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Administration of criminal justice in Swaziland: crises and confusion in the 1990s

Summary

The Kingdom of Swaziland is one of the few countries in the Southern Africa Development Community (SADC), Africa and the world where traditional institutions play a very important part in the overall governance of the country. The Kingdom, which in 1998 celebrated thirty years of political independence, has what has been described as a “modified traditional monarch”. The significance of traditional institutions in general and the monarch in particular, manifests itself not only in the general administration of the country but in the administration of criminal justice as well. This contribution describes the crises and confusion that arose in the administration of criminal justice in Swaziland in the 1990s in general and, in particular, the part played by the Director of Public prosecutions – DPP, who was assumed to have been connected to, and in league with, traditional bodies and officials. An analysis is made of how adherence to traditional norms and the influence of traditional institutions contributed to and became part of the crises. A conclusion is drawn that the DPP, who is an officer of the court, is in law expected to exercise his professional powers independently. When that ceases to be the case, this office can become a cause of injustice not only to individuals but to society as a whole.

Strafregspiegling in Swaziland: krisisse en verwarring gedurende die negentigerjare

Die koninkryk van Swaziland is een van die min lande in die Suider-Afrikaanse Ontwikkelingsgemeenskap (SAOG), Afrika, trouens in die wêreld, waar tradisionele instellings 'n baie belangrike rol in die algehele regering van die land speel. Die koninkryk, wat in 1998 dertig jaar van politieke onafhanklikheid herdenk het, het wat bestempel word as 'n “gewysigde tradisionele monargie”. Die belangrikheid van tradisionele instellings oor die algemeen en die monarg in die besonder, blyk nie net uit die algemene administrasie van die land nie, maar ook uit die strafregspiegling. Hierdie artikel beskryf die krisisse en verwarring wat oor die algemeen in die strafregspiegling in Swaziland gedurende die negentigerjare ontstaan het en in besonder, die rol wat die Direkteur van Openbare Vervolging gespeel het — dit word aanvaar dat hy nou betrokke en kop in een mus was met tradisionele liggame en beamptes. 'n Ontleding word gedoen van hoe die behoud van tradisionele waardes en die invloed van tradisionele instellings bygedra het en deel geword het van die krisis. Daar word tot die slotsom gekom dat daar van die Direkteur van Openbare Vervolging, wat 'n amptenaar van die hof is, regtens verwag word om sy professionele bevoegdhede op 'n onafhanklike wyse uit te voer. Wanneer dit nie meer die geval is nie, kan hierdie amp 'n oorsaak van ongeregtheid word, nie net wat die individu betref nie, maar ook vir die gemeenskap as 'n geheel.

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1. Introduction

Every country in the world has its important days and events marked by celebrations. The Kingdom of Swaziland celebrates political independence on 6 September. The 1998 celebrations, however, were special. The country not only marked its thirtieth year of independence, but also celebrated the thirtieth birthday of His Majesty King Mswati III.¹ The two occasions are, in many respects, different, but in Swaziland the two were combined and marked together because both had national significance. Not only does the Kingdom have the three branches of modern government found in other African countries, it also has an absolute monarch, who emphasizes the protection, safeguarding and promotion of the Kingdom's cultural traditions as a matter of national pride.

This study was triggered by two unrelated events that took place towards the end of 1998 when Swaziland was still enjoying double celebrations and therefore in a festive mood. First was the hearing of the case of *Gladys Zengeni v The Attorney General*² in September and the tragic death of Justice Ben Dunn on 6 November. In both events the name of Adinkra Kosopire Donkoh (who had been the Director of Prosecutions from April 1992 until August 1996) was mentioned. During the hearing of Gladys Zengeni's case, for example, it was alleged in court that a statement to the effect that 'what Donkoh wants Donkoh gets' was made at the end-of-the-year party held by staff of the DPP's Chambers in 1994. At the memorial service in honour of the late Justice Ben Dunn, the President of the Law Society of Swaziland remarked that Donkoh misled the country's authorities (in 1996) into demoting Justice Dunn from the office of the Acting Chief Justice, which he had held for slightly over a year. As a result, several questions come to mind. Who exactly was Adinkra Donkoh and what part did he play? What place did he occupy and what influence did he wield in the Kingdom of Swaziland? What role did he play in the two incidences and how could that have happened? What were the contexts and circumstances in which all that took place? Those questions, and many more, were very engaging and some have not been answered to date.

Much material was collected and many sources consulted. What is presented here, therefore, is only part of the findings and tentative conclusions arrived at, as they relate to a limited sphere of criminal justice administration in the Kingdom. The discussion largely covers developments in the 1990s, as obtained from court files and judgments of decided cases, supplemented by newspaper reports and unstructured interviews. Whereas, on the surface, the criminal justice system appeared to function normally, behind the glitter and glamour of traditional ceremonies and harmony, there was a dark cloud of disenchantment and huge cracks in the system, as

1 King Mswati III was born on 19 April 1968, five months before Swaziland became independent, in September 1968. The King's birthday is in most cases gazetted as a public holiday.

2 High Court civil case No 2241/95 (yet to be decided).

gathered from the crises and confusion to be outlined below.³ These crises and confusion partly arose as a result of attempts by the traditional system of leadership to dominate its modern counterpart especially in justice administration in general, and criminal justice administration in particular.

As a background to what happened in the 1990s, a sketch of the Swaziland criminal justice system follows in the next section, before outlining evidence of confusion and crises that rattled the courts of the country in the 1990s. The talents, skills and charisma Donkoh injected into the criminal justice administration in the country will be related to power structures and contextualised in Max Weber's classification of authority in part four of the paper before wrapping up with tentative conclusions in the final section.

2. Criminal justice administration in Swaziland

Before Swaziland gained its independence in 1968, it was governed as part of South Africa. The legal and judicial system of the Kingdom, therefore, like those of other countries in Southern Africa, derives its roots from a mixture of Roman-Dutch law and English law. In addition to that, and like other countries in Africa, Swaziland also has a dual system of laws, namely the received law and indigenous customary law. Both systems of law existed before independence and were recognized as such and provided for in the Independence Constitution 1968.⁴

Swazi courts, created through colonial legislation in 1950, continue to exist and operate to date and it is through them that indigenous customary law is administered.⁵ Like in other countries in the region, received law is administered through a hierarchy of courts consisting of magistrates' courts, with appeals to the High Court and the Court of Appeal. The independence Constitution also made provisions for the Judicial Service Commission, the

3 Three significant cases have been deliberately omitted. They are: first, the contempt of court proceeding against *The Times of Swaziland* newspaper 1993, *Douglas Loffter*, High Court Criminal Case No 200/93, Hull CJ (unreported judgment dated 16 June 1993). See also *The Times of Swaziland* 22 June 1993. Secondly, the prosecution of two members of staff in the Registrar General's office, including the Acting Registrar of the High Court, *Harry Sibhaha Dlamini*, High Court Criminal Case 17/93, Sapire AJ, (unreported judgment dated 2 April 1993). Thirdly, the case of a prominent footballer, Tholeni Nkambule, suspected of killing a nurse. The case, which was withdrawn by the prosecution, was discussed in Senate, see *The Times of Swaziland* 24 April 1996. Informants brought those cases to my attention and two of the judgments were made available, but circumstances surrounding them appear to be too intricate, difficult and engaging to merit inclusion in this discussion.

4 For background discussion of the legal and judicial system of Swaziland, see Rubin 1970:230-247. Also Crawford 1969:476-485 and 1970:76-86.

5 Swazi indigenous matters were governed by a combination of two pieces of legislation, the *Swazi Administration Act* 79/1950 and the *Swazi Courts Act* 80/1950. In 1998 the *Swazi Administration Act* 1950 was overhauled and replaced by the *Swazi Administration Order* 6/1998. The background to the Order and several other aspects are discussed in Bukurura 1999 and 2001.

