introductory part is followed by a section on independence and impartiality of the Judiciary, setting out applicable regional and universal standards, and the constitutional framework regulating judicial independence and administration of the Judiciary (Part 2). Part 3 of the report focuses on the appointment and conditions of service of judges. Case allocation is covered in Part 4 of the report. Part 5 of the report considers the state of relations between judges and lawyers, and the question of public confidence in the administration of justice. Conclusions and recommendations are set out in Part 6 of the report.

2 INDEPENDENCE AND IMPARTIALITY OF THE JUDICIARY

The rule of law is weak in Swaziland, and the country has a long history of disregard for the independence of the Judiciary and violations of human rights including the right to a fair trial.[12] The FFM-SZ's assessment is that the above highlighted recent events are but a culmination of a systemic crisis.

Some key, recent highlights serve to illustrate the endemic nature of the crisis. In July 2014, human rights lawyer Thulani Maseko and journalist Bheki Makhubu were convicted of contempt of court and given prolonged prison sentences. The conviction followed a clearly unfair trial, and their subsequent imprisonment constituted arbitrary detention, as they resulted from the defendants having exercised their rights to freedom of opinion and expression in an article[13] critical of the Judiciary for lack of independence and impartiality.[14] The men have since been released following a Supreme Court ruling from 30 June 2015 that upheld their appeal.[15] Previously in 2011, the Judicial Service Commission (JSC) removed former High Court Judge Thomas Masuku from office for allegedly criticizing the King. The proceedings leading to Judge Thomas Masuku's dismissal from the bench were not transparent, impartial or fair, and due process safeguards were not respected.[16] Again in 2011, there was a four-month long boycott of the courts by the Law Society of Swaziland, to protest the lack of judicial independence. The Law Society also filed a complaint with the African Commission accusing former Chief Justice, Michael Ramodibedi, of systematically undermining judicial independence.[17] The Law Society's complaint remains pending before the African Commission. Also in 2011, the former Chief Justice issued a Practice Directive ordering the non-registration of lawsuits that challenge the King "directly or indirectly", effectively removing access to justice in any case against corporations in which the King owns shares or has an interest. The former Chief Justice is reported to have also issued another Practice Directive, which abrogated the fair process in the allocation of cases and allowed the Chief Justice to intervene in the allocation of sensitive and political cases.

After a brief overview of the main international, including African, law and standards applicable, this section of the report analyses the constitutional framework pertaining to the independence and impartiality of the Judiciary in Swaziland. Considering the Mission's finding that a major threat to the independence of the Judiciary appears to emanate from the Executive and the former Chief Justice, this part of the report also considers the relationship between the Executive and the Judiciary, as well as among the judges themselves.

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[12] See International Commission of Jurists, *Report of the Centre for the Independence of Judges and Lawyers: Fact- finding Mission to the Kingdom of Swaziland* (June 2003); International Bar Association Human Rights Institute (IBAHRI), *Swaziland – Law, Custom and Politics: Constitutional Crisis and the Breakdown in the Rule of Law* (2003).

[13] This article was reproduced in the Swaziland High Court judgement in which Thulani Maseko and Bheki Makhubu were convicted. See http://www.swazilii.org/sz/judgment/high-court/2014/102 (last accessed 9 December 2015).

[14] See International Commission of Jurists, 'The Failure of Justice: Unfair Trial, Arbitrary Detention and Judicial Impropriety in Swaziland – ICJ Trial Observation Report 2015' (July 2015); UN Working Group on Arbitrary Detention, Opinion No. 6/2015 concerning Thulani Rudolf Maseko, UN Doc. A/HRC/WGAD/2015 (6 May 2015).

[15] International Commission of Jurists, 'Swaziland: release of human rights defenders Thulani Maseko and Bheki Makhubu a victory for the rule of law' (30 June 2015). Available at http://www.icj.org/32354/ (last accessed 9 December 2015).

[16] See International Commission of Jurists, Oral Intervention on the Adoption of the Outcome Document of the Universal Periodic Review of Swaziland (15 March 2012). Available at http://icj.wpengine.netdna-cdn.com/wp-content/uploads/2012/06/Swaziland-adoption-UPR-advocacy-2012.pdf (last accessed 9 December 2015).

[17] Communication 406/2011, Law Society of Swaziland vs The Kingdom of Swaziland.

2.1 Regional and universal international law and standards

There a number of principles under general international law and international human rights law applicable to the situation under the consideration. The independence of the Judiciary is essential component of the Rule of Law and is essential to ensure the effective functioning of the rule of law in any society. It is also indispensable to the fair and effective administration of justice, essential components of which are guaranteed under international law, including the International Covenant on Civil and Political Rights (ICCPR) and the African Charter on Human and Peoples' Rights (ACHPR). Swaziland is a Party to both of these treaties and is legally bound by their provisions. Among the applicable rights protected is the right to a fair trial by a competent, independent and impartial court established by law (article 14 ICCPR; article 7 ACHPR), the right to liberty and security of person (article 9 ICCPR; article 6 ACHPR) and the right to effective remedies and reparation for violations of human rights (Article 2(3) ICCPR). The independence of the Judiciary, in addition to being at the core of fair trial rights, is also specific obligation under article 26 of the ACHPR, which provides that "State Parties … shall have the duty to guarantee the independence of the Courts." The applicable generalized standards are contained in the UN Basic Principles on the Independence of the Judiciary.[18]

Independence of the Judiciary

The independence of the Judiciary must be guaranteed by the State and enshrined in the Constitution or the law. This means that not only individual judges, but also the Judiciary as a whole must be independent and impartial.[19] Judges must be free to "decide matters before them impartially, on the basis of the facts and in accordance with the law, without any restrictions, improper influences, inducements, pressures, threats or interferences, direct or indirect, from any quarter or for any reason".[20]

For the Judiciary as an institution, the requirement of independence refers in particular to: the procedure and qualifications for the appointment of judges; guarantees relating to security of tenure until a mandatory age of retirement or expiry of term of office; and the conditions governing promotion, transfer, suspension and cessation of their functions.[21] These features are considered further in Part 3 of this report. Institutional independence of the Judiciary also refers to the degree to which the executive and legislative branches of power do

[18] Basic Principles on the Independence of the Judiciary, Adopted by the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders held at Milan from 26 August to 6 September 1985 and endorsed by General Assembly Resolutions 40/32 of 29 November 1985 and 40/146 of 13 December 1985.

[19] Among others, Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, Adopted by the African Commission on Human and People's Rights, Article A.1; International Covenant on Civil and Political Rights (ICCPR), Article 14(1); Universal Declaration of Human Rights, Article 10; Basic Principles on the Independence of the Judiciary, Principle 1 and 2; Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, Article A.4(a); Universal Strengthening Judicial Integrity, as revised at the Round Table Meeting of Chief Justices held Charter of the Judge, Approved by the International Association of Judges on 17 November 1999, Article 1; Bangalore Principles of Judicial Conduct, Adopted by the Judicial Group on at the Peace Palace, The Hague, 25-26 November 2002, Value 1 and 2.

[20] Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, Article A.5(a); UN Basic Principles on the Independence of the Judiciary, Principle 2. See also UN Basic Principles on the Independence of the Judiciary, Principles 1-7; Draft Universal Declaration on the Independence of Justice (also known as the Singhvi Declaration), Articles 2-8; Bangalore Principles of Judicial Conduct, Value 1; Universal Charter of the Judge, Articles 1-4.

[21] See Human Rights Committee, General Comment No. 32, Article 14: Right to equality before courts and tribunals and to a fair trial, UN Doc. CCPR/C/GC/32 (2007), para. 19.

or do not in practice interfere with judges and judicial decision-making, which is a main issue of focus in this part of the report.[22]

Judges must also respect the independence of their colleagues within the scope of the exercise of judicial functions: "No one must give or attempt to give the judge orders or instructions of any kind, that may influence the judicial decisions of the judge, except, where applicable, the opinion in a particular case given on appeal by the higher courts." [23]

Impartiality

Judges "must not allow their judgment to be influenced by personal bias or prejudice, nor harbour preconceptions about the particular case before them, nor act in ways that improperly promote the interests of one of the parties to the detriment of the other." Further, even where an individual judge might arguably in fact be able to ignore a personal relationship to one of the parties to a case, he or she should step aside from the case to protect against an apprehension of bias: "the tribunal must also appear to a reasonable observer to be impartial."[24]

Integrity

Judges must ensure that their conduct is above reproach in the view of a reasonable observer, avoiding impropriety and the appearance of impropriety in all their activities. Their behaviour must reinforce the people's confidence in the integrity of the Judiciary.[25]

2.2 The Constitutional framework

Section 141(1) of the Constitution of the Kingdom of Swaziland ('the Constitution') guarantees the independence of the Judiciary by providing that: "In the exercise of the judicial power of Swaziland, the Judiciary, in both its judicial and administrative functions, including financial administration, shall be independent and subject only to this Constitution, and shall not be subject to the control or direction of any person or authority".

Section 141(2) of the Constitution specifically prohibits the Crown and any of its agencies from interfering with the operations and functions of the judges. At the same time, section 141(3) places a positive obligation upon the Crown and all its agencies to provide all necessary support to enable the Judiciary to exercise its constitutional mandate in an independent manner.

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[22] Ibid.

[23] Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, Article A.4(f), which provides in part "… nor shall decisions by judicial bodies be subject to revision except through judicial review, or the mitigation or commutation of sentences by competent authorities, in accordance with the law"; Universal Charter of the Judge, Article 4; Article A.5(e) states that "A judicial officer may not consult a higher judicial authority before rendering a decision in order to ensure that his or her decision will be upheld".

[24] The Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, Article A.5(d) presents four concrete situations in which the impartiality of a judicial body would be undermined. Further also: Human Rights Committee, General Comment No. 32, Article 14: Right to equality before courts and tribunals and to a fair trial, UN Doc. CCPR/C/GC/32 (2007), para. 21; UN Basic Principles on the Independence of the Judiciary, Principle 2; Draft Universal Declaration on the Independence of Justice (also known as the Singhvi Declaration), Article 25; Bangalore Principles of Judicial Conduct, Value 2 and 4; Universal Charter of the Judge, Article 5.

[25] Bangalore Principles of Judicial Conduct, Value 3 and 4; Universal Charter of the Judge, Article 5-7.

Section 141(5)-(7) of the Constitution includes safeguards for the Judiciary's financial and administrative independence, by providing that expenses shall be funded directly from the Consolidated Fund and that the Judiciary shall determine its own administrative affairs.

Section 159 of the Constitution establishes an independent Judicial Services Commission. Among other things, it advises the King on judicial appointments and plays a role in disciplinary proceedings, as detailed below in Part 3 of this report. Although the JSC has a constitutionally guaranteed level of independence,[26] this is undermined and *de facto* inexistent due to the Crown's absolute control over the appointment of its members, in contravention of international standards.[27]

Composition of the Judicial Service Commission

Section 159(2) of the 2005 Constitution provides as follows:[28]

(2) The Commission shall consist of the following-
- (a) the Chief Justice, who shall be the chairman;
- (b) two legal practitioners of not less than seven years practice and in good professional standing to be appointed by the King;
- (c) the Chairman of the Civil Service Commission; and
- (d) two persons appointed by the King.

