THE UNIVERSAL DECLARATION OF HUMAN RIGHTS AND THE CONSTITUTION OF ESWATINI

Introduction

On 10 December 1948, the United Nations' General Assembly adopted the Universal Declaration of Human Rights (UDHR): the international bill of rights. This document contains a wide-ranging catalogue of rights designed to protect the citizen in any country of the world. Conscious, however, of the fact that the Declaration carried no force of law, the United Nations reduced the rights into two separate covenants: one on Political and Civil Rights, the other on Economic, Social and Cultural Rights both of which were adopted in 1966 and ratified by ESwatini in 2004.

The 27 Articles of the Covenant on Political and Civil Rights represent a typical bill of rights which one would find in a modern Constitution including the Constitution of ESwatini 2005[1]. These rights include, but not limited to: the right to life; protection of right to personal liberty; protection from inhuman or degrading treatment; protection from deprivation of property; right to a fair hearing; and equality before the law.

The Kingdom of ESwatini is a party to a number of key international, regional and sub-regional human rights instruments. These include the International Covenant on Civil and Political Rights (ICCPR), the International Covenant on Economic, Social and Cultural Rights (ICESCR) and the Convention Against Torture and Other Forms of Cruel, Inhuman or Degrading Treatment or Punishment (CAT).

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[1] Chapter 3 of the Constitution 'Protection and Promotion of Fundamental Rights and Freedoms'.

In our jurisdiction, human rights instruments are not part of domestic law unless the content of such instruments are incorporated by an Act of Parliament[2].

The Constitution of ESwatini

The theory of rights animating the Constitution of ESwatini has at least two distinctive features. First, the Constitution distributes rights into judicially enforceable rights (chapter 3). Second, it places social and economic rights which must be respected in law and policy-making in chapter 5 which deals with Directive Principles of State Policy. The directive principles of state policy are not enforceable.

Chapter 3 of the Constitution declares and guarantees the following rights: right to life, liberty, right to a fair hearing, equality before the law and equal protection of the law; freedom of conscience, freedom of expression and of peaceful assembly and association and movement; protection of the privacy of the home and other property rights of the individual; protection from deprivation of property without compensation as well as protection from inhuman or degrading treatment, slavery and forced labour, arbitrary search and entry[3].

Any person or group of persons who feel(s) that his chapter 3 right(s) have been contravened may approach the High Court for redress[4]. From this section, it can be said that the Judiciary has the responsibility to interpret the Constitution and to enforce the Bill of Rights which is justiciable and enforceable[5]. The Courts are the ultimate interpreters of the Constitution.

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[2] Section 238 of Constitution Act 2005.
[3] Section 14(1) (a)-(e).
[4] Section 35(1) of the Constitution, 2005.
[5] Section 35(1) and section 151(2) of the Constitution.

Section 35 of the Constitution provides classes of persons that can approach the High Court for redress in the event of a violation of a right in the Bill of Rights chapter. The following category of persons has standing to approach the High Court for redress in the event of a violation of a right in chapter 3 of the Constitution: a person acting in their own interest; a person acting on behalf of a group of which that person is a member; or a person acting on behalf of another who is detained.

Section 151 of the Constitution gives the High Court unlimited original jurisdiction in both criminal and civil matters as wee as jurisdiction to **enforce fundamental rights and to hear and determine any matters of a constitutional nature.**

Constitutional matters are those that involve the interpretation, protection or enforcement of the Constitution. Such matters have to do with the direct application of the Bill of Rights. These are matters that involve a constitutional challenge to law or conduct based on an unjustified infringement of a fundamental right.

It should be noted that constitutional matters are not confined to the direct application of the Bill of Rights. There exists another form of constitutional matter- an indirect application of the Bill of Rights. This may arise by virtue of section 35(3) & (4) of the Constitution which states as follows:

'[35] (3) If in any proceedings in any court subordinate to the High Court any question arises as to the contravention of any of the provisions of this Chapter, the person presiding in that court may, and shall where a party to the proceedings so requests, stay the proceedings and refer the question to the High Court unless, in the judgment of that person, which shall be final, the raising of the question is merely frivolous or vexatious.

(4) Where any question is referred to the High Court in pursuance of subsection (3) the High Court shall give its decision upon the question and the court in which the question arose shall dispose of the case in accordance with that decision or, if that decision is the subject of an appeal to the Supreme Court, in accordance with the decision of the Supreme Court.'

These sections give discretion to a trial court acting *mero motu* during interpretation of any law, to refer any matter to the High Court for constitutional determination. Where a constitutional question is raised during a trial by a party to the proceedings, the trial court is bound to refer the matter to the High Court for adjudication.

In constitutional matters 'standing' is now regulated by section 35 of the Constitution and not by Common law.

Declaration of Emergency

Declaration of emergency derives from a governmental declaration made in response to an extraordinary situation posing a fundamental threat to a country. Section 36 of the Constitution regulates declaration of emergency.

Section 38 provides that the right to a fair hearing, the right to life, equality before the law and security of person, freedom from slavery or servitude; and freedom from torture, cruel, inhuman or degrading treatment or punishment cannot be limited even in the event of a state of emergency.

Section 38 of the Constitution is consistent with provisions of the ICCPR which list the right to life; prohibition of torture, freedom from slavery; the right to recognition before the law as non-derogable under any circumstances.

The United Nations' Human Rights Committee has recognized that in addition to the non-derogable rights listed above, there are several other humanitarian provisions that must remain inviolable and these are:

- The humane treatment of all persons deprived of their liberty
- Procedural guarantees and safeguards designed to ensure the integrity of the judicial system; and

- Protection of rights of persons belonging to minorities.

The Bill of Rights chapter in the Constitution is specially entrenched[6]. Any amendment of this chapter in the Constitution requires that a Bill be passed at a joint sitting of Parliament and supported by the votes of not less than three-quarters of all the members of both houses of parliament. The fact that the bill of rights chapter is specially entrenched shows how seriously the protection of human rights is taken by the Constitution.

Conclusion

The Constitution provides the ground rules. It is up to all human rights actors to do their part to advance the protection of human rights in the country.

[6] Section 246(1)(c).

CJ speech