Civil Service Commission and the Office of the Attorney General.⁶ Together with institutions established or recognized by the provisions of the Constitutions, other pieces of legislation established the Royal Swaziland Police, Swaziland Prisons and the Law Society of Swaziland, all of which are constituent parts of the criminal justice system.

When the Constitution was abrogated, through the King's Proclamation of 1973, the administration of justice in general, and that of criminal justice in particular, suffered greatly. Although the institutions responsible for those functions remained in place, the constitutional safeguards that are concomitant with the independence and integrity of such institutions were enormously eroded. A few examples need to be mentioned. Constitutional provisions regarding the independent Judicial Service Commission were suspended, the duty to prosecute suspects, previously under the office of the Attorney General, was removed and transferred to the office of the Director of Public Prosecutions, which was created by the King's Decree.⁷ Also suspended were the constitutional safeguards in respect of individual rights. In simple terms, the effect of the abrogation of the Independence Constitution was to take away the independence of legal institutions responsible for the administration of criminal justice which, consequently, exposed them to political pressures and manipulation by the powers-that-be. As will be demonstrated below, some of the consequences of the suspension of those constitutional provisions continue to be felt many years after.

3. Manifestations of confusion and crises in the 1990s

There is profound literature that records and analyses social, political and economic developments of Swaziland up to the late 1980s. Some of those materials are directly concerned with legal developments in the country while others mention, or touch upon, the legal situation only in passing. In both ways, there is not very much in those materials that sheds light on the impending crises and amazing events that ultimately took place in the 1990s. In this paper an attempt has been made to draw from, and relate as best as possible, the processes of the 1980s to the events of the 1990s. The incredible events and processes to be outlined include: public outcry and complaints

6 The Independence Constitution 1968 contained the following provisions, section 91 (Office of the Attorney General), section 113 (Judicial Service Commission) and section 115 (Civil Service Commission). The abrogation of the Constitution did away with the Judicial Service Commission with most of its functions being performed directly by the King. Other functions were transferred to a reconstituted Civil Service Board, see the Civil Service Order 16/1973 enacted by the King-in-Council. Director of Public Prosecutions Order 17/1973 enacted by the King's Order-in-Council, made provisions for the Office of the Director for Public Prosecutions. King's Orders 16 and 17 were published on 7 May 1973 less than a month after the Proclamation. In 1982 the Judicial Service Commission was re-introduced by the *Judicial Service Commission Act* 13/1982. Informants from among the legal profession in Swaziland doubt the independence of the new Commission. See also notes 22 and 45 below.

7 Director of Public Prosecutions Order referred to above.

about the administration of justice; and contempt proceedings against a prominent conservationist, Terence Reilly; and their consequences. Also covered are: prosecutors' protest against a magistrate and their boycott of the High Court and subordinate courts; and prosecution of, and threats against, certain magistrates and their subsequent removal from employment, followed by the withdrawal of labour by the magistrates. The 1990s also saw some lawyers in the country protest against a magistrate whom they considered incompetent, and newspaper owners and editors being prosecuted. Around the same time prominent trade union leaders were also prosecuted: one prosecuted for fraud and others for law and order offences. Of interest also was the threat to arrest the Chief Justice for misuse of a government vehicle, and allegations of fraud against, and a judicial probe of the conduct of, the Director of Public Prosecutions.

Most of these events were, in one way or another, related and had a bearing on the administration of criminal justice in Swaziland. Even without a thorough understanding of the details and the context in which they took place, one may ask: where else in the Commonwealth jurisdiction, have events of this nature ever been heard of? Why did they happen in Swaziland at the time and how can they be explained? These are not innocuous questions to ask in this day and age when transparency and openness are important components of democratic governance.

It is of the utmost importance that these events are brought to the attention of readers and the wider audience, and reflected upon in order to be able to learn from them.

3.1 Contempt of court proceedings against Terence Reilly: 1992

The judiciary in Swaziland, like most other countries around the world, is one of the pillars of criminal justice administration. Courts are responsible for hearing criminal charges brought against suspects and for the ultimate determination of guilt or innocence of the accused. Courts in Swaziland, like other places in the world and Africa in particular, have experienced a public crisis of confidence regarding their role and operations. One need only mention the way in which popular feelings run high when certain suspects are prosecuted and ultimately acquitted in circumstances the general public considers suspicious. These feelings take on different and dramatic proportions when those with political power or in influential positions are involved. That was the situation regarding the prosecution of suspected poachers in Swaziland, which will be discussed shortly.

Public dissatisfaction, with the operation of courts, was recorded by the Department of State of the United States of America⁸ as follows:

In 1992 there was a growing public frustration and outcry at what is perceived as gross inefficiency in the legal system, personified by the modern judiciary. This feeling is shared by the police, public

8 Department of State (United States of America) 1993:286-291.

prosecutors, and the courts. Inefficiency (manifested by poorly investigated and prepared cases and a shortage of magistrates and judges) led to a series of unpopular acquittals which damaged public confidence in the system and which threatens the rule of law.

Terence Reilly is a prominent wildlife conservationist in Swaziland. He has been involved with wildlife in Swaziland since his childhood.⁹ It is no secret that he was one of those who felt frustrated with the legal system for acquittals of suspected poachers or imposition of lenient sentences on those few who were arrested and were successfully prosecuted. In an event that happened either accidentally or deliberately, rangers employed by, and working with, Terence Reilly and under his supervision and control, killed suspected poachers in or around Big Bend on 15 April 1992.

As a law enforcement officer, Reilly was aware that the rangers, and probably himself, might be summoned or arrested for the killings. Together with the Minister of Justice, Honourable Zonke Khumalo, they sought audience with Chief Justice David Hull on 16 April 1992. It is not clear who arranged the meeting, but reliable sources indicate that it was the Minister of Justice who asked for it and took Terence Reilly with him. Chief Justice Hull, a New Zealander, had been appointed to his post barely a month earlier and arrived in Swaziland only in mid-March.¹⁰ The new Chief Justice might not have known what was on the cards. After the Minister had introduced Terence Reilly to the Chief Justice and the usual African brief chat, he excused himself and left. Reilly took advantage of this meeting and is understood to have explained the background to, and the details of, the Big Bend killings to the Chief Justice. The new Chief Justice was not impressed. He instituted contempt of court proceedings against Reilly, gave him an opportunity to file an affidavit and seek counsel. Counsel was heard and judgment given on 24 April 1992.¹¹

In his judgment, Chief Justice Hull noted that Reilly acknowledged that approaching a judge of the High Court, in order to discuss issues likely to be brought before the court was improper. As a result, the Chief Justice noted, that he wanted to ensure that such a thing never happened again before the court he presided over and, indeed, before a magistrate's court. As a law enforcement officer, Chief Justice Hull observed that Reilly ought to have known that whatever happened in Big Bend was a matter to be investigated and determined strictly in accordance with the due process of law, and there was no need to explain that to the Chief Justice. Chief Justice

9 For a history of wildlife conservation in Swaziland and Terence Reilly's involvement, see Reilly 1985. Also <http://www.biggame.co.sz/reillysrock/history.html> accessed 18 January 2000.

10 Honourable Mr. Justice David Hull was appointed Chief Justice of Swaziland with effect from 1 March 1992 (Legal Notice 9/1992 dated 24 January 1992). Adinkra Kosopile Donkoh, on the other hand, was appointed Acting DPP with effect from 1 April 1992 (Legal Notice 47/1992 dated 8 May 1992).

11 Contempt of court committed *ex facie curiae* by Terence Reilly on 16 April 1992, Criminal Case No 69/92, unreported judgment by Chief Justice Hull dated 24 April 1992.

Hull also made it clear to the accused what law enforcement entailed and how he expected to see it conducted under his leadership. Reilly was acquitted after the Chief Justice was assured that there was no intent to unlawfully commit any contempt of court, and after considering an apology from the accused, Chief Justice Hull ended his judgment by acknowledging that he was new in the Kingdom of Swaziland and was not familiar with the customs of the country, which he was hopeful he would become familiar with in due course.

