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The new Swaziland constitution and its impact on media freedom

Abstract

This paper examines media freedom in Swaziland since the kingdom's new constitution came into effect in 2006. Despite the constitution, Swaziland remains a non-democracy and there continues to be a restrictive media environment.

The paper tackles three research questions: (i) How repressive were media laws in Swaziland before the constitution came into effect? (ii) What does the 2006 constitution say about media freedom? (iii) To what extent has the constitution improved media freedom?

The paper relies on a qualitative analysis of the pre-existing media laws, the constitution itself, and a survey of media events since 2006.

The paper concludes that there has been no discernible progress on media freedom in Swaziland and there is little reason to be optimistic in the near future that this will change.

Key words: Constitution, media freedom, media law, Swaziland

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INTRODUCTION

The new Swaziland constitution has been in place for more than two years and although it has a Bill of Rights that enshrines freedom of expression and freedom of the media, no discernible progress has been made in changing the existing restrictive media environment in the southern African kingdom.

There are no legal protections for journalists and media workers in Swaziland despite the formal constitutional protection (SADC, 2004:47).

In Swaziland, customary law, which has equal status with the Roman Dutch Common Law and statutes, continues to restrict freedom of the media and freedom of expression. Although, in theory, the constitution is supreme over all other laws, unwritten customary law wields enormous power in practice and because Swazi Law and Custom is not codified, it cannot be tested against the constitution (MISA, 2007:2-3).

Tensions between the government and the independent media in Swaziland, which were high in the years proceeding the signing of the constitution, remain so. In the past years the media have become quite vocal in terms of exposing issues of bad governance, corruption and fiscal irresponsibility, although there is still a tendency to 'tread carefully' with regard to the issues they address and the manner in which they do it (Dlamini, 2006:175).

Cultural traditions that promote a culture of silence and non-questioning of authority have led to certain stories not seeing the light of day or to journalists exercising self-censorship on pertinent national issues. The media have also been the recipient of an onslaught of criticism from the entire spectrum of the national leadership including the King, Queen Mother, the Prime Minister, cabinet ministers, parliamentarians and traditional leaders (Dlamini, 2006:176; MISA, 2007:38).

According to Dlamini, 'They have all questioned the media's right to press freedom, asserting that the media in Swaziland is too free and responsible for damaging the image of the country internationally. In their view the media is disrespectful and abusing its freedom by exposing issues that should not be addressed' (Dlamini, 2006:176).

The harassment of the media has been conducted under various guises, including protecting the country's image, national security, 'respecting' others' rights to privacy and 'responsible' reporting (Dlamini, 2006:176).

In addition to this overt harassment a more subtle form of self-censorship still exists in media houses in Swaziland. This self-censorship is enforced by unwritten, often ambiguous, cultural rules that restrict conduct. According to these rules, certain public figures and institutions are exempted from media and public scrutiny. These are enforced mostly by traditional authorities that have power to declare what is 'unSwazi' and what is not. In a society that still holds strongly onto its culture, traditional and cultural rules force journalists to tread carefully and cautiously when conducting their duties (Mamba, 2005:99; Mabuza, 2007:68; MISA, 2007:4).

After introductory sections on the background to Swaziland itself and to the media environment itself, this paper sets out three research questions:

- How repressive were media laws in Swaziland before the constitution came into effect?
- What does the 2006 constitution say about media freedom?
- To what extent has the constitution improved media freedom?

The essay concludes that the constitution has made no discernible impact on the repressive media environment in Swaziland.

SWAZILAND INTRODUCTION

Swaziland, a country landlocked between South Africa and Mozambique, is the smallest nation on the African continent, with a population of just under one million people. It is classified as a middle-income country but about 70 percent of the population lives on an income of less than US\$1 per day. Swaziland has the highest rate of HIV infection in the world. In 2007-2008, about 600 000 people had received food aid from international donor agencies to fend off starvation (Rooney, 2007).

Since 1973, the monarch (presently King Mswati III) has ruled by decree after Mswati's father Sobhuza II suspended the constitution that had been in place since the kingdom gained its independence from Britain in 1968. The 1973 decree has not been formally rescinded since the constitution came into place.