2.3 Relationship between the Judiciary and the Executive

The FFM-SZ observes that for the better part of his tenure as Chief Justice, Mr. Ramodibedi's close relations with the Executive led him to head the Judiciary with a view to defending Executive interests, at the expense of administering independent and impartial justice for the Kingdom's inhabitants. Various persons with whom the FFM-SZ spoke concurred that the Crown, Executive and Chief Justice, enjoyed a warm relationship. During that period,[29] the former Chief Justice is alleged by many members of civil society and the legal profession to have colluded with members of the Executive to obtain favourable court judgements against human rights defenders critical of Swaziland's monarchical rule and its governance and policies. He also stands accused of seeking to oust independent judges.

Various stakeholders reported to the FFM-SZ, and both the Prime Minister and the former Chief Justice confirmed, that during the first year of Judge Michael Ramodibedi's tenure as the Chief Justice, the Government "won all cases in which it was being sued", after which it hosted the judges at a function to celebrate. The FFM-SZ considers this form of 'celebration' to be inappropriate and unacceptable, as it undermines judicial independence. Moreover, as set out below

[26] Constitution, S. 159(1) and (3).
[27] Constitution, S. 159(2). Also note the inconsistency re: the JSC's composition between the Constitution and the Judicial Service Commission Act 1982, which lists the Chief Justice, the Chairman of the Civil Service Board and three persons appointed by the King (JSC Act, S. 3(1)).
[28] The Chief Justice is appointed by the King on the advice of the JSC (S. 153(1)). The Chairman of the Commission is appointed by the King on the recommendation of the line Minister (S. 173(3) and 186(1)).
[29] In Swaziland, Ramodibedi was appointed as acting judge in the Court of Appeal in 2006; he was appointed as acting Chief Justice in 2010.

in Part 4 of this report, the Chief Justice's improper control over case allocation appeared, in the FFM-SZ's opinion, to have contributed to this outcome.

The FFM-SZ further concluded that the close relationship of the former Chief Justice with the Executive inevitably entailed his involvement in the factional politics of the Kingdom, leading to the most recent judicial crisis. Several stakeholders consulted by the FFM-SZ in this regard suggested that the former Chief Justice became too close to then Minister of Justice, Sibusiso Shongwe, and subsequently became involved in a political tussle between the latter and the Prime Minister.

The Estate Issue

Several of the FFM-SZ's interlocutors cited what was referred to as "the Estate issue" as the beginning of the falling out of the former Chief Justice and Minister of Justice with the Prime Minister.

Under Swazi customary law, a widow who married under that law inherited only a child's share of the estate or E1200 (whichever is greater) if her former husband has passed away without appropriately providing for them in a valid will.[30] Under civil law, which allows for monogamous marriage only, a widow, in contrast, is entitled to half of the estate in addition to a child's share.[31] The Constitution provides that "a surviving spouse is entitled to a reasonable provision", regardless of the civil or customary status of the marriage.[32] International law, including the ICCPR, the ACHRP and the Convention on the Elimination of Discrimination against Women, to which Swaziland is a party, requires equal protection and non-discrimination against women in respect of the administration of family law, including inheritance.

On 14 July 2014, the Minister of Justice – "with the full blessing of the Judiciary", in the former Chief Justice's words – made a speech at Siteki in which he directed the Master of the High Court's office on the division of estates to ensure equality between all wives in a customary marriage, in an attempt to narrow the discrimination between civil law and common law widows.

However, the Prime Minister very publicly set aside that "policy statement", saying that this was not within the mandate of the Minister of Justice and calling upon the latter to withdraw the statement. According to some of the FFM-SZ's interlocutors, the Prime Minister was incensed by the Minister of Justice's statement, which he allegedly perceived as an attempt to undermine his authority.

Several stakeholders confirmed that the Minister of Justice subsequently started disengaging from the Cabinet and "operating outside the Cabinet structure", as the Prime Minister stated. They also alleged that when questioned about the policy-making, the Minister of Justice said to have acted on the Chief Justice's advice. Furthermore, in the Prime Minister's opinion, there had been "a further escalation in the last six months", in which the former Minister of Justice and Chief Justice were allegedly deciding on the

[30] See Wezzy Ndzimandze and 16 others vs Titselo Dzadze Ndzimandze and 13 others (981/2014) [2014] SZHC234 (23rd September 2014), para. 4.
[31] Ibid., para. 17.
[32] Constitution, S. 34(1).

outcome of cases and instructing judges to those ends. The former Chief Justice meanwhile accused the Prime Minister of interference with the independence of the Judiciary.[33] In his interview with the FFM-SZ, he said that "[the Prime Minister] is attacking the Judiciary left and right".

The "Estate issue" also gave rise to the *Ndzimandze* case, which featured in the impeachment proceedings against former Chief Justice Ramodibedi.

On 23 September 2014, in *Wezzy Ndzimandze and 16 others vs Titselo Dzadze Ndzimandze and 13 others,* a full bench of the High Court composed of Judge Annandale and acting Judges Mazwi Masuvo and Bongani Dlamini declared section 2(3) of the 1953 Intestate Succession Act unconstitutional, in view of the above-cited section 34 of the Constitution. The Court directed the liquidation of the estates in line with the Constitution, equating customary law marriages to civil law marriages in community of property, until Parliament is able to enact legislation to regulate the property rights of spouses, including common law husband and wife.

The case had continued before the High Court subsequent to an intervention by then Chief Justice Ramodibedi, after the Minister of Justice's policy was withdrawn by the Prime Minister and despite the 17 children of the estate not pursuing their case against that policy. After the applicants had withdrawn their notice of motion and founding affidavit, their counsel sought leave to withdraw as attorneys of record. Former Chief Justice Ramodibedi refused that application, on the grounds that it was deemed a matter of extreme national importance, that the Court was already seized of the matter and that there was a need to interpret the Constitution as against the Intestate Succession Act. He accordingly ordered that the case should be continued, leading to the above judgment.[34]

During the interview with the FFM-SZ, then Chief Justice Ramodibedi confirmed that he "instructed the Court to proceed" because of the case's constitutional importance and, moreover, that while the children had withdrawn their case after the Minister of Justice's policy was retracted, the widows' counterclaim remained pending. He added that "the Prime Minister was incensed, the man was so upset".

After the High Court decision, the Cabinet met to discuss the verdict, with acting Prime Minister Paul Dlamini qualifying it as a "sensitive matter" and noting it had implications on the Cabinet's decision. The Attorney General filed an appeal to the High Court judgment, which a full bench of the Supreme Court unanimously dismissed on 3 December 2014.[35]

[33] Chief Justice Ramodibedi v. the Chairman of the Judicial Service Commission & the Attorney General (810/2015), Founding affidavit of Michael M. Ramodibedi (2 June 2015), para. 6 among others.
[34] See *Attorney General v Titselo Dzadze Ndzimandze (Nee Hlophe) & 27 Others* (55/2014) [2014] SZSC 78 (3 December 2014), Opinion Twum J.A., para. 6.
[35] Attorney General v Titselo Dzadze Ndzimandze (Nee Hlophe) & 27 Others (55/2014) [2014] SZSC 78 (3 December 2014).

In view of the above, the FFM-SZ observes that Executive officials have violated the Constitution and undermined the independence of the Judiciary. However, the FFM-SZ equally considers that former Chief Justice Ramodibedi bears responsibility for undermining the independence and the impartiality of the Judiciary. For instance, the then Chief Justice Ramodibedi himself initiated the contempt of court charges against journalist Bheki Makhubu and lawyer Thulani Maseko and he presided over a Judiciary that failed to respect the two's right to fair trial despite an international and domestic outcry against the manner in which the two were tried and convicted. His participation in what appears to be power struggles within the Executive and the Monarchy eventually also gave rise to the latest judicial crisis.

2.4 Relations between the members of the Judiciary

From its consultations with various stakeholders, it appears to the FFM-SZ that there is continuing factionalism, involving members of the Judiciary and the other branches of power, which has been exposed by the latest crisis.

It is important that each individual judge is able to act independently, constrained only by considerations of professional responsibility. When a judge's conduct and decisions are based on the perceived dictates of alliance with a particular power faction, his or her independence and impartiality is necessarily compromised.

This situation of a factionalized Executive and Judiciary culminated most recently in the abuse of the justice system to settle political scores. Various interviewees relayed to the FFM-SZ that those aligned or sympathetic to the former Minister of Justice on various occasions attempted to obtain a warrant of arrest against the Prime Minister. It was also reported to the FFM-SZ that the arrest warrants in April 2015 were issued as a consequence of the Prime Minister teaming up with judges perceived to be aligned to him or opposed to former Chief Justice Ramodibedi.

March-April 2015 Arrest Warrants

In March 2015, the Anti-Corruption Commission, headed by the Prime Minister, brought an application for an arrest warrant against Minister of Justice Shongwe before then Chief Justice Ramodibedi, who refused to grant the application on the ground that proper clearance had to be obtained before arresting a serving Minister appointed by the King.

The immediate response by the Anti-Corruption Commission was to seek a warrant of arrest against the Chief Justice personally, on the grounds of conflict of interest and defeating or obstructing the course of justice.

On 17 April, Judge Maphalala issued warrants of arrest against Chief Justice Ramodibedi and Judge Simelane. Judge Annandale set them aside the next day.

Subsequently, arrest warrants were issued against then Chief Justice Ramodibedi, Judges Simelane and Annandale and High Court Registrar Nhlabatsi. They were accused under the Prevention of Corruption Act No. 3 of 2006 of having administered their respective

judicial functions in a manner amounting to abuse of authority and a violation of their legal duties, in order to obtain a favourable result.[36] Then Chief Justice Ramodibedi and Judge Simelane were in addition also charged with defeating or obstructing the course of justice.

On 20 April, Judges Simelane and Annandale and Registrar Nhlabatsi were arrested, while an attempt to arrest then Chief Justice Ramodibedi failed as he had locked himself up in his home, leading to a 37-day stand-off.

Judge Annandale was held in custody for four days. On 12 May, the charges against Judge Annandale and Registrar Nhlabatsi were withdrawn.

At the time of the FFM-SZ's country visit, there remained a lack of clarity concerning the status of the arrest warrant issued against the then Chief Justice and none of the interlocutors were able to provide a clear answer. The Prime Minister said it had been "put in abeyance", although it remained unclear by whom or on which legal ground. In the opinion of the Deputy Attorney General, once a warrant is extended it is up to the warrant-holder to decide what to do with it. He said that due to the flight risk, the warrant would not be cancelled, but that as long as the impeachment case was on-going, and if the former Chief Justice would not flee, the arrest warrant would not be executed.