As it turned out, the contempt proceedings against Reilly set in motion a chain of events that, with benefit of hindsight, influenced or had a bearing upon several other things that happened later in the administration of criminal justice in the Kingdom of Swaziland. Chief Justice Hull's lack of familiarity with the Swazi way of doing things soon became clear and was to become part of his own undoing, as will be explained later.

3.2 Chaos in Swaziland courts 1993

The powers-that-be responded to public dissatisfaction by taking several initiatives that ultimately became the backbone of what happened in the eventful months of July and August 1993. The newly-appointed Chief Justice, who had not been in the country when the dissatisfaction with criminal justice administration arose, was required, as part of his duties as head of the judiciary, to take stock. He, in turn invited representatives from stakeholder institutions to a meeting, which took place in his Chambers. Among those in attendance were: the Commissioner of Police (or representative), the Attorney General and the Acting DPP. Very little is known of what transpired in that meeting, but indications are that the parties were required to establish the causes for public dissatisfaction and how to remedy them. In essence, the purpose of the initial meeting was to work on strategies for restoring efficiency, accountability and credibility in the administration of criminal justice in general and the prosecution of suspected criminals. Similar meetings, under the chairmanship of the Chief Justice, were held in his chambers, several more followed after that, until they were abandoned when the Chief Justice, who initiated them, became disillusioned with their usefulness.

It has been said that certain officials (such as the Minister, Principal Secretary for Justice and others from the King's Office), who had nothing to do with criminal justice administration in the country, insisted on becoming parties to those meetings, attending and contributing to their proceedings. The Chief Justice, who could not understand the usefulness of the attendance by such officials and their contributions, considered this as interference in the justice administration process and ultimately refused to be a party to their scheme and withdrew his participation.¹²

¹² When Acting DPP Donkoh spoke to the press (reported in *The Times of Swaziland*: Sunday 8 August 1993) he observed that the first committee was dissolved by Chief Justice Hull when charges of defeating the ends of justice were laid against a magistrate.

The King's advisors considered those meetings to be very useful and decided to reconstitute the committee's composition. A lawyer, who was a member of the Judicial Services Commission, was invited to attend one of the reconstituted committee's earlier meetings. Unlike Judicial Service Commission meetings which were held in the Chief Justice's Chambers, the new committee met in the conference room of the Ministry of Justice.¹³ After that meeting, the lawyer reported to his colleagues of the existence of a committee he did not himself understand. He also revealed that, in his opinion, there was suspicion of both the committee's legal standing and its objectives. In a television interview that followed, the lawyer is known to have referred to this committee as 'the Secret Committee'. That name was not only preferred but it was retained by members of the legal fraternity in their subsequent statements and communications. To the King's advisors, however, this was a King's Advisory Committee on legal matters and, like most other advisory bodies in the Kingdom, it did not need to be set up by a legal instrument and its composition and functions were entirely at the discretion of His Majesty. Informed sources in the King's Office only referred to it as 'the Thursday Committee' since it held its meetings on Thursdays, in the same spirit as meetings originally initiated by Honourable Chief Justice Hull.¹⁴

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- 13 The Committee was composed of the following:
Hon Zonke Khumalo: Minister of Justice - Chair.
Paul Shabangu: Principal Secretary Justice - Secretary.
P O'Connor: Representative of Commissioner of Police - Member.
AK Donkoh: Acting DPP - Member.
AFM Thwala: Attorney General - Member.
Easter Lukhele: Chairman of the Civil Service Board - Member.
Terence Reilly: Conservationist - Member.
Thulani Masina (the lawyer who refused to be part of it, and who withdrew from it and revealed its existence) was informed of and invited to the meeting by Easter Lukhele.
Donkoh's interview given to *The Times of Swaziland* of Sunday 8 August 1996 did not mention P O'Connor, Paul Shabangu and Terence Reilly as members of the reconstituted committee.
The Ministry of Justice itself confirmed the existence of the Committee and assured lawyers that there was nothing sinister about it (*The Times of Swaziland*: 6 August 1993). Donkoh's side of the story regarding the 'Secret Committee' was reported in *The Times of Swaziland*: Sunday 8 August 1993.
Thulane Masina's appointment to the Judicial Service Commission made in 1991 (Legal Notice 15/91 dated 15 March 1991) was revoked with effect from 8 November 1993 (Legal Notice 175/1993 dated 26 November 1993). Thulane Masina himself and other lawyers believe that his removal from the Judicial Service Commission was prompted by nothing other than his public revelation of the existence of the 'Secret Committee'.
- 14 *The Times of Swaziland*: Sunday 8 August 1993 reported that the Acting DPP had acknowledged the existence of the Committee. A careful reading of that report gives an impression of two committees and not one – one committee, chaired by the Chief Justice and the second chaired by a person other than the Chief Justice. An editorial, of the same newspaper, deplored the existence of the committee, and concluded that its composition was wrong.

By whichever title the committee was called, it turned out to be very powerful and was considered a nightmare by magistrates and other members of the legal profession. Rumours going around Swaziland at the time had it that the committee made substantive decisions regarding appointments, promotions and demotions and even disciplinary matters, which were later rubber-stamped by legally constituted bodies like the Civil Service Board and the Judicial Service Commission. It is also said that membership of those statutory bodies was decided upon and approved by the very committee before being officially appointed by the King.

Magistrates in the country considered the existence of the Committee and its agenda to be a threat to their jobs. In early August they took a decision to withdraw their labour in protest hoping to put pressure on the government to clarify the situation.¹⁵ The magistrates' protest lasted about two weeks.

Prior to the magistrates' withdrawal of their labour in August, public prosecutors in the Kingdom had boycotted the High Court and subordinate courts in July 1993. It started with, and was related to, public prosecutors in the capital, Mbabane, complaining about the performance of a magistrate in the region and the acquittal of a magistrate on charges of obstructing the course of justice. Several issues were raised, but the gist of their complaints was that the magistrate was both delaying justice, and refusing to hear fresh matters and handle trials in Mbabane. According to their complaints, the magistrate's refusal was not only frustrating the prosecutors work, it also resulted in a backlog of cases; withdrawals of cases for want of prosecution; and caused the accused persons, awaiting trial, to be kept in prison for longer periods.¹⁶ It must be borne in mind that the magistrate in question had previously been based in Mbabane, from where he was transferred to Piggs Peak, about 68 kilometres away, and was only required and expected to visit Mbabane two days a week.

As the committee meetings described above were going on, and just before the magistrates' boycott, it came to the attention of the Acting DPP, through his contacts in the Police Force, that one of the magistrates had engaged in criminal

15 *The Times of Swaziland*: 3 August 1993. The Law Society of Swaziland, on its part, had not been directly involved in these developments in 1993. So, with the exception of only a few comments and appeals, on the whole legal practitioners appeared to have taken a back seat and reacted more or less as mere spectators during most of the year. The exceptions to this were a report in *The Times of Swaziland* on 6 August 1993, for example, when the Law Society alleged that the 'Secret Committee' planned to remove a local judge. That statement also called for the dismissal of the Acting DPP. *The Swazi News* also reported on 7 August 1993 that the Law Society of Swaziland appealed to magistrates to go back to work. It is also significant to note that around the same time Justice Douglas Lukhele of the High Court resigned from the bench (*The Times of Swaziland*: 6 June 1993) and went back to private practice. The reasons for his resignation are unknown, but there are suggestions that in view of his known character and principles, his resignation might have had something to do with the events of the time.