Despite the signing of the constitution, very little has changed in Swaziland since the constitution's inception and the kingdom remains a non-democracy. The powers of the monarch over Parliament and the political executive remain unchanged. The king appoints members of the Cabinet and political parties remain banned in the kingdom (US State Department, 2008).

In its report on the human rights situation in Swaziland in 2007, the US State Department (2008) noted that Swazi Government agents continued to commit or condone serious human rights abuses:

Human rights problems included: inability of citizens to change their government; unlawful killings by security forces; police use of torture, beatings, and excessive force; police impunity; arbitrary arrests and lengthy pre-trial detention; infringement on citizens' privacy rights; limits on freedom of speech and of the press; restrictions on freedom of assembly and association; prohibitions on political activity and harassment of political activists; restrictions on freedom of movement; discrimination and violence against women; poor enforcement of women's rights; child abuse; trafficking in persons; societal discrimination against mixed race and white citizens; antiunion discrimination and child labor.

MEDIA LANDSCAPE

Most of the media in Swaziland are government controlled. Swazi TV and the radio stations under the umbrella of the Swaziland Broadcasting and Information Services (SBIS) are in effect departments of the Swazi civil service (MISA, 2007:26). There is one independent television channel, Channel Swazi, which was created specifically to support King Mswati III. Although it is independent of the state, its journalism policy is to support the king (*Weekend Observer*, 2008-02-02:13)

There are two newspaper groups in Swaziland: the Observer Group, owned by a conglomerate that is effectively under the control of the Swazi Royal Family, and the Times of Swaziland Group which has three national newspapers, which while

independent of government nonetheless exercises strict self-censorship, especially when reporting the activities of the king (MISA, 2007:38).

Generally, in the state and private sector, the government has kept a tight reign on media in recent years (MISA, 2007:18-28). In 1997, the Minister of Information and Public Service introduced the Media Council Bill. Some of the more draconian aspects of the Bill included the requirement that all newspaper owners had to have a degree in journalism and to live in Swaziland. The Bill was deferred in 1998 after strong domestic and international opposition to it, but the threat of its reintroduction surfaces from time to time to intimidate journalists; the most recent example of this was in November 2007 (SADC, 2004:49-50; House of Assembly, 2007).

How repressive were media laws in Swaziland before the constitution came into effect?

It is estimated that there are more than 30 pieces of legislation in place that restrict the operations of the media (Maziya, 2003:86-88; MISA, 2007:6) and none of these have been repealed to make way for the Bill of Rights. According to Vukani Maziya, (the chief executive of state-controlled Swazi TV), these restrictive laws have resulted in lack of growth in the media industry, harassment and intimidation, strained relationships and mistrust between government and the media, weakened media organisations and lack of professionalism (Maziya, 2003:86-88).

Some of the main laws restricting the media are as follows:

National security and sedition

The Official Secrets Act, 1968, prohibits any person who possesses or has been entrusted, 'by any person holding office under the Government', with any code, password, sketch, plan, model, article, note, document or information, from communicating it to any unauthorized person, retaining it, failing to take proper care of it or using it 'in any manner or for any purpose prejudicial to the safety or interests of Swaziland'. The penalty is a fine or a prison sentence of up to five years, or both. To convict a person under this Act, it is not necessary to prove that the accused was guilty of any particular act, but merely that 'it appears, from the circumstances of the case or the conduct of the accused, that his purpose was a purpose prejudicial to the safety or interests of Swaziland' (Norris, 2001).

In accordance with the Seditious and Subversive Activities Act, 1938, a speech or publication is seditious if it is intended to bring the King, his heirs, successors, or government into contempt or encourage hatred of them. The Act defines 'publication' to include 'all written or printed matter and everything, whether or not of a nature similar to written or printed matter, containing any visible representation or by its form, shape, or in any manner capable of suggesting words or ideas, and every copy and reproduction of any publication'.

Also seditious are publications or speeches that:

- intend to encourage hatred or contempt of, or excite disaffection towards the administration of justice in Swaziland

-promote feelings of ill-will and hostility between different classes of the population of Swaziland.