Judge Simelane remains suspended and, at the time of completion of this report, there is no indication of whether criminal or disciplinary proceedings would be held against him. The criminal charges against the former Chief Justice have not been dispensed with and there is again no official indication of whether the charges will be pursued. The former Chief Justice left Swaziland after the King informed him through official communication of the termination of his contract on 18 June 2015.

The FFM-SZ observes that factional divisions within the Judiciary have bred an atmosphere of mistrust, suspicion and fear amongst individual judges. This situation is not conducive to the judges' proper discharge of their mandate and makes the Judiciary susceptible to interference with its independence by the Executive and private forces wielding influence. It also affects the confidence of the public in the Judiciary and the administration of justice.

[36] See Anti-Corruption Act 2006, S. 33: Offences in respect of corrupt activities relating to judicial officers.

3 THE APPOINTMENT, SERVICE AND REMOVAL OF JUDGES

A transparent and fair process of appointing judges is a prerequisite for an independent and impartial Judiciary. This part of the report considers the judicial appointment processes in Swaziland and how they have contributed towards the current crisis. To achieve this, the report examines the Swazi judicial appointments processes against the domestic, regional and universal legal frameworks.

3.1 Regional and universal international law and standards

As mentioned in Part 2 of this report, institutional independence of the Judiciary is guaranteed and safeguarded by a number of formal elements, including the proper procedure and qualifications for the appointment of judges; guarantees relating to security of tenure until a mandatory age of retirement or expiry of term of office; and the necessary conditions governing promotion, transfer, suspension and cessation of their functions.[37]

Appointment

Judges should be appointed through an open process on the basis of prescribed criteria that are based on merit and integrity, and without discrimination.[38] To ensure that the composition of the Judiciary is essentially reflective of the population and to ensure non-discrimination and equality before the law, steps should be taken to ensure the appointment of qualified women and members of minority communities.[39]

The persons selected must be "individuals of integrity and ability with appropriate training or qualifications in law".[40]

An appropriate method of appointments of judges is a prerequisite for the independence of the Judiciary[41] and is a means of ensuring equal access to the

[37] Human Rights Committee, General Comment No. 32, Article 14: Right to equality before courts and tribunals and to a fair trial, UN Doc. CCPR/C/GC/32 (2007), para. 19.
[38] Principle 10 of the UN Basic Principles on the Independence of the Judiciary provides in part: "In the selection of judges, there shall be no discrimination against a person on the grounds of race, colour, sex, religion, political or other opinion, national or social origin, property, birth or status, except that a requirement, that a candidate for judicial office must be a national of the country concerned, shall not be considered discriminatory." Also, Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, Adopted by the African Commission on Human and People's Rights, Article A.4(h)-(j); Human Rights Committee, General Comment No. 32, Article 14: Right to equality before courts and tribunals and to a fair trial, UN Doc. CCPR/C/GC/32 (2007), para. 19.
[39] Gabriela Knaul, Special Rapporteur on the independence of judges and lawyers, Report to the General Assembly, UN Doc. A/HRC/66/289 (2011), para. 22-33, 92; Human Rights Committee, Concluding Observations on the United Kingdom, UN Doc. CCPR/CO/73/UK (2001), para. 15; Human Rights Committee, Concluding Observations on France, UN Doc. CCPR/C/FRA/CO/4 (2008), para. 26; Human Rights Committee, Concluding Observations on Sudan, UN Doc. CCPR/C/79/Add.85 (1997), para. 21; Committee Against Torture, Conclusions and recommendations on Bahrain, UN Doc. CAT/C/CR/34/BHR (2005), para. 7(h); Committee on the Elimination of Racial Discrimination, General Recommendation XXXI on the prevention of racial discrimination in the administration and functioning of the criminal justice system, UN Doc. A/60/18 (pp. 98-108) (2005), para. 5(d); Committee on the Elimination of Racial Discrimination, Concluding Observations on Guatemala, UN Doc. CERD/C/GTM/CO/12-13 (210), para. 8; Committee on the Elimination of Racial Discrimination, Concluding Observations on Colombia, UN Doc. CERD/C/304/Add.76 (1999), para. 13.
[40] Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, Article A.4(i) and (k). UN Basic Principles on the Independence of the Judiciary, Principle 10.

profession. As reflected in the Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa: "Any method of judicial selection shall safeguard against judicial appointments for improper motives".[42] The Human Rights Committee and the Special Rapporteur on the independence of judges and lawyers, in relation to appointment and promotion of judges, have repeatedly recommended the use of bodies that are independent from the Executive,[43] plural and composed mainly (if not solely) of judges and members of the legal profession,[44] and that apply transparent procedures.[45]

Promotions within the Judiciary must be based on objective factors, particularly ability, integrity and experience.[46]

Security of tenure

When judges have security of tenure in office, they are less vulnerable to pressure from those who can influence or make decisions about the renewal of their terms of office. Accordingly, international standards prescribe that judges tenure must be guaranteed until a mandatory retirement age or expiry of the term of office.[47]

Disciplinary proceedings

Complaints about judicial misconduct must be processed expeditiously and fairly under an appropriate procedure.[48]

The rights of a judge against whom complaints are made include the rights to a fair proceeding, including to notice of the accusations against him or her, to

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[41] Human Rights Committee, General Comment No. 32, Article 14: Right to equality before courts and tribunals and to a fair trial, UN Doc. CCPR/C/GC/32 (2007), para. 19.
[42] Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, Article A.4(h). UN Basic Principles on the Independence of the Judiciary, Principle 10.
[43] Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, Article A.4(h) encourages "the establishment of an independent body". Also e.g., Concluding Observations on the Congo, CCPR/C/79/Add.118, para. 14; Concluding Observations on Liechtenstein, CCPR/CO/81/LIE, para. 12; Concluding Observations on Tajikistan, CCPR/CO/84/TJK, para. 17; Concluding Observations on Honduras, CCPR/C/HND/CO/1, para. 16; Concluding Observations on Azerbaijan, UN Doc. CCPR/C/AZE/CO/3 (2009), para. 12; Human Rights Committee, Concluding Observations on Kosovo (Serbia), UN Doc. CCPR/C/UNK/CO/1 (2006), para. 20; Draft Universal Declaration on the Independence of Justice (also known as the Singhvi Declaration), Article 11; Universal Charter of the Judge, Article 9.
[44] Leandro Despouy, Special Rapporteur on the independence of judges and lawyers, Report to the Human Rights Council, UN Doc. A/HRC/11/41 (2009), para. 28-29. See International Commission of Jurists, International principles on the independence and accountability of judges, lawyers and prosecutors – Practitioners' guide, no. 1 (2007), pp. 45-48.
[45] Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, Article A.4(h); Leandro Despouy, Special Rapporteur on the independence of judges and lawyers, Report to the Human Rights Council, UN Doc. A/HRC/11/41 (2009), para. 32; Leandro Despouy, Special Rapporteur on the independence of judges and lawyers, Preliminary Report to the Human Rights Commission on a mission to Ecuador, UN Doc. E/CN.4/2005/60/Add.4 (2005), para. 5(d).
[46] Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, Article A.4(o); UN Basic Principles on the Independence of the Judiciary, Principle 13; Draft Universal Declaration on the Independence of Justice (also known as the Singhvi Declaration), Article 14.
[47] Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, Article A.4(l); UN Basic Principles on the Independence of the Judiciary, Principle 12; Draft Universal Declaration on the Independence of Justice (also known as the Singhvi Declaration), Article 16(b) and 18(c); Universal Charter of the Judge, Article 8.
[48] Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, Article A.4(r); UN Basic Principles on the Independence of the Judiciary, Principle 17; Draft Universal Declaration on the Independence of Justice (also known as the Singhvi Declaration), Article 28.

adequate time and facilities to prepare and present a defence including through counsel,[49] to challenge the evidence against him or her and present witnesses.

Decisions must be based on established standards of judicial conduct, and sanctions must be proportionate.[50] A judicial code of conduct, drafted primarily by judges and members of the legal profession and consistent with international standards,[51] can help to safeguard judicial integrity and protect against conflicts of interest.[52] Such a code, which should be enshrined in the law, should serve as the basis for the determination of cases of alleged judicial misconduct within a fair disciplinary system.[53]

Decisions to suspend or remove a judge must be limited to cases in which the incapacity or behaviour of a judge renders the individual unfit to discharge his or her judicial duties. Decisions and sanctions in disciplinary proceedings should be subject to independent judicial review (although this may not apply to decisions of the highest court or the Legislature in impeachment proceedings).[54]

The body responsible for the discipline of judges should be independent of the Executive,[55] plural and composed mainly (if not solely) of judges and members of the legal profession.[56]

Criminal proceedings

Judges, like any other individuals, must remain criminally liable for any offences they commit. Responsibility of judicial officers for criminal conduct is especially important where such conduct undermines the credibility and integrity of the individual as an officer of the court, and/or undermines the reputation of the Judiciary as a whole and the confidence of the public in the proper administration of justice by the Judiciary.

In order to safeguard the independence of the Judiciary, however, it is a general rule – reflected in the *Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa* – that "judicial officers shall not be liable in civil or criminal proceedings for improper acts or omissions **in the exercise of their**

[49] Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, Article A.4(q).
[50] UN Basic Principles on the Independence of the Judiciary, Principle 19; Draft Universal Declaration on the Independence of Justice (also known as the Singhvi Declaration), Article 27.
[51] Bangalore Principles of Judicial Conduct; International Bar Association Minimum Standards of Judicial Independence, para. 35-42.
[52] Bangalore Principles of Judicial Conduct, Preamble and 'Implementation'.
[53] UN Basic Principles on the Independence of the Judiciary, Principle 19.
[54] Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, Article A.4(p)-(q); UN Basic Principles on the Independence of the Judiciary, Principle 17-20; Draft Universal Declaration on the Independence of Justice (also known as the Singhvi Declaration), Article 26-31; Universal Charter of the Judge, Articles 8 and 11.
[55] Human Rights Committee, Concluding Observations on Azerbaijan, UN Doc. CCPR/C/AZE/CO/3 (2009), para. 12; Human Rights Committee, Concluding Observations on Honduras, UN Doc. CCPR/C/HND/CO/1 (2006), para. 16; Human Rights Committee, Concluding Observations on Kosovo (Serbia), UN Doc. CCPR/C/UNK/CO/1 (2006), para. 20.
[56] Leandro Despouy, Special Rapporteur on the independence of judges and lawyers, Report to the Human Rights Council, UN Doc. A/HRC/11/41 (2009), para. 28-29.

judicial functions" (emphasis added).[57] Notwithstanding this principle, judges may incur criminal responsibility for crimes under international law.[58]

The *African Union Convention on the Prevention and Combating of Corruption*[59] is a binding treaty established to combat corruption in Member States of the African Union. Article 5 obliges States Parties to criminalize acts of corruption enumerated in Article 4, including passive bribery of public officials. Acts of corruption committed by members of the Judiciary fall within the scope of Article 4 but are not addressed separately. The *Southern African Development Community Protocol against Corruption*[60] also obliges State Parties to criminalize acts of corruption of public officials,[61] but similarly does not address the situation of judges explicitly.