16 *The Times of Swaziland*: 2 July 1993

conduct sometime in October 1992. The Acting DPP instructed the police to investigate the magistrate and charge him accordingly with the crime of defeating the ends of justice.¹⁷ The charges were that the magistrate wrongfully and unlawfully advised a suspect, brought before him in his capacity as the justice of peace to make a confession, not to confess to allegations made against him, because such confession could lead to facing the hangman. The suspect is said to have taken the magistrate's advice and no confession was recorded. The charges against the magistrate were heard in the High Court and, on 9 July 1993, the magistrate was acquitted.¹⁸

The acquittal of the magistrate, and the complaints by the prosecutors, led to another unfortunate and bizarre incident in the courts of Swaziland. The Acting DPP, who was angry about the acquittal, is reported to have destroyed an application for the summary trial of 'the accused who was given counsel not to confess' which was filed on 25 May 1993. Following the destruction of these documents, and the prosecutors' complaints against the magistrate in Mbabane, Chief Justice Hull issued an order preventing the Acting DPP from appearing in any case at the High Court, until the DPP gave an explanation of the destruction of the documents. The Chief Justice also directed the acting DPP to apologize for the conduct of the prosecutors that had taken place the previous week.¹⁹

Following the Chief Justice's order, the public prosecutors held a meeting, chaired by the DPP, and resolved that their right of audience before courts in Swaziland derived from, and was dependent upon, that of the DPP. With the prevention of the DPP from appearing before the High Court, it was reported, public prosecutors also lost their right to appear before that court as well as subordinate courts in the country.²⁰

Also in the eventful month of August 1993, an official car that was being used by the Chief Justice was withdrawn. There are differing versions of this event, but certain facts appear not to be in dispute. When the Chief Justice took up his post in March 1992 he was expected, as part of his contract, to purchase his own car. By August 1993, more than a year after he assumed office, and despite several reminders by the Permanent Secretary of the Ministry of Justice, he had not done so and continued to use a government car. At that same time there were several other government officials who used

17 *The Times of Swaziland*: 2 July 1993.

18 *Sipho David Mabuza* Criminal Case No 211/93; High Court judgment by Sapire, AJ dated 9 July 1993 (unreported). See also *The Swazi News*: July 1993. The DPP's appeal was dismissed; see *Sipho David Mabuza* Criminal Appeal 20/93, unreported judgment of Melamet JP dated 17 June 1994. The magistrate then sued the government for unlawful arrest and detention and claimed damages to the tune of E1.5 million, Civil case No 1370B/95. An out of court settlement of E355, 000 was agreed to and paid (see *The Times of Swaziland*: 21 October 1998). In April 1998 the Minister of Justice appointed a Commission of Enquiry into the Prosecution of and Payment of Civil claim to the Magistrate, Legal Notice 68/1998 published on 29 April 1998. No report had been produced by December 1998.

19 *The Times of Swaziland*: 2 July 1993.

20 *The Times of Swaziland*: 2 July 1993.

government vehicles in breach of the Civil Service regulations. The DPP, not the Permanent Secretary of the Ministry of Justice, wrote a letter to the Chief Justice warning that if he, the Chief Justice, was to be arrested for abusive use of the government vehicle, the DPP will have no option but to prosecute him. Copies of that letter were circulated to, among others, the registrar of the High Court and the Permanent Secretary of the Ministry of Justice. On Friday afternoon, 6 August 1993, several officers of the government vehicles anti-abuse unit were spotted around the High Court premises. The Chief Justice was advised of these developments and the government car he had been using was withdrawn to avoid embarrassment.²¹ In fact, that was the last time the Chief Justice used that vehicle.

We have so far described several events that took place in the months of July and August 1993. The events were: the creation of a coordinating committee to expedite criminal trials that was transformed into what became known as the 'Secret Committee', followed by an acknowledgement, by committee members, of its existence, with reassurance about its origins and purpose. Also covered so far is how Chief Justice Hull prevented the Acting DPP from appearing before the High Court and its after-effects. The withdrawal of labour by magistrates; the arrest and prosecution of a magistrate and his ultimate acquittal; prosecutors' dissatisfaction with the performance of a magistrate; and the threat of arresting the Chief Justice for the abusive use of a government vehicle and subsequent withdrawal thereof. The crises in Swaziland courts were not over, as more was yet to come in the following three years. What transpired in 1994 and 1995 will be described first before turning to the drama involving the DPP himself in 1996.

3.3 Events during 1994 and 1995

By standards set in 1993, the following two years were relatively quiet but not without incidence. Three events will be discussed, namely: the suspension of a magistrate from duty, his criminal trial for allegations of theft of a motor vehicle and subsequent acquittal in 1994; the prosecution of newspaper owners and editors; and the threat to arrest legal practitioners in 1995.

In the description of events that took place in 1993 mention was made of the magistrate who was tried for obstructing the course of justice. In 1994 another magistrate was suspended from duty, pending his trial on suspicions of forgery, uttering and fraud, related to a car theft in February 1994. The charges against the magistrate (Accused 2), together with another person (Accused 1), were based on acts alleged to have been committed between 6 and 14 July 1993 when the magistrate borrowed the vehicle from the first accused.

²¹ *The Swazi News*: 7 August 1993's, headline was "CJ's car confiscated". It reported that the CJ had to walk from the High Court. Following the publication of this article, the editor of the *Swazi Observer* (the sister newspaper to the *Swazi Times*) received a cartoon without caption, showing a person, with the appearance of Chief Justice Hull, riding on a bicycle. The Editor did not publish the cartoon for fear of its political, social and legal implications.

The case was heard and tried by a South African judge, one Mr Justice MJ Strydom. At the end of the trial, Accused 1 was found guilty of having committed certain forgeries and uttering some exhibits. He was, however, cleared of certain alleged offences. The magistrate (Accused 2), on the other hand, was cleared of all charges.²²

After the acquittal, the Judicial Service Commission instituted disciplinary proceedings, which were also conducted by another South African judge. The second judge, like the first, found that the magistrate was innocent of any misconduct and dismissed the disciplinary charges.²³

The DPP's legal duty to prosecute suspected law-breakers was taken to newspapers in June 1995. Owners and editors of the two local dailies (the *Times of Swaziland* and the *Swazi Observer*) were arrested on 6 June 1995 and prosecuted for the contravention of the *Books and Newspapers Act 20/1963*.²⁴ The offences are created by sections 4(1), 15 and 16(2) and they include: failure to hold certificates of registration, not holding bonds to print, not holding bonds to publish, and failure to print legibly in the English language, names and addresses of printers and publishers and the names and places in which the papers are printed and published.

The Times of Swaziland was alleged to have committed these offences since 1 September 1963, while the *Swazi Observer* was alleged to have

22 *Samuel Ace Kunene* Criminal Trial No. 96/94, unreported judgment of Strydom J, dated 15 June 1994. Many things followed after that acquittal, only one of them is mentioned here. The Magistrate brought action against the Government for unfair dismissal in the Industrial Court and was awarded E 76, 000 in June 1998; see Industrial Court of Swaziland Case No 88/96, unreported judgment by Parker J.

23 There were several important legal appointments made in 1994. Absalom Thwala, who was Attorney General, was appointed judge of the High Court (Legal Notice 129/1994 dated 10 June 1994); Siphso Zwane, who was Deputy Attorney General, was elevated to Attorney General (Legal Notice 127/1994 dated 10 June 1994). Adinkra Donkoh, who was Acting DPP since 1992, was made substantive DPP (Legal Notice 130/1994 dated 10 June 1994). As one would imagine, the appointment of Donkoh caused a furore among members of the Law Society of Swaziland as they had called for his dismissal as Acting DPP as late as August 1993. The first two appointments could have been considered ordinary and normal in other Commonwealth jurisdictions. In Swaziland, however, they were given a variety of complicated interpretations, which one need not get into here, except to mention that Thwala had been DPP before Zwane took over in December 1990 (Legal Notices 135/90 and 136/90 of 14 December 1990). Zwane was later removed from the office of the DPP (on 8 May 1992) when he was made Deputy Attorney General. It was on the same day (8 May 1992) that Donkoh was appointed Acting DPP (see Legal Notices 46, 47 and 48/1992).