The Act is a 'draconian piece of legislation, the primary purpose of which is to provide for the suppression and punishment of sedition, that is criticism of the King and the Swaziland government' (SADC, 2004:64).

Protection of sources

There are no laws, which specifically refer to the protection of the confidentiality of journalistic sources. The principle of the right of a journalist to protect their sources, which is a crucial element of media freedom and of freedom of expression and information generally, is certainly not respected in Swaziland.

In March 2000 the *Swazi Observer*, a newspaper owned by a royal trust, was closed, reportedly because of financial difficulties, but it was generally believed to be because the *Observer* had refused to reveal sources for reports the *Observer* had published that were critical of the Prime Minister and the Commissioner of Police (Norris, 2001).

Defamation and the right of reply

Criminal defamation remains part of Swaziland's laws dating back to the Cape Libel Act of 1882, which made it an offence punishable by two years' imprisonment or a fine, or both, to publish a defamatory libel that is to injure the reputation of a person and expose him or her to hatred, ridicule and contempt. The defences available are: (a) truth and public benefit (b) fair comment (c) privilege. The Criminal Procedure and Evidence Act, 1939 also covers the defences against a charge of defamation (Norris, 2001).

Swaziland offers specific protection for the person of the Ndlovukati (Queen Mother). In the Protection of the Person of the Ndlovukati Act, 1968, 'A person who does or attempts to do, or makes preparation, or conspires with any other person, to do, an act with the intention of bringing into hatred or contempt, or of inciting disaffection or ill will or hostility against, the person of Ndlovukati, shall be guilty of an offence'.

Norris (ref) contends that in Swaziland there is even wider acceptance that those in official positions have need of greater protection. Aside from the specific legal protection, there is a wider specific assumption in Swaziland that public figures warrant greater protection for reasons of cultural tradition.

Freedom of Information

Swaziland has no freedom of information legislation. The Official Secrets Act and other practices restrict the media in their efforts to obtain information and report freely on the activities of government. Access to information from the government and officials depends on goodwill and contacts rather than on any clearly established rules.

Obscenity

The Obscene Publications Act, 1927 prohibits the importation, making, manufacture, production, sale, distribution, or public exposure of indecent or obscene material. No exemption is granted to material of an artistic, literary or scientific nature. The penalties are a fine, or a prison sentence of up to six months, or both. Possession or ownership of indecent or obscene materials or objects is similarly punishable by the same Act. Furthermore, officials may, upon receiving a complaint which they believe to be well-founded, seize impugned material by force and destroy it where warranted. Such power is subject to an appeal to the courts by the owner.

The Act does not define what it means by the terms ‘indecent’ and ‘obscene’. Presumably this is meant to refer primarily to pornographic material (SADC, 2004:59).

Reporting of Courts and Parliament

Section 3 of the Parliamentary Privileges Act of 1967 guarantees freedom of speech and debate in Parliament and states that this freedom cannot be impeached or questioned in any court or place outside Parliament (Norris, 2001).

The Magistrate’s Courts Act, 1939 grants magistrates the power to hold trials *in camera* or to exclude females, minors and the public generally ‘in the interest of good order or public morals’. The Criminal Procedure and Evidence Act of the same year extends this power of the magistrate to the preparatory examination phase of a case. The Act adds a further reason which may justify *in camera* proceedings. A magistrate may decide it is in the interests of ‘the administration of justice’ (Norris, 2001).

The Magistrate’s Courts Act, 1939 also guarantees the public’s right of access to records, stating that ‘the records and proceedings of the court shall in all cases be accessible to the public, under the supervision of an officer of the court at convenient times and upon payment of such fees as may be prescribed by the rules’.

Proscribed Publications Act, 1968

A particularly notorious piece of legislation impacting on the print media sector is the Proscribed Publications Act, 1968, which empowers the Minister for Public Service and Information to ban publications ‘if the publication is prejudicial or potentially prejudicial to the interests of defence, public safety, public order, public morality or public health’ (SADC, 2004:48).