The order of events in handling coinciding criminal or disciplinary matters against sitting judges is treated differently under the law and practice of different States. There are two common models of dealing with such cases. First, judges may be provisionally suspended while criminal investigations are taking place. In such cases, disciplinary proceedings are held in abeyance until the outcome of the criminal investigation. A conviction in the criminal case then normally leads to disciplinary action. Acquittal in the criminal case might also lead to subsequent disciplinary action, depending on the reasons for acquittal, and bearing in mind that different standards of proof will normally apply to disciplinary versus criminal proceedings. Alternatively, it is also common for law enforcement authorities to hold back from undertaking a criminal investigation until disciplinary proceedings are concluded. This may allow subsequent use by law enforcement authorities of information gathered during the course of the disciplinary proceedings. Given that criminal proceedings must apply a higher standard of proof (proof of guilt beyond reasonable doubt), the earlier dismissal of disciplinary allegations may assist law enforcement authorities to determine whether or not to proceed with a criminal case.

The sequencing of disciplinary and/or criminal proceedings should always be based on the need to safeguard the independence as well as the accountability of judges and must always be consistent with relevant regional and international human rights law and standards. Arresting a judge before any disciplinary investigations are conducted has in some cases undermined respect for judicial offices. Since there is no universally or overwhelmingly accepted practice that might constitute a general standard in this regard, the FFM-SZ considers that the key issue to be determined is whether the particular practice and sequencing of events is consistent with the safeguarding of judicial independence and the strict adherence with due process and the right to a fair trial, including the right to be presumed innocent, while at the same time allowing for holding offending judges to account. Where a crime has been committed, it is of vital importance that the judge is treated on an equal basis with other persons, and the FFM-SZ considers that criminal acts should in principle be adjudicated in court, with normal

[57] Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, Article A.4(n)(i). The UN Basic Principles on the Independence of the judiciary provide: "Without prejudice to any disciplinary procedure or to any right of appeal or to compensation from the State, in accordance with national law, judges should enjoy personal immunity from civil suits for monetary damages for improper acts or omissions in the exercise of their judicial functions." (Principle 16).
[58] Nüremberg Military Tribunal III, *United States v. Josef Altstoetter et al.*, Judgment of 3 and 4 December 1947, Council Law No. 10, 1946-1949, vol. III (1951).
[59] African Union Convention on the Prevention and Combating of Corruption, entered into force on 5 August 2006. Swaziland signed the Convention on 7 December 2004, but has not ratified.
[60] Southern African Development Community Protocol against Corruption, adopted on 14 August 2001, entered into force 6 August 2005.
[61] Ibid., Article 7(2).

consideration of prosecutorial discretion applying. In that situation, while special substantive or procedural safeguards may apply in light of the need to protect judicial independence, a judge should otherwise face the same level of scrutiny as any other individual who has committed a criminal offence.

In the situation at hand, the Anti-Corruption Commission issued the arrest warrants. Given that the Anti-Corruption Commission is subject to the control of the King,[62] as is the Judicial Service Commission, the FFM-SZ considers that no practical difference results from the sequencing of proceedings.

3.2 Judicial appointments

In Swaziland, the Crown comprehensively controls judicial appointments. Pursuant to the Constitution, [63] the JSC [64] is responsible for making recommendations to the King. In doing so, section 159(1) and (3) of the Constitution require the Commission to act independently. However, as noted above, the Crown effectively exercise full control over appointments to the JSC, creating a great risk of undermining the independent character of individual members of the JSC.

Several interviewees confirmed to the FFM-SZ that the advisory function of the JSC has in practical terms been interpreted to mean that the King may freely reject the advice received from the JSC, a power he has exercised on occasion. Moreover, the process appears to be very opaque: vacancies are not advertised; there are no public interviews; and the shortlist of candidates that is referred to the King for his consideration is not publicly disclosed. The Law Society has complained that its opinion is often not solicited in this process, particularly in the selection of the two legal practitioners to be appointed to the JSC in line with section 159(1)(b) of the Constitution of Swaziland. Such lack of transparency and consultation in the judicial appointment process has, according to information provided to the FFM-SZ, created an environment of favouritism and corruption. Several stakeholders cited the lack of safeguards and the Crown's control over the appointment process as an important contributing factor to the lack of judicial independence.

Moreover, judges have on several occasions[65] been appointed in contravention of pertinent Constitutional provisions, undermining the rule of law. Most recently, on 5 May 2015, after the arrest warrant was issued against then Chief Justice Ramodibedi, the King appointed Justice Maphalala as Acting Chief Justice. Several considerations put into question the lawfulness of this appointment. Arguably, Justice Maphalala is not the most senior of the Justices of the Supreme Court, whereas the Constitution provides that the functions of the office of the Chief Justice should be performed by the most senior Supreme Court Justice when this office falls vacant.[66] Justice Ebrahim is more senior than Justice Maphalala and,

[62] The Anti Corruption Commission in Swaziland is established under the Prevention of Corruption Act, 2006. Pursuant to S. 4(1) and (2), the King appoints the Commissioner and Deputy Commissioners upon the advice of the Judicial Service Commission.
[63] Constitution, S. 153(1).
[64] See S. 159 (2) of the Constitution of Swaziland for the composition of the JSC.
[65] See M. Ndlangamandla writing in the Mail and Guardian (10–16 May 2013) on the appointment of 'sweetheart judges' at p. 30, cited at: Maxine Langwenya, *Swaziland: Justice Sector and Rule of Law. A review by AfriMAP and the Open Society Initiative for Southern Africa* (March 2013), p. 93.
[66] Constitution, S. 153(2).

although he has surpassed the constitutionally prescribed age of retirement, he continues to serve on the Supreme Court.[67]

Furthermore, the independence of the Judiciary has been undermined through the appointment of judges to serve in an acting, temporary capacity. Section 153(3) of the Constitution gives the Chief Justice the mandate to advise the King on such appointments. From its consultations with the various stakeholders, the FFM-SZ found that this process has in practice been an affair between the former Chief Justice and the King, shrouded in secrecy and conducted without any form of oversight and without the consultation or participation of relevant stakeholders, such as (other) judges or the Law Society. Several interviewees pointed out that vacancies are never publicly advertised. Without transparency, this process has proved prone to abuse and manipulation, resulting the appointment of judges who are allegedly incapable of asserting their independence. It was repeatedly pointed out to the FFM-SZ that it appears that acting judges have been appointed to prevent certain (sitting) judges from hearing matters, in order to thus influence the proceedings so as to guarantee an outcome favourable to the interests of the Crown or (members of) the Executive. For instance, the Chief Justice is alleged to have assigned his case against the Swaziland Revenue Authority to be heard by Judge Simelane.[68]

The FFM-SZ considers that the interpretation and implementation of Constitutional provisions on the subject does not comply with international law and standards regarding judicial appointments and does not provide the necessary safeguards to ensure the independence and competence of the Judiciary. Moreover, the appointment of judges who do not meet the prescribed qualifications of the Constitution violates the rule of law, undermining judicial independence as well as the public's confidence in the judicial system. The practice of appointing acting judges in a temporary capacity in order to influence the outcome of proceedings similarly violates due process and the rule of law.

3.3 Security of tenure and disciplinary and/or criminal proceedings against judicial officers

The Constitution of Swaziland provides for a process through which judges of the superior courts can be removed from office for "serious misbehaviour or inability to perform the functions of office arising from infirmity of body or mind".[69] It sets out the procedure that must be followed, pursuant to which an *ad hoc* committee composed of the Minister responsible for Justice, the Chairman of the Civil Service Commission and the President of the Law Society (in the case of the Chief Justice) or the Chief Justice (in the case of the other Justices) advises the King on referral of the matter to the JSC for investigation.[70] The JSC then "shall enquire into the matter and recommend to the King whether the Chief Justice or the Justice ought to be removed from office."

[67] In 2013, the High Court was seized with an application seeking to set aside a Supreme Court judgment on the basis that Justice Ebrahim sat in the panel despite having attained the mandatory age of retirement (*Bhokile Shiba v. Mr Justice Ebrahim and others*). According to one interviewee who spoke with the FFM-SZ, "the case was frustrated until the applicants ran out of steam".

[68] See the judgement of Judge Simelane in this case, in which the Respondents unsuccessfully sought to challenge the assignment of the case to Judge Simelane. Available at: http://www.swazilii.org/files/Judgment%20Michael%20Ramodibedi%20v%20Commissioner%20General%20SRA.pdf (last accessed 9 December 2015).

[69] Constitution, S. 158(2),

[70] Constitution, S. 158(3) and (10).

As set out above, the independence of the JSC is compromised by the Crown's control over the appointment of its members. In actual practice, the Commission has not performed its disciplinary functions impartially and has collaborated in abusive proceedings, for instance to arbitrarily dismiss a judge deemed too independent.

Dismissal of Judge Masuku

In August 2011, at the behest of former Chief Justice Ramodibedi, the Judicial Service Commission suspended and later dismissed High Court Judge Thomas Masuku, who was well-known for applying international human rights law and rule of law principles in his judgments.

Judge Masuku's dismissal followed a tainted disciplinary process. The initial twelve charges of misconduct were vague and unsubstantiated. Among other allegations, the Chief Justice accused Judge Masuku of insulting the King in relation to a judgment in which Judge Masuku had used the words "forked tongue". Furthermore, he was accused, among other things, of associating with those who seek unlawful regime change and destabilizing the High Court's judges and staff.[71]

The disciplinary hearing was not conducted in compliance with fundamental principles of justice,[72] and domestic and international observers were refused access. Among other things, Chief justice Ramodibedi refused to recuse himself, notwithstanding the fact that: he acted both as accuser and as judge; application for the hearing to be held in public was denied; and the opportunity to cross-examine deponents to the affidavits attesting to Judge Masuku's alleged misconduct (including Judge Simelane and the Secretary of the Judicial Service Commission) was also refused. No reasons were provided for these decisions.

Also regarding the impeachment of former Chief Justice Ramodibedi, several stakeholders who met with the FFM-SZ raised concern about the lack of independence of the JSC, indicating that they consider its members to be heavily conflicted and unable to impartially assess the accusations levied against former Chief Justice Ramodibedi and the other judges with whom he is jointly accused of misconduct.

[71] See Annex to a letter to the Secretary of the Judicial Service Commission dated 25 July 2011 setting out Justice Masuku's grounds of defence.