Terence Reilly and Victor Day Dlamini were appointed members of the Judicial Service Commission for two years with effect from 1 February 1994 (Legal Notice 8/1994 dated 1 February 1994). The appointment of a person, who is not legally qualified, to the Judicial Service Commission became possible following the passage, by His Majesty the King, of the Judicial Service Commission (Amendment) Order 16/1993 of 30 August 1993, which amended sec 3(c).

24 *The Times of Swaziland*: 7 June 1995.

started committing the offences on 8 February 1984. The prosecution asked the court to order the papers to stop publication forthwith pending the determination of the matter. The magistrate, before whom the accused appeared, released them on their own cognisance and surety of Emalangeni (equivalent to South African Rand) 1000 each and refused to grant the order applied for.²⁵

Earlier, reference was made to complaints by public prosecutors against a magistrate in Mbabane. On 9 October 1995, it was the turn of legal practitioners to complain against another magistrate, this time in Manzini. A group of lawyers, numbering between ten and twenty, was reported to have refused to appear before a certain magistrate expressing doubts about his competence in both criminal and civil matters. The event, which occurred outside court premises, was not a low-key affair. The conversation between the lawyers in question was conducted loudly, and attracted people in the area. The Principal Magistrate of the station intervened. He invited the lawyers to his chambers with a view to solving the problem in private to protect the dignity of the court.²⁶

The Director of Public Prosecutions got wind of what transpired and was not amused. He wrote to the Commissioner of Police directing him to investigate and arrest the lawyers responsible. Part of the letter reads as follows:

It is in account of certain events that occurred at Manzini Magistrate Court premises on the 9th October 1995, which were given wide publicity and coverage by the mass media in the country and abroad. It gives an account of a rowdy behaviour by a group, which behaviour cannot be condoned in any way. In fact if any act unlawfully and intentionally violated the dignity, repute or authority of the judiciary in this country, that was it.

The said conduct by this mob should be investigated and alleged perpetrators brought to book as a matter of urgency. I hereby direct you to open investigations to find the persons who were involved in this shameful conduct which has brought the administration of justice into disrepute and submit a docket to me for prosecution.

At least the alleged leader and spokesman of the group ... is clearly identified ... The identity of the rest of the group should also be established, after which they should all be arrested and charged jointly and severally with contempt of Court, and alternatively, with defeating or obstructing the course of justice. The docket should then be forwarded to me without delay for prosecution.²⁷

25 *The Times of Swaziland*: 7 June 1995.

26 Most of this material is obtained from the High Court judgment of Dunn J, *The Law Society of Swaziland v The Director of Public Prosecutions*, civil case 2394/95, dated 3 November 1995 (unreported).

27 See above.

The Law Society of Swaziland, of which the lawyers in the Kingdom were members, was informed of the impending arrest of its members, and filed an urgent application to interdict the Commissioner of Police from arresting them, and the DPP from conducting any prosecution. A rule *nisi* was granted on 20 October 1995 and confirmed, with slight variation, on 3 November 1995. Aggrieved with the decision of the High Court, the DPP appealed. The appeal was dismissed, with the Justices of Appeal making the following observation:

Without going into detail it seems... that the Appellant seriously over-reacted to the memorandum of the Principal Magistrate of Manzini. His reference to 'a mob' and direction to the police to arrest members of the respondent Society were uncalled for since it would have been the simplest matter to call upon the members of the Society to appear in Court and show cause why they should not be found guilty of contempt of Court. While not in any way wishing to appear as condoning the conduct of members of the Society, the order to arrest them reveals a relationship between the Director of Public Prosecutions and the Law Society which is most unfortunate and which can only be inimical to the interests of the administration of justice in this Kingdom.²⁸

3.4 Dramatic scenes surrounding Donkoh himself: 1996

Some people might have been surprised if the DPP, who was an instrumental and important part of most of the events since 1992, did not produce scenes of his own. There were no disappointments on that front because several dramatic events unfolded around Donkoh himself between January and August 1996. First was the trial of trade union leaders that ended dramatically and later there were allegations of attempted insurance fraud by him.

In January 1996 the Swaziland Federation of Trade Unions called a mass stay-away that led to the arrest and prosecution of three Union leaders. The charges against Union leaders were ultimately withdrawn, but not before causing an incident of their own. The High Court judge, who presided over the matter and granted them a reprieve, was also acting as

²⁸ *Director of Public Prosecutions v The Law Society of Swaziland*, civil appeal 28/95, unreported judgment dated May 1996. The Court of Appeal judgment was written by Browde JA (Schreiner and Leon JAA concurred). See also *The Times of Swaziland*: 4 April 1996. It must also be noted that, with effect from 1 April 1995, the appointment of Honourable Mr Justice David Hull, as Chief Justice of Swaziland, was revoked by His Majesty the King (Legal Notice 57/1995 dated 13 April 1995). In fact, the three-year contract of service signed between him and the government of the Kingdom of Swaziland, through the British Overseas Development Agency, came to an end on 31 March 1995 and it was not renewed. A two months extension, from 1 April to 31 May 1995, was given to allow him to conclude and wind-up his partly heard cases (Legal Notice 79/1995 dated 2 June 1995). Justice Ben Dunn was consequently appointed as Acting Chief Justice with effect from 1 April 1995 (Legal Notice 58/1995 dated 13 April 1995), only to be removed less than a year later, see 3.4.

Chief Justice at the time. Either by design or coincidence, the appointment of the judge, as Acting Chief Justice, was revoked within a few days, after the order to release the suspected Union leaders was given.²⁹

The Law Society of Swaziland, which on previous occasions had acted cautiously and with restraint, issued three press statements in one day covering two full tabloid pages. Among other things, the statements narrated in detail the order of events leading to the order of release issued by the judge; and expressed their fears and concerns in regard to the interference into justice administration by secretive committees in the Kingdom. The Society also mentioned its concern with judicial appointments in general, and the judge's security of tenure and its implications in particular. In addition to praising His Majesty the King for resisting irresponsible advice from some of his advisors and acting calmly and with wisdom, the Society also had some things to say about the DPP himself when it revealed that the Law Society knew

...just how close Mr Adinkra Donkoh came to succeeding in becoming the Chief Justice of Swaziland. The harsh and brutal reality is that the Director of Public Prosecutions has continuously flouted his powers, has brought the office of the Director of Public Prosecutions into total disrepute, leading the citizenry of this country into a total lack of trust in his office. His actions in the current debate have led even us lawyers into mistrusting the whole judicial system in Swaziland.³⁰

The message in the statements by the Law Society was not only very strong, compared to the mild reaction to the events between 1993 and 1995, but it was also very revealing and detailed in content. Members of the Law Society observed that an individual office holder (the DPP) had exceeded his powers, and had brought justice into disrepute, but took no conclusive action to remedy the situation and redress the balance. Apart from ordinary day-to-day representation of clients, its members had joined the bandwagon of the ordinary public that had lost faith in the justice system of which they are a constituent part. That has to be described as a very grim situation indeed.³¹

29 Mass stay-away, organised by Swaziland Federation of Trade Unions (SFTU), took place between 22 to 28 January 1996. Charges against Union leaders were laid on 22 January 1996 for the contravention of the *Industrial Relations Act 1/1996*: secs 40 and 75, which Act was only passed on 19 January 1996 and assented to by the King on the following day. Those charges were later changed to violation of the *Police and Public Order Act 17/1963*, only to be withdrawn on 25 January 1996. Acting Chief Justice Dunn presided over the case. His appointment, as Acting Chief Justice, was revoked with effect from 9 February 1996 (Legal Notice 19/1996 dated 8 February 1996), only two weeks after he ordered the release of Union leaders.

30 *The Swazi Times*: 15 February 1996: 26 and 27. The statements by the Law Society were issued only seven days after the publication of the Legal Notice in which the appointment of Justice Ben Dunn, as Acting Chief Justice, was revoked.