Books and Newspaper Act, 1963

Section 4 prohibits anyone from printing or publishing a newspaper in Swaziland unless the editor of the newspaper is resident within Swaziland and without a registration certificate issued by the Registrar of Books and Newspapers. Where a newspaper has more than one editor, the chief editor has to be resident in Swaziland. The effect of this is that newspapers have to be locally controlled and registered in order to be disseminated in Swaziland (SADC, 2004:65).

Cinematograph Act, 1920

The primary purpose of the Act is to control the making and public dissemination of films, and of pictures and placards relating to the films.

It is prohibited for anyone to make a film showing African gatherings or African life without the prior permission of the Minister for Public Service and Information. The Act further prohibits films to be made of certain Swazi cultural occasions and celebrations namely the Incwala Day, the King's Birthday, the Umhlanga (Reed Dance) and the Somhlolo (Independence Day) without the Minister's written consent. The Minister has an unlimited discretion to grant or to refuse consent (SADC, 2004:63-64).

A particularly draconian aspect of the legislation is that it empowers the Minister to declare any picture to be objectionable (within his complete discretion) if he believes that the picture ridicules or shows contempt for any member of the King's naval, military or air forces; scenes tending to 'disparage public characters'; scenes calculated to 'affect the religious convictions or feelings of any section of the public'; scenes 'suggestive' of immorality or indecency; executions, murders and 'other revolting scenes'; scenes of 'debauchery, drunkenness, brawling, or of any other habit of life not in accordance with good morals and decency'; scenes depicting 'successful' crime or violence; and scenes which are 'in any way prejudicial to the peace, order or good government of Swaziland'.

What does the 2006 constitution say about media freedom?

There are doubts about how much the constitution truly represents the wishes of the Swazi people. The constitution became effective in February 2006, but its writing took 10 years to complete, this was after pressure from within Swaziland and the international community had been building for several years to modernise the political system, particularly to draft a constitution containing a bill of rights. In 1996 King Mswati III appointed a 30-member Constitutional Review Commission (CRC) to examine the constitutional system, determine citizens' wishes regarding a future system of government and to make recommendations on a new constitution. This process took five years (International Bar Association, 2003:3-5).

The King expressly requested the International Bar Association (IBA) to peruse the draft constitution, once it was completed, and to forward comments to him and to the Constitutional Drafting Committee (CDC), which was set up in 2002.

The conduct of the CDC remains a secret to this day. The Swaziland High Court confirmed this in November 2007 when it denied Swazi people the right to see records about how the Swaziland Constitution was drawn up (*Weekend Observer*, 2007-11-10: Supplement 1-4).

The High Court said that nobody was allowed to see the records containing information on the way the constitution was drawn up, and what the people said during the period the constitution was drafted, because the CRC had itself said that its deliberations should remain secret.

Even the media were denied the opportunity to report and comment on the CRC while it was in operation.

In its report published in 2003, the IBA called the draft constitution 'flawed' and reported that one critic went so far as to call it 'a fraud'.

The IBA report states, ‘The extent to which individual Swazis were consulted has also been questioned. The CRC did not keep records of the submissions it received and media coverage of submissions was apparently banned’.

There is therefore no formal record of how Swazi citizens presented their views and of what in fact they said to the CRC.

The IBA said that information was elicited in a highly charged atmosphere where individuals were reportedly asked, in the presence of chiefs, whether they wanted to retain the King and whether they preferred political parties. In such circumstances the overwhelming majority of people are said to have confirmed the ban on political parties being maintained, that the executive powers of the King should be maintained, the position of traditional advisers to the King strengthened, and that Swazi customs should have supremacy over any contrary international rights obligations.

Under such circumstances was the constitution born.

The main provision of the Swazi constitution as it relates to freedom of the media and freedom of expression is Section 24 which states:

- A person has a right of freedom of expression and opinion
- A person shall not except with the free consent of that person be hindered in the enjoyment of the freedom of expression, which includes the freedom of the press and other media, that is to say:
 - freedom to hold opinions without interference
 - freedom to receive ideas and information without interference
 - freedom to communicate ideas and information without interference (whether the communication be to the public generally or to any person or class of persons)
 - freedom of interference with the correspondence of that person
- Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of this section to the extent that the law in question makes provision:
 - that is reasonably required in the interests of defence, public safety, public order, public morality or public health
 - that is reasonably required for the purpose of:
 - protecting the reputations, rights and freedoms of other persons or of the private lives of persons concerned in legal proceedings;
 - preventing the disclosure of information received in confidence;
 - maintaining the authority and independence of the courts; or
 - regulating the technical administration or the technical operations of telephony, telegraphy, posts, wireless broadcasting or television or any other medium of communication
 - that imposes reasonable restrictions upon public officers, except so far as that provision or, as the case may be, the thing done under the authority of the law is shown not to be reasonably justifiable in a democratic society.