[72] See, among others, International Commission of Jurists, Southern African Development Community Lawyers Association & Southern African Litigation Centre, 'Joint Statement: Swaziland: Failure to expeditiously resolve Judge Masuku matter' (22 August 2011), available at http://www.southernafricalitigationcentre.org/2011/08/22/salc-joint-statement-swaziland-failure-to-expeditiously-resolve-judge-masuku-matter/ (last accessed 9 December 2015); and 'Joint Statement: Swaziland shows contempt for rule of law as minister of justice and judge are dismissed' (30 September 2011), available at http://www.southernafricalitigationcentre.org/2011/09/30/salc-joint-statement-swaziland-shows-contempt-for-rule-of-law-as-minister-of-justice-and-judge-are-dismissed/ (last accessed 9 December 2015); International Commission of Jurists, Oral intervention on the adoption of the outcome document of the Universal Periodic Review of Swaziland (15 March 2012), available at http://icj.wpengine.netdna-cdn.com/wp-content/uploads/2012/06/Swaziland-adoption-UPR-advocacy-2012.pdf (last accessed 9 December 2015).

Some stakeholders argued that, considering that Swaziland is a small jurisdiction, it was likely all persons involved in the Chief Justice's impeachment proceedings[73] could be conflicted in one way or another. Whereas this is certainly plausible, the FFM-SZ notes that this situation could be mitigated through the involvement of independent non-Swazi nationals in the proceedings. Judges from jurisdictions of another frequently sit on courts in other countries, through a variety of both regularized and *ad hoc* procedures. Moreover, it is highly problematic that, with the exception of the Chairperson of the Law Society, the King appoints all persons involved in the two-stage procedure.[74]

Impeachment of former Chief Justice Ramodibedi

On 5 May 2015, the King issued a decision to suspend former Chief Justice Ramodibedi, which the Prime Minister announced the next day at a press conference.[75] On 11 May 2015, the former Chief Justice received a letter from the Secretary of the Judicial Service Commission informing him of the suspension and the fact that the *ad hoc* committee had advised the King to refer the case to the JSC for investigation.[76]

On 18 May, the JSC Secretary informed the former Chief Justice by letter of four charges against him, reduced by the JSC at its 1 June meeting to the following three allegations of serious misbehaviour:

1. *Abuse of office in the allocation of the Swaziland Revenue Authority matter*

The first allegation concerns the allocation by the former Chief Justice of a case concerning the Swaziland Revenue Authority matter[77] to Judge Simelane. The case concerns a challenge by former Chief Justice Ramodibedi to the taxation of the gratuity he received at the end of his employment contract (for Chief Justice) covering 26 February 2010 to 31 December 2012. In the matter, then Registrar of the High Court Simelane had made representations to the Swaziland Revenue Authority on behalf of the former Chief Justice.

The serious misbehaviour allegedly consists of allocating the case to Judge Simelane with the intention to obtain a judgment in his favour or, alternatively, of eroding the public's confidence in the

[73] These are the members of the *ad hoc* committee that advises the King on referral of the matter to the JSC, which is made up of the Minister responsible for Justice, the Chairman of the Civil Service Commission and the President of the Law Society (Constitution, S. 158 (10)); and the members of the JSC, with the Chief Justice being replaced by the most senior Justice of the Supreme Court (Constitution, S. 158(7)).
[74] Re: Minister responsible for Justice, see Constitution S. 67(2)-(3): "(2) The King shall appoint Ministers from both chambers of Parliament upon the recommendation of the Prime Minister. (3) At least half of the number of Ministers shall be appointed from among the elected members of the House."; others noted above, para. 2.2 of this report.
[75] See *Chief Justice Ramodibedi v. the Chairman of the Judicial Service Commission & the Attorney General (810/2015)*, Answering affidavit Lloraine Hlophe, para. 26 and 28 and Annex B containing a copy of the legal notice dated 5 May 2015.
[76] Chief Justice Ramodibedi v. the Chairman of the Judicial Service Commission & the Attorney General (810/2015), Founding affidavit Michael Ramodibedi, para. 14.
[77] Michael Ramodibedi v Commissioner General, Swaziland Revenue Authority and Another (785/13).

justice system by allocating the case to a conflicted judge.

2. *Abuse of office in the hearing of the Impunzi Wholesalers (Pty) Ltd v. the Swaziland Revenue Authority*[78]

The second allegation concerns the allocation of the mentioned case by the former Chief Justice to himself as presiding judge, at a time when he was personally engaged in litigation against the Swaziland Revenue Authority.

3. *Abuse of office in order to achieve an ulterior motive in the hearing of the Estate Policy matter*

The third allegation concerns the Estate policy (see above), which was relevant to the division of a large estate with several widows.[79] The former Chief Justice is accused of serious misbehaviour in: a) directing the application to be heard; b) then proceeding to frame the issues for determination; c) personally registering the application when the applicants had withdrawn the matter; d) insisting on the application proceeding in circumstances where the applicant's attorneys had withdrawn as attorneys of record; and, e) manipulating the outcome of the matter by giving instructions to the presiding judges (Judges Annandale, Dlamini and Mavuso), thereby demonstrating a vested interest in the outcome of the matter. Alternatively, the misbehaviour concerning the same facts was framed as unlawfully directing the application to be heard, while being aware that the Constitution requires that these matters be dealt with through the promulgation of legislation.

The former Chief Justice's application for the recusal of the JSC's members was denied. He applied for the recusal of the Acting Chief Justice by challenging his appointment on the grounds that he was not the most senior judge of the Supreme Court. He also alleged bias, as the Acting Chief Justice was one of three judges who (allegedly falsely) reported to the King that then Chief Justice Ramodibedi had issued a warrant of arrest against him, and as the first official act of the Acting Chief Justice had been to demand the surrender of official vehicles. JSC member Dlamini was challenged for his association with the Prime Minister, "who is behind the whole judicial crisis including the present impeachment proceedings" and to whom Dlamini is a personal lawyer. The Chairman of the Civil Service Commission was challenged for allegedly lacking impartiality and being predisposed to a predetermined outcome, as he also sits on the *ad hoc* committee that advised the King to refer the matter to the JSC. [80] Former Chief Justice Ramodibedi has filed a constitutional challenge to the JSC's decision in the Supreme Court (decision pending).

On 18 June 2015, the JSC's Secretary notified Mr Ramodibedi of the King's decision to remove him from office as Chief Justice with effect from 17 June, for serious misbehaviour.

[78] Available at http://www.swazilii.org/search/node/impunzi.
[79] Wezzy Ndzimandze and 16 others vs Titselo Dzadze Ndzimandze and 13 others (981/2014) [2014] SZHC234 (23rd September 2014).
[80] Letter dated 20 May 2015 from Chief Justice Ramodibedi to Secretary of the JSC and verbal submissions at JSC hearing on 25 May 2015, as also reflected in the Decision by the JSC, para. 1-2.

The FFM-SZ further found that on certain occasions[81] arrest warrants have been served against serving members of the Judiciary. Judge Thomas Masuku, Judge Jacobus Annandale, Judge Mpendulo Simelane and former Chief Justice Michael Ramodibedi, whose cases are described above, exemplify this practice. Stakeholders who met with the FFM-SZ also reported that there had been attempts to obtain warrant of arrests against other judges who are currently serving in the Swaziland Judiciary. These warrants have been issued notwithstanding section 141(4) of the Constitution of Swaziland which provides that "a judge of a superior court or any person exercising judicial power, is not liable to any action or suit for any act or omission by that judge or person in the exercise of the judicial power."

A distinction should be clear between conduct that: (1) is purely in the exercise of a judicial power by the judge; and (2) involves civil or criminal liability with respect to conduct that does not involve the legitimate exercise of a judicial power. In respect of the first type of conduct, and as set out in the section on regional and universal international standards including the African Principles and Guidelines, there is a presumption against civil and criminal liability. There is nothing, however, to prevent the establishment of liability in the case of other wrongdoing, particularly where there is serious criminal misconduct and especially if this undermines the officer's integrity or public confidence in the administration of justice. If a judge is arrested with respect to conduct that has not been carried out in the exercise of judicial power and function, justice must be administered with a view to ensuring accountability while respecting judicial independence.

Section 141(4) of the Constitution appears to be aimed at ensuring that serving judges enjoy the independence and personal security that they need in exercising their judicial authority. In its consultations with judges and other stakeholders, the FFM-SZ determined that the use of arrest warrants against serving judges had caused significant damage upon the independence, impartiality and personal security of serving judges, especially in a context where there is undue interference in judicial functions by the Executive. The perception that these warrants are used merely as a measure of harassment is buttressed by the fact that most are eventually withdrawn and do not lead to a criminal trial.

[81] Also see AmaBhungane Reporters, 'Judges' arrests on hold as Swazi furore continues' (22 May 2014). Available at: http://amabhungane.co.za/article/2014-05-22-judges-arrests-on-hold-as-swazi-furore-continues (last accessed 8 December 2015).

4 CASE ALLOCATION

The UN Special Rapporteur on the independence of judges and lawyers has characterized the method for assigning cases within the Judiciary as "paramount for guaranteeing the independent decision-making of judges".[82] The assignment of cases is exclusively an internal matter of judicial administration.[83] The Implementation Measures for the Bangalore Principles of Judicial Conduct, elaborated by the Judicial Integrity Group, provide in this regard that the "division of work among the judges of a court, including the distribution of cases, should ordinarily be performed under a predetermined arrangement provided by law or agreed by all the judges of the relevant court".[84]

The Special Rapporteur has noted that assignment of cases at the discretion of the court chairperson "may lead to a system where more sensitive cases are allocated to specific judges to the exclusion of others". The situation where the court chairperson in specific cases retains the power to assign or withdraw cases was pointed out to be one which, "in practice, can lead to serious abuse".[85]

In Swaziland, the FFM-SZ found that the manner in which cases have been allocated and managed has greatly contributed towards undermining the independence and impartiality of the Judiciary. It is problematic that court rules on case allocation are not readily accessible; attempts by the FFM-SZ to obtain them were unsuccessful. However, there was confirmation that historically the Registrar of the High Court had been responsible for allocating the cases, in consultation with the Chief Justice. In more recent practice, as confirmed by judges and other stakeholders with whom the FFM-SZ met, the former Chief Justice personally allocated cases, usurping the Registrar's functions and regularly side-stepping the established practice in which the "duty judge" hears new matters.

Former Chief Justice Ramodibedi acknowledged to the FFM-SZ that he indeed personally assigned cases, but claimed to have done so in order to ensure that each judge be assigned cases according to his or her individual competencies. Many of the other interlocutors expressed the opinion that, through the former Chief Justice's personal allocation of cases, he had colluded with certain judges and the Executive to manipulate the course of justice and influence the outcome of proceedings, by assigning certain cases to specific judges whom he knew could be trusted to adjudicate in a way protective of the interests of the Crown or (members of) the Executive or other powerful political or private interests.

Beyond subverting the course of justice in specific disputes, interventions in case allocation by the former Chief Justice cast serious doubts over the impartial nature of any proceedings, as expressed by numerous stakeholders. Furthermore, the FFM-SZ found that it spoiled relations between the Chief Justice and some members of the Judiciary, who objected to this interference with their functions. It also generated friction between the Judiciary and the legal profession.