31 Besides the urgent application, filed by the Law Society on behalf of its protesting members in October 1995, no other positive legal measures were considered or taken in respect of the alleged excesses of powers by the DPP. Informed sources suggest that most Law Society members, like other members of the public and officials, were themselves fearful of Adinkra Donkoh. Why that was the case has not been easy to determine.

The final plot in the Donkoh drama came on Sunday 14 April 1996. A local newspaper reported that Donkoh was being investigated for attempting to defraud the Royal Swazi National Insurance Corporation (RSIC). He was said to have filed a false claim on 18 March 1996, for his car damaged on 16 March 1996. The car was alleged to have been involved in an accident, which the local police station at Big Bend had no report of. Incidentally, even the insurance policy on the car had been taken only on 13 March 1996, three days before the fateful day. The newspaper story also noted that Donkoh's car had been towed from his house on 12 March 1996, a day before the insurance policy was taken.³²

Although police were said to be investigating the RSIC matter, by early July 1996 no charges of attempted fraud had been laid against the suspect. It was on 9 July 1996 that Donkoh was served with a letter of interdiction from duty, which stated in part that:

in consideration of the allegations of fraud against you involving insurance claim, which has been brought to my attention by your ministry, I consider that in the interest of the service you should be interdicted. Therefore, by virtue of the powers conferred upon me by Regulation 39(1) of the Civil Service Board (General) Regulations, 1963, you are hereby interdicted and you should cease forthwith to exercise the powers and functions of your office.

In an application to the High Court, on a matter of urgency, Donkoh protested his innocence and the purported interdiction on 11 July 1996.³³

32 *The Times of Swaziland*: Sunday 14 April 1996. There were several coincidences surrounding the alleged false claim by Donkoh. First, the closeness of the dates in question, ranging from the towing of the vehicle from his house, to the date the insurance policy was taken and the alleged accident, taken together with the absence of a police report. RSIC, like other insurance corporations, always examines claims of this nature very closely. Secondly, there was a criminal case going on against an employee of the RSIC who was also a prominent trade union leader. He was being prosecuted for stealing a Form V certificate, forging it and uttering it with intent to defraud the RSIC (*The Times of Swaziland* of 19 July 1996 reported that the accused had been acquitted of the charges).

It was also observed by informants that one public prosecutor, who was Donkoh's friend and had worked with the RSIC in the past, suggested to him that with some luck, the insurance corporation sometimes pays even for such claims, either through laxity or oversight. Two days before the insurance fraud story came to light, the Acting Minister of Justice was reported to have told Parliament that it was difficult to replace the DPP because he was performing his duties very well (see *The Times of Swaziland*: 12 April 1996).

33 The interdiction letter, written by the Minister of Labour and Public Service, was addressed to Donkoh and copied to the Principal Secretary of the Ministry of Justice (see also *The Times of Swaziland*: 11 & 12 July 1996). On the same day, 9 July 1996, the Principal Secretary transmitted a copy of the letter to Donkoh with another covering letter, in which he stated as follows: "My office wishes to assure you that it harbours nothing sinister against you as we have high regard for you as a hard worker and a dedicated official. However, being forced by circumstances facing us now, we have seen no other option but to act as we do in the interest of impartial justice."

Papers were served on the Attorney General on the same day. The matter was heard on 15 July 1996 when Dunn J declared the decision of the Minister of Labour and Public Service as unlawful and null and void and consequently set it aside.³⁴

Charges of attempted fraud were ultimately brought against Donkoh, when he was out of the country for medical treatment, on 25 July 1996 before a magistrate in Mbabane. The magistrate issued a warrant of arrest and ordered the suspect to appear before court on 5 August 1996.³⁵ That was not to be the case because, only a few days later, a public prosecutor successfully applied before the magistrate's court to have the charges and the warrant of arrest withdrawn.³⁶

There are conflicting versions of what happened between 30 July and 7 August 1996 and an attempt to reconcile them has not been easy. What is clear, however, is that it was a very difficult week for all the staff at the DPP's Chambers and most of the people who work in the Ministry of Justice as a whole.³⁷ Donkoh was in town and in and out of and around his office. Very few people, if any, knew exactly what he was up to. On 6 August 1996 His Majesty the King signed an order appointing a Tribunal of Inquiry into the allegations surrounding Donkoh.³⁸ Section 3 of the Order provided the following:

34 *Adinkra Donkoh v Minister for Labour & Public Service*, Civil Trial Case No 1690/96. See also, *The Times of Swaziland*: 16 July 1996. Ironically, the High Court judge who heard and decided the matter, in favour of the applicant, was the same local judge who the Law Society and legal fraternity in general, alleged was to be removed from office through Donkoh's tricks and at the instance of the 'Secret Committee' and whose appointment, as Acting Chief Justice, was revoked in February 1996 (*The Swazi Observer*: 15 February 1996).

35 *The Times of Swaziland*: 26 July 1996.

36 *The Times of Swaziland* of 31 July 1996 headline reads 'Donkoh won't be arrested any more and fraud case against him withdrawn'. Earlier, it was reported that prosecutors held a meeting in Donkoh's office (*The Times of Swaziland*: 30 July 1996). Suggestions are that it was after that meeting that a public prosecutor appeared before a magistrate to withdraw the case. A local newspaper also reported that, after successfully challenging his purported interdiction in the High Court on 15 July, Donkoh went to South Africa for medical treatment (that is between 15 July and 28 July, see *The Times of Swaziland*: 31 July 1996). It appears that Donkoh only returned to his desk on 29 July 1996. So, it was during his absence from the country that the charges against him were laid. Upon his return to office, however, the charges were immediately withdrawn.

37 Informants in the Ministry of Justice and DPP's Chambers described that week in phrases like: 'a week of sheer madness', 'a week of uncertainty'. Newspaper reports of the week's events also reflect that unease (*The Times of Swaziland* headline on 1 August 1996, for example, was 'Urgent meeting held over Donkoh affair'. *The Times of Swaziland*: 6 August 1996, asked: 'Is Donkoh intimidating some of the prosecutors?')

38 Legal Notice 130/1996 titled 'Appointment of the Director of Public Prosecutions Tribunal Notice' signed on 6 August 1996 and published on 7 August 1996. The Tribunal was chaired by Justice Stanley Sapire, the Acting Chief Justice; and composed of Justice Josiah Matsebula (of the High Court) and Justice Martin Banda (of the Industrial Court). The Tribunal was directed by His Majesty to submit its report within seven working days. See also *The Times of Swaziland*: 8 August 1996.

The tribunal shall investigate and enquire into the circumstances surrounding the allegations of fraud against the DPP, Adinkra Kosopire Donkoh, his conduct subsequent to the institution of criminal proceedings against him, the subsequent withdrawal of charges against him and generally enquire into his suitability to continue to occupy the office of the Director of Public Prosecutions.

When the tribunal met for the first time, on 8 August 1996, Donkoh did not appear, and suspicions were that he was no longer in town and probably not in the country as well. His lawyer, Peter Dunseith, however, appeared before the tribunal and reported that he had been instructed to attend the proceedings on behalf of his client and cross-examine witnesses. The tribunal met for several days, heard witnesses and produced a report that was submitted to His Majesty the King. The contents of the report remain unknown. It was reported in the media, on 13 August 1996, a day or two before the submission of the report that Adinkra Donkoh had resigned from his office as the Director of Public Prosecutions.³⁹

All the events and drama described above are, by all standards, unusual in any Commonwealth jurisdiction. They involved law officers of different kinds and covered different types of confrontations. The events in question cannot, in any conceivable way, be described as a reflection of a properly functioning criminal justice system, but rather a chaotic and confused one. The crises must have been part of, or at least were fuelled by, a complicated hybrid of traditional sources of authority and that of a modern, rational bureaucratic system, attempting to assert its independence.