To what extent has the constitution improved media freedom?

The Swazi government is keen to give the impression that it is committed to reforming the 30-plus restrictive media laws that currently exist in the kingdom, but media stakeholders doubt its sincerity.

In 2005, a Media and Information Policy was adopted that proposed legal reforms with a view to update and/or introduce supportive mechanisms that address the needs of the mass media environment. The policy also recognises the importance of the right to access to information (Dlamini, 2006:176).

Following this new policy, in 2007 the government introduced seven parliamentary bills, including: the Freedom of Information and Protection of Privacy Bill, the Swaziland Media Commission Bill, the Swaziland Public Broadcasting Corporation Bill, the Swaziland Broadcasting Bill and the Books and Newspapers Bill (MISA, 2007:6-8).

What all these bills have in common is that they purport to place the interests of the media at their centres and they have not originated from within Swaziland. A Commonwealth Secretariat consultant was engaged to draft the bills, relying for inspiration on bills that presently exist in democratic countries. The fact that Swaziland is not a democracy was apparently overlooked.

Members of a workshop held for media stakeholders to discuss the bills before they were piloted in Parliament saw the unreality of the approach taken by the consultant and concluded that their own input was irrelevant because 'traditional authorities' in the kingdom had not been consulted on the bills' contents. Since nothing happened in Swaziland without the consent of these 'traditional authorities' the bills as presently written had no value, they said (Anon, 2007).

The constitution itself in Section 2 states, 'This Constitution is the supreme law of Swaziland and if any other law is inconsistent with this Constitution that other law shall, to the extent of the inconsistency, be void'.

This should mean that all the anti-media laws that existed before 2006 are no longer operative. It is impossible to say with certainty that the laws are now void, since their validity or otherwise has not been tested in the Swazi courts. There are, however, reasons to be pessimistic.

The US State Department, in its 2007 Country Report on Swaziland Human Rights, noted that although the constitution provides for freedom of speech and of the press the government limited these rights in practice and journalists practiced self-censorship (State Department, 2008).

The Swazi media are all too ready to toe the line when it comes to its relationship with power. When addressing editors in April 2006, the Swazi King commended the media for its 'patriotism and maturity' during a border blockade staged by the Congress of South African Trade Unions and banned political parties in an attempt to force political change in Swaziland. The media had joined trade unions in opposing the blockade. Later in the year the Swazi Prime Minister praised the media for a 'job well done' (Mabuza, 2007:68).

The media are not strong in Swaziland and find themselves in deep trouble if they voice criticism of the ruling elite, especially King Mswati III.

In March 2007 the Times of Swaziland Group of Newspapers was forced into publishing an abject apology to King Mswati III after the *Times Sunday* ran a news

commentary sourced from the international news agency Afrol News in which the ‘authoritarian’ king was criticised for giving a bad impression to foreign investors.

Such open criticism of the king is not allowed in Swaziland (not even in so-called independent newspapers like the *Times Sunday*). The newspaper group was forced to publish an abject apology or face immediate closure (MISA, 2007:38).

Other incidents in which the media were harassed or restricted since the constitution was passed include the following (Rooney, 2008):

May 2006

King Mswati III banned newspapers from writing about his wives without his permission, even while covering official events, after the *Times Sunday* interviewed one of his wives (with her consent) while she was sick in hospital. This was the second time in 12 months that the Swazi king gagged the media from reporting about royalty. It should be noted that this ban was not reported within Swaziland. This banning by the king simply continued a trend that had been operating since before the new constitution: in 2005, for example, the king ordered the media to stop writing about his lavish spending after newspapers published that he had purchased US\$500 000 worth of luxury vehicles for his 13 wives (Ndlovu, 2006).