In the Swazi context, the FFM-SZ found that the lack of separation of powers entails a high possibility of collusion between the Chief Justice and the Crown and members of the Executive. Combined with the lack of individual independence of

[82] Leandro Despouy, Special Rapporteur on the independence of judges and lawyers, Report to the Human Rights Council, UN Doc. A/HRC/11/41 (2009), para. 46.
[83] UN Basic Principles on the Independence of the Judiciary, Principle 14.
[84] Measures for the Effective Implementation of the Bangalore Principles of Judicial Conduct, S. 3.2.
[85] Leandro Despouy, Special Rapporteur on the independence of judges and lawyers, Report to the Human Rights Council, UN Doc. A/HRC/11/41 (2009), para. 47.

judges and the Chief Justice's personal involvement in case allocation, this has served to weaken the Judiciary's independence. The Chief Justice's actions, which clearly contravene standards and best practices designed to protect the principle of impartiality, have grave implication for the enjoyment of the right to a fair trial of persons who come before the Swazi Judiciary.

5 JUDGES, LAWYERS AND THE PUBLIC

5.1 Relations between the Judiciary and the legal profession

While the Law Society of Swaziland[86] still enjoys cordial and professional relations with certain individual judges, it appears to the FFM-SZ that, overall, the relationship between the Judiciary and the Law Society of Swaziland is tense and frosty.

The Law Society accuses the former Chief Justice and the JSC of failing to address their key concerns, which include the failure by the JSC to consult the Law Society in the appointment of judges and acting judges and the failure by the JSC to investigate and deal with reported cases of intimidation of lawyers by certain judges, including the Chief Justice. Furthermore, members of the Law Society reported to the FFM-SZ that judges have on occasion advised parties to proceedings that they would not get a judgement in their favour due to their representation by lawyers who are viewed as "agents of regime change". This alleged conduct is in direct contravention of the Constitution, in particular section 21(1), as well as regional and international law and standards,[87] which gives individuals the right to a fair hearing and the right to be represented by a legal practitioner of their choice. It also undermines the rights of lawyers to freedom of expression, guaranteed under international law.[88]

Contempt of court case against critics of the former Chief Justice[89]

On 17 March 2014, leading human rights lawyer Thulani Maseko was arrested on the basis of a warrant issued by then Chief Justice

[86] The 1964 Legal Practitioners Act requires that every person admitted and enrolled as an advocate or attorney is a member of the Law Society (S. 35(1)).
[87] See among others, Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, in particular Article I; ICCPR, Article 14 and Human Rights Committee, General Comment No. 32, Article 14: Right to equality before courts and tribunals and to a fair trial, UN Doc. CCPR/C/GC/32 (2007); United Nations Basic Principles on the Role of Lawyers.
[88] Swaziland's Constitution (S. 24) protects every person's right to freedom of expression and opinion, but contains a limitation clause, which provides i.a. that laws may make provision for a restriction on the freedom of expression "that is reasonably required for the purpose of … maintaining the authority and independence of the courts; or … that imposes reasonable restrictions upon public officers" except if "that provision or, as the case may be, the thing done under the authority of that law" is not "reasonably justifiable in a democratic society". This is incompatible with Article 19 of the ICCPR, which exhaustively restricts permissible reasons for limitation to those necessary in view of respect of the rights or reputations of others, and for the protection of national security or of public order (*ordre public*), or of public health or morals. Also see Human Rights Committee, General Comment No. 34 on Article 19: Freedoms of opinion and expression, UN Doc. CCPR/C/GC/34 (12 September 2011).
[89] See, among others, International Commission of Jurists, 'The Failure of Justice: Unfair Trial, Arbitrary Detention and Judicial Impropriety in Swaziland – ICJ Trial Observation Report 2015'; UN Special Rapporteurs on the freedom of expression, on Human Rights Defenders, on arbitrary detention, and on the independence of the judiciary, 'Swaziland: UN experts condemn continued detention and trial of human rights defenders' (12 June 2014); International Commission of Jurists, 'Swaziland: release of human rights defenders Thulani Maseko and Bheki Makhubu a victory for the rule of law' (30 June 2015), and earlier statements concerning the case, available at www.icj.org; International Commission of Jurists, American Bar Association's Center for Human Rights & Hogal Lovells US LLP, Submission to the Working Group on Arbitrary Detention on behalf of Thulani Maseko, 17 February 2015, available at http://www.icj.org/swaziland-un-working-group-on-arbitrary-detention-calls-for-release-of-human-rights-lawyer-thulani-maseko/ (last accessed 9 December 2015); Amnesty International, 'Swaziland: Free editor and human rights lawyer jailed after summary proceedings' (18 March 2014), available at https://www.amnesty.org/en/latest/news/2014/03/swaziland-free-editor-and-human-rights-lawyer-jailed-after-summary-proceedings/ (last accessed 9 December 2015).

Ramodibedi for "contempt of court", based on statements made in magazine articles, in which Mr. Maseko criticized the conduct of the Chief Justice in relation to the arrest and hearing in chambers of a government vehicle inspector. Mr Maseko was detained overnight and, reportedly, the Chief Justice ordered the police to deny him access to his lawyer.

The next day, Mr Maseko was brought to the Chief Justice's chambers. The lawyers representing him were not informed that this was taking place, and learned of this by chance. The Chief Justice ordered Mr Maseko be remanded into custody for seven days, despite the prosecutor not requesting this. Afterwards, Mr Maseko appeared before Judge Simelane, who extended the detention.

On 6 April, Mr Maseko was released when High Court Judge Dlamini determined that the initial arrest warrant was invalid. The Attorney General's Office and the Office of the Director of Public Prosecutions appealed.

On 9 April, Judge Simelane issued a new verbal order for the arrest of Mr Maseko, who was re-arrested following Judge Simelane's decision to disregard the judgment by Judge Dlamini directing the release of Mr. Maseko. On 11 April, Judge Simelane also denied an application for bail.

Mr Maseko's case was heard before Judge Simelane, who refused to recuse himself despite an apparent conflict of interest (he was a material witness in the case concerning the government vehicle inspector, which was the subject of criticism in the articles). On 17 July 2014, Mr Maseko was found guilty of the criminal offence of contempt of court. On 25 July, he was sentenced to two years' imprisonment, without the option of a fine or supervised release. Mr Maseko filed an appeal against his conviction and sentence.

On 3 November 2014, the Supreme Court declared it was unable to hear the appeal against the re-arrest because the record of the proceedings was incomplete. The Supreme Court then postponed the matter indefinitely and indicated that Mr. Maseko would be entitled to submit an application to be released on bail. When it was made clear to Mr. Maseko that such a bail application would be decided by Judge Simelane, he opted not to pursue the bail application on fear of an apprehension of bias.

On 22 April 2015, the United Nations Working Group on Arbitrary Detention concluded that there had been non-observance of the right to a fair trial "of such gravity as to give the deprivation of liberty of Mr Maseko an arbitrary character".

The detention and trial of Mr Maseko for the exercise of the right to express his opinion on a court case were deemed by the Working Group to run counter to Swaziland's international human rights obligations, in particular article 19 of the International Covenant on Civil and Political Rights. It moreover acknowledged that, as a

lawyer, Mr Maseko had the right to take part in public discussions of matters concerning the law and the administration of justice.[90]

Furthermore, the Working Group held that Mr Maseko's right to a fair trial was violated, as the proceedings were not impartial. The initial arrest warrant for criticizing the conduct of the Chief Justice was issued by the Chief Justice himself, on his own motion. He also remanded Mr Maseko to pre-trial custody although the prosecution had not requested this. At this time, Mr Maseko was also deprived of his right to legal assistance and was not allowed to consult with counsel. Judge Simelane, a material witness in the related case concerning the vehicle inspector, remanded Mr Maseko in custody, denied an application for bail, and refused to recuse himself from presiding over the trial.[91]

In July 2015, the Supreme Court upheld the appeal against the conviction and sentence of Mr Maseko, ordering his immediate release, as well as that of editor Bheki Makhubu, who was also convicted on the same charges. The Crown conceded most of the legal arguments by defence counsel and in particular that Judge Simelane ought to have recused himself from presiding over the case.

On the other hand, former Chief Justice Michael Ramodibedi accused the Law Society of carrying out "a local and international campaign" against him right from the time he was appointed as Chief Justice. He expressed the view that the Law Society of Swaziland had not been objective in its criticism of the Judiciary.

It should be recalled that UN Basic Principles on the Role of Layers requires governments to "ensure that lawyers (a) are able to perform all of their professional functions without intimidation, hindrance, harassment or improper interference … and (c) shall not suffer, or be threatened with, prosecution or administrative, economic or other sanctions for any action taken in accordance with recognized professional duties, standards and ethics."[92] In addition, "Lawyers … are entitled to freedom of expression, belief, association and assembly. In particular, they shall have the right to take part in public discussion of matters concerning the law, the administration of justice and the promotion and protection of human rights and to join or form local, national or international organizations and attend their meetings, without suffering professional restrictions by reason of their lawful action or their membership in a lawful organization."[93]

5.2 Interference with access to justice

A further source of contention arose over the issue of Practice Directive number 4 of 2011, which not only led effectively to restrictions on the exercise of the legal profession, but on the general capacity of people in Swaziland to access justice.

[90] UN Working Group on Arbitrary Detention, Opinion No. 6/2015 concerning Thulani Rudolf Maseko, UN Doc. A/HRC/WGAD/2015 (6 May 2015), para. 26-30.
[91] Ibid., para. 31-35.
[92] UN Basic Principles on the Role of Lawyers, Principle 16.
[93] Ibid., Principle 23.

On 16 June 2011, the former Chief Justice issued the directive in his capacity as the Head of the Judiciary, preventing all Swazi courts from receiving or entertaining any case that challenges the King directly or indirectly. It aimed at giving effect to Section 11 of the Constitution of the Kingdom of Swaziland, which grants his Majesty the King or Ingwenyama (which in the local vernacular language means "Lion") immunity from judicial process. The consequence was effectively to place the Executive above the law.

This situation led to a judicial crisis during which the Law Society took the unprecedented move to collectively boycott the courts for over four months and called for the removal of the former Chief Justice in an official complaint launched against him with the Judicial Service Commission. No action was undertaken by the JSC, resulting in the Law Society of Swaziland filing a Communication 406/2011 against Swaziland with the African Commission on Human and Peoples Rights.

In Communication 406/2011[94] the Law Society of Swaziland alleges that Practice Directive 4/2011:

- Amounts to an ouster of the courts' jurisdiction in all cases involving the King, his office or his interests;
- Removes effective protection of the law in Swaziland where the cause of action involves the King, his interests or his office being a statutory body;
- Violates a wide range of rights, specifically the right to access to justice and effective remedies inherent in all human rights enjoyed by Swazi citizens;
- Violates the independence and impartiality of the Judiciary;
- Violates the principle of equality before the law; and,
- Places the Chief Justice in this unusual position of being at the forefront of the ouster of the jurisdiction of the courts and an assault on judicial independence.