4. Max Weber and authority: the part played by Donkoh

Many people and officials were involved in the events and dramatic scenes outlined above. However, there were feelings among most of our informants, which are not entirely unfounded, that the most central and key figure to most, if not all of them, was Adinkrah Kosopire Donkoh. The belief was that, although he might not necessarily have directly made all decisions himself, he had, at least, brought pressure to bear upon or influenced those who made the decisions. The suggestion was that he was the person with the courage and insight capable of initiating most of those things. It has not been easy to demarcate exactly where facts end and speculations begin. In the discussion above, an attempt has been made to relate the events as much as possible to the trends and tendencies of the exercise of the powers of the DPP and make inferences. Readers are, then, left to make their own conclusions. So far, an attempt has also been made to keep the personality of the office holder out of the discussion. Yet, in the case of Donkoh, like other charismatic people, one informant observed, his personality was very much part of, and had a bearing upon, most of what transpired and the decisions taken.

³⁹ It was also reported that Donkoh's resignation letter was sent through his lawyer, see *The Times of Swaziland*: 13 August 1996.

Donkoh joined the DPP's Chambers in 1978 as Crown Counsel. He was part of the prosecution teams that successfully prosecuted several of Swaziland's high profile cases in the 1980s and early 1990s. He was regarded as brilliant, dedicated and hard working, by both his admirers and detractors. He was also known to be very courageous. One Principal Secretary in the Ministry of Justice at the time, is known to have once said that, if Swaziland had as many as three lawyers of Donkoh's mental ability, most of the legal problems the small country faced could have been resolved. Earlier, mention was made of an Acting Minister who noted, as late as April 1996 (just before the fraud allegation became public), that the DPP was doing his job well and he could not be replaced. In appreciation and recognition of his talents and abilities Donkoh's employment contract was renewed every two years without many questions being asked from 1978 to 1992, when he was appointed Acting DPP. In 1994, he became a substantive office holder ahead of two local lawyers in the same Chambers. After he occupied the DPP's office, however, he launched and lost far too many high profile prosecutions he, by his own assessment, would no doubt have wanted to win. He also refused to prosecute certain offenders. When asked to compare his previous experience of winning cases in the 1980s, and that of losing them in the 1990s, he answered, correctly in my view, that the success of his office was not measured by the number of cases he won, but by the extent he applies his mind to legal issues. How the legal mind was applied to the prosecutions outlined above must be left for the readers to assess.

Akinkra Donkoh was Ghanaian by nationality. It was known in the Kingdom of Swaziland that he came from the Ashante Kingdom. So, in that respect too, there were parallels and Donkoh was, therefore, not a stranger to the mystique of culture and traditionalism. With an adequate knowledge of deference to tradition and traditional authority, and unlike Chief Justice Hull, he learnt the Swazi ways very easily and fitted in well. In fact, one interviewee noted, Donkoh had the habit of pouring a little of his drink, mostly whisky, as he was about to start drinking as libation to his ancestors. He was described by both friends and foes as more Swazi than many of the Swazis themselves. At some stage he was known to have applied for Swazi citizenship.⁴⁰ Some people even believed he was already a Swazi citizen by the time the 1996 events unfolded.

During 18 years of his stay in Swaziland, he cultivated and reaped trust among his peers in the Ministry of Justice, where he worked, and with ordinary people in the Swaziland capital of Mbabane, where he lived. There are reliable stories of Donkoh going to football matches cheering teams by beating drums and encouraging others to join in. As much as he interacted with peers and ordinary people, so did he with influential people and those in power. He succeeded, first through his legal talents and hard work, and much later probably through other traditional connections, which in siSwati is known as "*kubhulala*". He is said to have successfully caught the eye of His Majesty King Mswati III as well. It is probably partly because of this that he was not only appointed to high office but was also co-opted into influential committees.

40 *The Times of Swaziland*: Sunday 25 June 1995.

Once his credentials were established he was known to be riding high. Like any other human being, he also ruffled a few feathers as well.

In Donkoh, therefore, Swaziland had a competent and dedicated lawyer, a rational and charismatic bureaucrat, and a traditionalist, all combined in one. Being a flamboyant lawyer, occupying an influential office and rubbing shoulders with the powers-that-be, are important assets that many people not only admire but would also like to have. In the Kingdom of Swaziland, with a small population of slightly less than a million, people with a combination of assets as those stated above, are few and far between. Such people are not only conspicuous, but whatever they do is in no doubt noticeable and subject to public scrutiny. Such scrutiny is bound to have serious consequences, as Donkoh might have come to learn a little later.

On the basis of Max Weber's classification of authority, one can say with little hesitation that Adinkrah Kosopire Donkoh embodied all three sources of authority. That was no mean achievement. Donkoh was able to utilize any one of those sources of authority depending on purpose, need and convenience. Where none of the three worked individually, he was able to tap on the combination of all three collectively.

If one were to engage in a little bit of speculation, which is not considered out of order in Swaziland, it could be said that some people, both in and outside positions of power, appreciated Donkoh's agility, talents, skills and experience. As a consequence of such appreciation they might have thought that those qualities needed to be put to good use in order to get certain things done. Others might only have expected that such talents could be needed, and if so, they were available, in Donkoh, for use. Donkoh, too, might have had his own plans, of using his skills and influence as and when he needed to. At the end of that double-edged sword, the administration of criminal justice, to which Donkoh was a constituent part, was partly enhanced as much as it was partly debased.

On the one hand, the administration of criminal justice partly benefited in the sense that the high profile cases Donkoh successfully prosecuted are landmarks in the legal history of Swaziland. Some people in Swaziland, for example, remember in great detail, the trials in the cases of *Madeleke*,⁴¹ *Mfanasibili*,⁴² and certain ritual murders, as if they were the only successfully prosecuted criminal cases in the history of that country. Some people spoke admirably of the cross-examination of witnesses, demonstrated in the case of *Madeleke*, for example, as the lawyer's magic of (Donkoh in particular) knowing what happened at a place when one was not. Others associated the

41 Swaziland High Court, criminal case no 17/91, unreported judgment of Rooney J dated 16 October 1991. This was a case of a very tragic murder in which the body of the deceased was never found. See case note by Rwelamira 1992:132-139. The High Court decision was confirmed on appeal.

42 *Majaji Simelane & Prince Mfanasibili*, Criminal Case 368/86, High Court judgment of Hannah, CJ, dated 28 May 1986 (unreported), and Court of Appeal Criminal Case 17/86 judgment of Maisels, JP dated 17 June 1987 (unreported). The two cases arose from activities related to the infamous "liqoqo" era that followed Sobhuza II's death 1982-1986, see Davies *et al* 1984:50-70.

criminal justice administration with Donkoh's brilliance, flamboyance and, in some instances, his arrogance. Yet, others suspected that Donkoh's courage, of facing up to and prosecuting ritual murder suspects, when some of his Swazi colleagues in the DPP's Chambers were shunning away, had some thing to do with his own "*muti*" (magic) brought from the Ashante Kingdom. There are other people who believed strongly that if Donkoh was still in Swaziland when the bombing of the Lusushwana bridge and the Deputy Prime Minister's office happened, in October 1998 and November 1998, respectively, the culprits could have been apprehended and successfully prosecuted. The disappearance without trace of Mrs Eleanor Mbhamali, a prominent businesswoman and Senator (in September 1997), was also listed among the many things Donkoh could have stuck his neck out and brought his agility, skill and intelligence to bear upon. From some of those views and sentiments, one is led to conclude that Donkoh left an indelible positive mark on the administration of criminal justice in Swaziland.

In many other respects, however, the image of criminal justice administration in Swaziland also suffered immeasurably between 1992 and 1996. The legal duty of the DPP is to prosecute suspected criminals. That duty involves the exercise of wide discretion. When discretion is not exercised judiciously a lot of harm arises. On the face of it, almost all the situations described above had certain aspects of lawbreaking for which the DPP might have had reason to prosecute. Yet, when all the facets and legal issues are considered and compared, including the choice of which criminal conduct to target and when, and which suspects to prosecute and the motivation for such prosecutions, all seem to create some suspicion and leave a lot to be desired. The Big Bend killings, for example, which led Chief Justice Hull into admitting his unfamiliarity with Swazi customs, serve to illustrate this.