October 2006

Parliament ordered the *Times of Swaziland* to apologise for an opinion expressed in the newspaper that referred to a select committee that investigated the operations of the Swaziland Broadcasting and Information Service as a ‘kangaroo court’. The *Times* declined to apologize (Mabuza, 2007:69).

November 2006

The Public Services and Information Minister S’gayoyo Magongo instructed Swazi TV to reinstate an employee the station wished to dismiss. Swazi TV complied with the instruction. In Parliament the minister said Section 75 of the constitution empowered him to do this as it charges ministers with responsibility ‘for the policy and general direction and control’ over their departments.

December 2006

The *Times of Swaziland* came under attack by a committee that was putting together a case to demand the return of land from neighbouring South Africa which Swaziland claimed belonged to it. At a press conference members of the committee including the chair Prince Khuzulwandle, a member of the Royal Family, criticised the newspaper for collecting views on the issue from members of the public. The response the newspaper received was hostile to the demand for restoration prompting the committee to question why the newspaper asked ordinary people instead of people who were knowledgeable on the subject.

February 2007

The king's chief executive officer Bheki Dlamini barred journalists at a press conference from asking the king questions relating to the recently-formed Swaziland Police Union, whose formation had shaken the Swazi establishment.

June 2007

The Minister for Health and Social Welfare, Njabulo Mabuza, banned health workers from talking to the media in response to a number of stories highlighting the impact of a critical drug shortage.

Workers were forbidden to have any type of communication, including interviews and casual or 'indiscreet' conversations, whether at clubs, hotels, bars or private parties. Journalists were also barred from Mbabane Government Hospital, the country's key medical facility, whose problems had been highlighted in the press. These problems were considered by the press to be typical of the wider crisis afflicting the healthcare system. In fact, it turned out that the ban had been in position for some years previously but was only being enforced now following a series of news reports in newspapers about deaths in government hospitals.

October 2007

The *Times of Swaziland* tried to find out how much it cost taxpayers to send the Prime Minister Themba Dlamini on a trip from Swaziland to the Bahamas. The newspaper was told it could not have the information because it was 'classified' information. The newspaper had also been trying without success to get government to disclose the names of companies that won tenders for government business (*Times of Swaziland*, 2007-10-23:2).

November 2007

The Swazi House of Assembly set up a select committee to investigate the editor of the *Times Sunday* Mbongeni Mbingo following a comment piece the newspaper ran criticising the House Speaker for not allowing a debate to take place on possible amendments to the kingdom's constitution. The select committee exonerated the editor stating his rights to freedom of expression under the constitution.

However, what seemed like a victory for the free press was illusory because the select committee decided it wanted Parliament to accredit journalists who covered the proceedings of parliament, in effect giving the government control over who could report and who could not. The committee also called for the reintroduction of the defunct Media Council Bill (that had originally been tabled in 1997), which, among other things, would require journalists to be qualified and registered with some central body (House of Assembly, 2007).

CONCLUSION

Although the new constitution guarantees freedom of expression and the media, the long list of anti-media laws that still exist make the environment hostile for the media. As Maziya commented as long ago as 2003, the existence of such laws leads to lack of growth in the media industry, harassment and intimidation, strained relationships and mistrust between government and the media, weakened media organisations and lack of professionalism.

The experience since the constitution came into effect in 2006 is that very little has changed and journalists continue to operate in a hostile environment.

Certain cultural values continue to foster a climate of silence, in which those in authority are not questioned. These limit the freedom of the media to engage in important debates, for example about what may be done to tackle the kingdom's high levels of poverty and HIV/AIDS, spiralling corruption, poor economy and lack of international confidence.

Experiences to date suggest that the ruling elites in Swaziland have no interest in change. At present they control access to most of the media in Swaziland and can decide what does and what does not get talked about. This helps to a large extent to keep them in power and there is no reason to suppose that they will give up this power willingly anytime soon.

It will be very difficult to break this power, but with continued advocacy for democracy, both from within Swaziland and from the international community, it can be done.

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