The case remains pending at the time of publication of this report.

The FFM-SZ considers that these unwarranted interferences brought to bear on the legal profession have compromised the right to a fair trial and access to justice. Under these circumstances, lawyers cannot independently perform their functions, both in court and outside thereof.

5.3 Public confidence in the Judiciary

Throughout its consultations, the FFM-SZ found that there is very little public confidence in the Judiciary. It was also not clear whether or to what extent most members of the general population considered the Judiciary an accessible and effective means of delivering justice. Among the FFM-SZ's interlocutors, it appears that the Judiciary is widely viewed as being primarily a tool to protect the interests of the Crown and (certain members of) the Executive. The Judiciary is generally considered to be unable to enforce the Constitution and the law, especially in cases where Executive action is put into question.

The FFM-SZ's interlocutors professed a variety of reasons for their lack of confidence in the Judiciary, analysed also in this report. Main drivers appear to be the association of the former Chief Justice with (members of) the Executive, the failure by the JSC to address concerns raised by civil society, the opaque nature of judicial appointments and perceived corruption of some judges.

[94] African Commission on Human and Peoples' Rights, Communication 406/11, *The Law Society of Swaziland v. Kingdom of Swaziland*.

6 CONCLUSIONS AND RECOMMENDATIONS

6.1 Conclusions

As an outcome of its first Universal Periodic Review before the United Nations, the Kingdom of Swaziland pledged to the international community to "Take concrete and immediate measures to guarantee the independence and the impartiality of the Judiciary."[95] This promise remains unfulfilled. On the contrary, as the mission noted, there have been a number of retrograde developments that require urgent attention.

The state of the independence of the Judiciary in Swaziland has evolved unevenly over the years, with recent noticeable and worrying trends and instances of repeated interference from the Executive as well as the Judiciary's inability to defend its independence, professionalism and integrity. The framework for the appointment and disciplining of judges as currently provided in the Constitution appears inadequate for purposes of instilling confidence in the population that deserving and or qualified individuals are being appointed. The heavy involvement of the Crown in the appointment of judges is not consistent with international law and standards that safeguard the independence of the Judiciary. There is urgent need for the review of the Judicial Services Act and reform of the Judicial Services Commission to bring them into line with international, including regional, law and standards and best practice. A judicial code of conduct, while in existence, appears to be out-dated and inconsistent with international standards and principles. A code of conduct that is enforced by an independent and impartial Judicial Services Commission will bring confidence into the conducting of disciplinary proceedings against judges as there appear to be several shortcomings in the current framework, as evidenced in the cases against Judge Thomas Masuku and former Chief Justice Ramodibedi.

6.2 Recommendations

In light of its findings, and with a view to strengthening the rule of law, respect for and protection of human rights and access to justice and effective remedies in the Kingdom of Swaziland, and bearing in mind that an absolute monarchy ultimately is incompatible with a society based on the rule of law, the FFM-SZ makes the following recommendations:

To the Crown, the Executive and the Legislature

1. Respect and ensure judicial independence generally take the necessary specific steps to that end: to cease interference with judicial conduct and judicial functions; bringing the Constitution and subordinate legislation in line with regional and universal international law and standards, in particular on the separation of powers and respect for judicial independence.

2. Ratify or accede to, and implement into national law, regional and international human rights treaties to which Swaziland is not a party.[96]

[95] Human Rights Council, Report of the Working Group on the Universal Period Review: Swaziland, Addendum: Views on conclusions and/or recommendations, voluntary commitments and replies presented by the State under review, UN Doc. A/HRC/19/6/Add.1 (6 March 2012).
[96] Swaziland has signed, but not yet ratified, the International Covenant for the Protection of all Persons from Enforced Disappearances. Swaziland has neither signed nor ratified or acceded to the following key international treaties: the Optional Protocol to the International Covenant on Civil and Political Rights (ICCPR); the Second Optional Protocol to the ICCPR, aiming at the

3. Implement decisions and recommendations of regional and international human rights mechanisms in respect of Swaziland's obligations. These include in particular the decisions of the African Commission on Human and Peoples' Rights (in the matter of Lawyers for Human Rights/Swaziland 251/02) and the United Nations Working Group on Arbitrary Detention (Opinion 6/2015 pertaining to the detention of Thulani Rudolf Maseko and the Recommendations to Swaziland by the United Nations Human Rights Council Periodic review, including the many recommendations Swaziland has publicly committed itself to through formal acceptance.

4. Strengthen the legal and regulatory framework for the independence of the Judiciary, and its implementation, including by:

    a. Immediately reviewing the laws and regulations pertaining to the Judicial Services Commission with a view to bringing them in line with regional and international law and standards, including by removing the Crown's control over the Commission's composition;

    b. Enacting a Judicial Services Act consistent with regional and universal international law and standards, which, among other things:
        i. Sets out in detail the appointment procedure for judges allowing for public, transparent and fair processes that respect the separation of powers, including public announcement of any vacancies in the Judiciary, and ensuring the full participation of all concerned stakeholders;
        ii. Contains the necessary safeguards guaranteeing judges' security of tenure;
        iii. Provides for independent and impartial tribunals and fair procedures for disciplinary proceedings against judges that remove the potential for influence by the Crown and allow for the participation of external and independent judges.

    c. Reconstituting the Commission under revised laws and regulations (Recommendation 4(a)) in a transparent and fair manner;

    d. Cease the appointment of temporary, casual or short-term judges, unless – and in compliance with regional and universal international and national law and standards – there is an absolute need due to potential conflicts of interest or the need to clear case backlogs.

To the Judiciary

5. Repeal any Practice Directives that impede access to justice and/or the fair administration of justice, in particular Practice Directive 4/2011.

6. Develop and publish a code of conduct for judges, in line with regional and universal international standards, including the Bangalore Principles on Judicial Conduct, with a view to strengthening the integrity of the Judiciary and improving the accountability of judges.

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abolition of the death penalty; the Optional Protocol to the Convention against Torture and Other Forms of Cruel, Inhuman or Degrading Treatment or Punishment; the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women; Optional Protocol III to the Convention on the Rights of the Child; the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families; and the Rome Statute of the International Criminal Court.

7. Introduce and implement a case allocation and management system that is impartial and fair, removing direct control by the Chief Justice or the ability of any single judicial officer to influence the allocation and management of cases.

8. Establish an independent commission of inquiry to gather facts, undertake an assessment and make remedial recommendations in respect of serious deficiencies in the administration of justice, particularly alleged unfair trial and associated violations of fundamental rights and freedoms during Chief Justice Ramodibedi's tenure.

9. Following an independent needs assessment, develop and implement a mandatory program for continuous professional continuing education for the Judiciary, comprising also lower judicial officers, with a view to improving the understanding of the independence of judges and lawyers and raising awareness of human rights, including the right to fair trial.

To the Judiciary and the legal profession

10. Hold regular consultations between the Bench and the Law Society and all sectors of the Bar strictly on administrative matters of mutual concern, with a view to ensuring a fairer and more effective administration of justice and ensuring an appropriate professional relationship between the Judiciary and the legal profession.

To the international community

11. Support domestic civil society's ability to perform their role as a critical watchdog, including through documentation of human rights violations and advocacy, both domestically and in African and international forums, for improved observance of the rule of law and respect for human rights.

12. Support reform efforts by the authorities of the Kingdom of Swaziland aiming to improve the separation of powers, strengthen the rule of law and independence of the Judiciary and raise the level of human rights protection.

To civil society

13. Continue and strengthen capacity, including by seeking international cooperation and assistance, to perform monitoring, research, advocacy on rule of law and human rights question, particularly as they relate to the administration of justice; and, to this end engage with the institutions and mechanisms of the African Union's African Commission on Human and Peoples' Rights; the UN Human Rights Council, including its special procedures (particularly the Special Rapporteur on the Independence of Judges and Lawyers and Working Group on Arbitrary Detention) and the Universal Periodic Review process); and the UN treaty bodies, particularly the Human Rights Committee.

ANNEX A: TEAM MEMBERS

Justice Moses Chinhengo (Team Leader)

Justice Chinhengo, a commissioner of the International Commission of Jurists, studied law at the University of Zimbabwe where he graduated with a Bachelor of Law Honours degree. He is one of the three drafters of the new constitution of Zimbabwe. From March 2004 – March 2012 he was a Judge of the High Court of Botswana. He previously served as a Judge of the High Court of Zimbabwe, resigning from that position in 2004 due to what he perceived as executive interference in the Judiciary in Zimbabwe. Prior to becoming a judge he worked as a practicing lawyer for several years. From 1983 to 1989 he worked for the Ministry of Justice, Legal and Parliamentary Affairs and rose to the position of Chief Law Officer in the Legislative Department of the Ministry. In 2013 he co-founded the African Institute of Mediation and Arbitration (AIMA) in Harare, Zimbabwe and is a managing director of the Institute. Currently he is an arbitration and mediation practitioner. He is also a lecturer in the Department of Procedural Law at the University of Zimbabwe.

Justice Tamara Trotman

After finishing her law degree at the Free University in Amsterdam, Tamara Trotman started her career in 1992 as a criminal defence lawyer in the Hague. In 2006 she became a judge at the District Court of Rotterdam in the criminal law division and was appointed to the Court of Appeal in the Hague in September 2014. Tamara Trotman is also Chair of the Dutch foundation Judges for Judges (J4J). Judges for Judges is an independent and non-political foundation set up by judges to support fellow judges abroad who have run into problems or risk problems on account of their professional practice. These problems are mostly related to (presumed) violation of their professional independence. J4J also concerns itself with judges, who have been discharged for disturbing reasons, have been arrested and imprisoned, put under pressure, are threatened or even assassinated. The support J4J gives is mostly immaterial.

Justice Charles Mkandawire

Justice Charles Mkandawire, a commissioner of the International Commission of Jurists and is from Malawi. He is currently serving his second term as Commissioner, having first been elected in 2009 and then re-elected in 2014. He was seconded from his position as High Court Judge in Malawi to the position of Registrar of the Southern African Development Community (SADC) Tribunal until its closure following a decision by the SADC Heads of State. As Registrar of the SADC Tribunal he was responsible for the establishment and operationalisation of the Tribunal from 2006-2014. From 2001-2004 he served as Registrar of the High Court of Malawi and from 1998-2001 as Chair of the Industrial Relations Court in Malawi. He is currently Regional President of the Commonwealth Magistrates' and Judges' Association (CMJA) for East, Central and Southern Africa since 2012.

Justice Oagile Key Dingake

Judge Dingake did his LLB at the University of Botswana; LLM (University of London), Post Graduate Certificate in Development Studies at the University of Oslo, Norway, and PhD in Constitutional Law at the premier and leading University of Cape town. Judge Dingake has practised and taught law at the University of Botswana and other Universities. Judge Dingake, formerly Judge of the Industrial court, is a sitting judge of the High Court of Botswana, has sat as an acting Justice of Appeal before and also sitting judge of the Residual Special Court of Sierra Leone, having been appointed by the UN Secretary General Ban Ki Moon in 2013. The Residual Special Court is an international court that presides over those accused of grave breaches of International Humanitarian Law in Sierra Leone. This court is the successor to the Special Court for Sierra Leone, the court

that tried and convicted former president of Liberia Charles Taylor. He was honoured as an Extraordinary Law Lecturer at the University of Pretoria while serving as judge of the High Court in recognition of his academic record. He has in the past been a visiting lecturer at the University of Pretoria and International Development Institute of Labour Law in Rome. He has written several books and articles in revered law journals. Judge Dingake is a worldwide winner of Justice Gender Award granted to him in 2013 and speaker of choice in international forums on diverse issues related to human rights more particularly on Labour, HIV and the Law and gender justice

Otto Saki – Senior Legal Adviser, ICJ Africa Programme (Rapporteur)
Otto holds a bachelor of laws and masters of law from University of Zimbabwe and Columbia Law School respectively focusing on human rights, media, transitional justice and enforcement of international law. Otto has worked in various capacities in Zimbabwe as a programmes coordinator/deputy director for the premium human rights organisations, Zimbabwe Lawyers for Human Rights from 2003 until 2009, before joining USAID Zimbabwe as a senior advisor/ deputy office director for the democracy, rights and governance office from 2009 to 2013. Before joining ICJ in 2015, Otto was the chief of party of the USAID Rights and Rule of Law Programme in Uganda which partnered with the Judiciary, civil society and media practitioners on continuous professional development, human rights reporting and advocacy.

Laurens Hueting – Legal Adviser, ICJ Legal & Policy Office (Rapporteur)
Laurens studied law (Bachelor in Law and LLM), with a focus on EU external relations and human rights, and history (BA and MA), specializing in modern history, at Maastricht University (the Netherlands), Universiteit Gent (Belgium) and the Humboldt-Universität zu Berlin (Germany). Before joining ICJ staff in July 2012, Laurens worked as a legal intern for the ICJ and as an intern in the European Parliament's Human Rights Unit in Brussels. Within the ICJ's Legal & Policy Office, Laurens works for the Centre for the Independence of Judges and Lawyers, and the Sexual Orientation and Gender Identity Programme.

Justice Mavedzenge, Legal Consultant and PhD Candidate University of Cape Town (Rapporteur)
Justice Mavedzenge is a lawyer and a constitutional law scholar who has previously collaborated with the ICJ to publish a textbook on Economic, Social and Cultural rights under the new Constitution of Zimbabwe. He also collaborated with the ICJ to develop a Practitioners' Guide on the Enforcement of ESC rights in Zimbabwe. Currently, Justice Mavedzenge is studying towards a PhD in Constitutional and human rights law at the University of Cape Town. Previously he has worked as a Senior Program Officer responsible for the implementation of the Freedom House's Rule of Law project in Southern Africa. He also worked as a Program Officer at Pact Zimbabwe, where he was responsible for the implementation of a civil society and human rights strengthening program in Zimbabwe.

This report was reviewed by Ian Seiderman, ICJ Legal and Policy Director; Arnold Tsunga, ICJ Africa Programme Director; and Alex Conte, Senior Legal Adviser, ICJ Legal & Policy Office.

ANNEX B: TERMS OF REFERENCE

TERMS OF REFERENCE OF THE INTERNATIONAL COMMISSION OF JURISTS FACT-FINDING MISSION TO SWAZILAND (IFFM-SZ) 11 - 15 May 2015

These Terms of Reference are established by the International Commission of Jurists (ICJ) to govern its Finding Mission to Swaziland (IFFM-SZ). The IFFM-SZ is a mission of the ICJ, undertaken in collaboration with the Africa Judges and Jurists Forum (AJJF), Judges for Judges Netherlands (J4J) and the Commonwealth Magistrates' and Judges' Association (CMJA), to look generally at matters related to the independence of the Judiciary and the administration of justice in Swaziland, as detailed below.

The Mission team is composed of:

- Retired Judge Moses Chinhengo (Retired High Court Judge Botswana and Zimbabwe; ICJ-Commissioner; Interim Chair AJJF and member and Head of the IFFM-SZ) of Ruwa, Harare, Zimbabwe

- Judge Charles Mkandawire (High Court Malawi; ICJ-Commissioner; Regional President-CMJA and member of the IFFM-SZ) of Lilongwe, Malawi.

- Judge Oagile Dingake (Professor of Public Law at University of Cape Town, Judge Residual Special Court of Sierra Leone, Judge High Court Botswana; member of the IFFM-SZ) of Gaborone, Botswana

- Judge Tamara Trotman (Judge of Court of Appeal, The Hague, Chair Judges for Judges (J4J)), member of the IFFM-SZ of The Hague, Netherlands

- Laurens Hueting (ICJ-CIJL Legal Adviser and FFM Rapporteur)

- Otto Saki (ICJ-ARP Senior Legal Adviser and FFM Rapporteur)

- Justice Mavedzenge (ICJ Consultant and University of Cape Town PhD Candidate and FFM Rapporteur)

Background and Context

Judicial independence and the rule of law implementation is generally weak in Swaziland. A series of developments in recent years appear to indicate that the relationship between the Executive, and both the Judiciary and the Legislature is deteriorating, with grave implications for rule of law principles, including the separation of powers.

Most recently, on 20 April 2015, in a case raising serious concerns regarding the separation of powers, High Court judges Mpendulo Simelane and Jacobus Annandale, High Court registrar Fikile Nhlabatsi and the Minister of Justice Sibusiso Shongwe were arrested on various charges related to corruption and the obstruction of justice. There were efforts to also arrest the Chief Justice that resulted in a stand off with the police from 20th April 2015, the matter remaining unresolved to the date that this concept was produced. The Chief Justice's house was surrounded by the police forces in an attempt to arrest him. Water and electricity supplies were allegedly disconnected from the Chief Justice's house.

In July 2014, lawyer Thulani Maseko and journalist Bheki Makhubu were convicted and given prolonged prison sentences following an unfair trial, for having exercised their rights to freedom of opinion and expression in an article critical of the Judiciary. They remain in arbitrary detention today.

In 2011, the Judicial Service Commission removed High Court Judge Thomas Masuku, one of the country's few independent judges, from office for allegedly criticizing the King, following proceedings that were not transparent, impartial or fair, and in which due process safeguards were not respected. Domestic and international observers were not allowed to observe the proceedings.

Further in 2011, a four-month boycott of the courts by the Law Society of Swaziland to protest the lack of judicial independence seriously hampered the delivery of justice. The Law Society also filed a complaint with the African Commission accusing Chief Justice Ramodibedi of systematically undermining judicial independence, subsequent to the Chief Justice's dismissal of complaints by the Law Society against himself. The matter remains pending.

Also in 2011, the Chief Justice ordered a Practice Directive ordering the non-registration of lawsuits that challenge the King "directly or indirectly", effectively removing access to justice in any cases against corporations in which the King owns shares or has an interest. A further Practice Directive has abrogated the fair process in the allocation of cases and allows the Chief Justice to intervene in the attribution of sensitive and political cases.

For a more general briefing on the country profile of Swaziland, please visit http://www.icj.org/cijlcountryprofiles/swaziland/.

The terms of reference for the IFFM-SZ shall be as follows:

1. General Timeframe

These are the terms of reference for the IFFM-SZ of the ICJ and collaborating partners AJJF, J4J, and the CMJA to be carried out in Swaziland commencing on 11 May 2015 and ending 15 May 2015.

2. Activities to be undertaken under these terms of reference

The Fact-Finding Mission will complete the following activities:

- Assess the domestic legal framework (constitutional, legislative and administrative) and practice as it pertains to the independence of the Judiciary and the legal profession in Swaziland;
- Identify obstacles posed -- legal, structural, and practical – by the state of the independence of the Judiciary to the capacity of the Judiciary to fairly administer justice, including in relation to the protection of human rights;
- Gather information on and assess the relations between the critical stakeholders in the justice delivery chain, including the Judiciary, lawyers and other legal professionals, the Justice Ministry, and civil society;
- Gather information and assess the operations of the Chief Justice's office in key delivery areas, such as the case management system (including the allocation and tracking of cases); practice directives on administration of justice; appointment and disciplining of judicial officers and support staff; continuous legal education of judicial officers; and, defending the institutional and individual independence of the Judiciary; and,

- Assess the legal framework and practice regarding the independence of the Judiciary, and the implications on access to justice against international human rights law standards.

The Mission will consult as widely as possible with members of the Judiciary and the legal profession, governmental authorities, civil society and other key stakeholders.

3. Outputs

The ICJ will produce a report of the IFFM-SZ containing:

- A description and evaluation of the state of independence of Judiciary and legal profession in Swaziland, in law and practice, with a particular focus on recent events and developments as identified in the background above;
- An analysis against international law and standards of the legal framework and practice regarding the independence of the Judiciary and the legal profession and the separation of powers in Swaziland, and the implications on the fair administration of justice and access to justice; and,
- A set of recommendations, addressed to various stakeholders, aimed to address the concerns raised in the report and promote meaningful changes in law and practice.

The report will be prepared by the IFFM-SZ, in consultation with and subject to legal and policy review by the ICJ secretariat.

4. Expected Results

The Mission and its report aim to contribute to:

- A more professional, independent, impartial and accountable Judiciary;
- A more independent legal profession; and,
- Better adherence to the rule of law and separation of powers and international law and standards concerning the administration of justice in Swaziland.

ANNEX C: LIST OF INTERLOCUTORS

Prince David Dlamini, former Minister of Justice
Sibusiso Barnabas Dlamini, Prime Minister
Sabelo Matsebula, Attorney General (acting)
Isaac Magagula, Commissioner of Police

Chief Justice Michael Mathealira Ramodibedi
Acting Chief Justice Moses Cuthberth Bheki Maphalala
Justice Jacobus Annandale
Justice Qinisile Mabuza (NB: ICJ Commissioner)
Justice Mbufto Mamba
Judge Nkosinathi Nkonyane

His Excellency Nicola Bellomo, Ambassador of the European Union
Her Excellency Makila James, Ambassador of the United States of America

Representatives of the Law Society of Swaziland
Representatives of Lawyers for Human Rights Swaziland
Representatives of various civil society organizations

Lecturer in Political Sciences of the University of Swaziland
Lecturer in Law of the University of Swaziland

Journalists and editors

Except where quotations appear, most information and views shared with the researchers have not been individually attributed in this report. In addition, some interlocutors are not individually identified in the above list, where it was necessary to protect confidentiality, particularly for reasons of personal security.

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November 2015 (for an updated list, please visit www.icj.org/commission)

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ISBN 978-92-9037-222-6

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