These events have remained a mystery and the suspected murder case unresolved. Chief Justice Hull first knew of that particular case (in a manner he considered improper), in April 1992. He left the Kingdom, after the expiry of his contract in May 1995. By the time he left, the case had not reached the courts. The puzzles of that case continued to exist until 1996 when Donkoh resigned from his post as DPP, and beyond. The case was still unresolved until the end of 1999. The murders, that were a hot issue in April 1992, were still in some people's minds and on some MPs' lips until 1999. Even Donkoh's legal skills and brilliance did not make any positive mark on the case. In fact, there are suggestions in Swaziland that Donkoh's presence as DPP was, in part, itself a hindrance to any chances of prosecution. That is said to be the case because Donkoh knew of and understood Terence Reilly's connections with powerful people in the Kingdom and he, in turn, cultivated his own personal close association with the conservationist. Donkoh and Terence Reilly were, therefore, allies known to be in very close communication both personally and officially, as well as with the higher echelons of power in Swaziland.

Observers within the legal establishment in Swaziland suggest that the contempt of court proceedings, instituted against Terence Reilly by Chief Justice Hull in April 1992, were interpreted by the powers-that-be as

humiliation of an influential person in the Kingdom. When that was taken together with the Chief Justice's withdrawal of cooperation from the King's advisors and the subsequent order to suspend the acting DPP from appearing before the High Court, the Chief Justice severely alienated potential allies in the Kingdom, and his own position became precarious. He might not have been aware that his self-confessed unfamiliarity with the Swazi *modus operandi* might raise its head. His unfamiliarity with how alliances are formed and how they influence decision-making processes, was positive in terms of the Weberian tradition. However, in traditional Swaziland, that unfamiliarity played negatively and partly contributed to how he and his office were treated. The high and low of that is not that the contract of employment of the Chief Justice was not renewed. To the contrary, what suffered most was the administration of criminal justice over which he presided.

Twists and turns surrounding the Big Bend suspected murders have continued to emerge even after the departure of both Chief Justice Hull and Donkoh from the criminal justice administration and the country. It has now become clear that the suspects in that case were not even properly appointed as game rangers until August 1997.⁴³ A commission of inquiry into circumstances surrounding the killings was only appointed in April 1998, after Members of Parliament asked the Minister of Justice for explanation.⁴⁴ As from November 1998 the administration of the *Game Act* was transferred from the Minister responsible for Tourism to the King's Office.⁴⁵ Terence Reilly continues to be an influential person and member of

43 Game Rangers are appointed, under the *Game Act* 51/1953: sec 23, by the Minister responsible for Tourism. It is from such appointment that they derive their legal powers to protect and preserve wildlife in the Kingdom of Swaziland. In July 1997, the Minister of Tourism, Musa Nkambule, appointed eight game rangers in terms of the *Game Act* section 23. Those appointments were supposed to be with immediate effect, see Legal Notice 117/1997 dated 21 July 1997. A month later, in August, a different legal instrument was issued under the *Game Act* section 23, appointing the same people as game rangers but the appointments were backdated to 14 January 1991, see also *The Weekend Observer* 28 June 1997. Legal sources, in the Kingdom of Swaziland, believe the retrospective appointments were designed to protect the suspected rangers from prosecutions for offences alleged to have arisen from the events of 15 April 1992.

44 The Commission of Enquiry into the 1992 Big Bend Killing (By 'Game Rangers') Notice, Legal Notice 67/1998 dated 29 April 1998. The Commission was appointed by the Minister for Justice and was to be chaired by a lawyer, one Titus Mlangeni, and composed of two other commissioners and a secretary. The commission was mandated 'to inquire in particular whether or not the killers were game rangers and why the killers were not prosecuted'. In June 1998 the Chairman of that Commission, Titus Mlangeni, was appointed member of the Judicial Service Commission, a commission of which Terence Reilly was already a member. Although the commission was required to report not later than 18 May 1998, no report had been produced by the end of 1999.

45 Issues related to the events in Big Bend and the aftermath have come up in Parliament from time to time and it is the Ministers of Justice and Tourism who have been asked to explain. By Legal Notice 142/1998, dated 24 November 1998, the administration of the *Game Act* was transferred from the Ministry of Tourism to the King's Office. Informants believe that the transfer of responsibilities

both statutory bodies, like the Judicial Service Commission⁴⁶ and, non-statutory ones, like the 'Secret Committee'.

In view of these circumstances, those members of the legal fraternity in Swaziland who have drawn inferences of ill-will on the part of the DPP, and who believe that some of the prosecutions highlighted above were probably not in the interest of justice but motivated by other considerations, may not be exaggerating. What those motivations might have been, however, has not been established. Consequent confrontations between the DPP and the Chief Justice; between the DPP and the Law Society; prosecutors and magistrates and lawyers and magistrates might have come and gone, as much as they were won and lost at the time. Overall, they not only debased the administration of criminal justice in the country, but they were also extreme manifestations of a long-term malaise.

Irrespective of at which stage of the process one becomes aware of the described events and from whichever perspective they are analysed, mystification prevails. Those who were present as and when the events took place, observed or heard of what was happening, took note or even expressed their opinions and made conclusions with the context in mind. Yet, they were left with several lingering questions in their minds. Those who only became aware of the events later may not only ask what exactly happened and why, but will also not have the benefit of the background in which they took place. Such people will, undoubtedly, be left with something to think about. Both audiences would regard what happened in Swaziland as not only intriguing, but absolutely fascinating as well.

5. Conclusions

In most commonwealth jurisdictions, the office of the chief prosecutor is independent of political pressure and is legally required to observe the law and be subject to legal limits. The occupant of such office is appointed by yet another independent body, which is also required to consider a variety of qualities including the competency and integrity of the office bearer. A combination of these safeguards ensures that decisions to prosecute, or not, are not influenced by anything other than legal considerations. The essence of this particular safeguard, like other legal and constitutional safeguards, is to ensure that those entrusted with public power exercise it according to law and not whims. Sometimes those aspirations may not be

might restrain MPs from asking questions about those events in Parliament. As a result of their deference to the King, they may not freely demand for similar explanation from His Majesty's office as they did with Ministers of Justice and Tourism.

46 Terence Reilly was first appointed to the Judicial Service Commission for two years with effect from 1 February 1994 (Legal Notice 8/1994 dated 17 February 1994), see note 18 above. The appointment was renewed for another two years on 1 February 1996 (Legal Notice 67/1996 dated 10 May 1996). The latest appointment of two years was made in June 1998 (Legal Notice 83/1998 dated 19 June 1998).

realized, but they are at least in place and may, from time to time, be put in motion by aggrieved parties to test the legality of decisions in question.

Since the abrogation of the Independence Constitution in 1973, Swaziland saw most legal and constitutional safeguards being swept away. The creation of the office of the DPP by the DPP Order, for example, and the absence of an independent Judicial Service Commission, created a very big vacuum. That, however, must also be seen in the context of, and being partly to do with, the overall exercise of public power, which became an exclusive right of His Majesty the King — an executive monarch. The three branches of government and all other officials, of whatever description, are expected to perform their functions as His Majesty's delegates — delegates who, directly or indirectly, strive to know what their principal wants and expects even before he says it. Some officials are known to be always on their toes seeking to know what the likes and dislikes of the principal might be. The closer to His Majesty one gets, the more feared that person becomes. In some instances officials, like the rest of the public, engage in speculation of what might please the principal and go out of their way to do such. His Majesty's word, whether actually said or imagined to have been said, is believed to be true, by both officials and the general public. That situation arises, partly because his mouth tells no lie, expressed in siSwati as "*engumlomo longacalinga*", and partly because there is no other way of verifying what was said or not. In such circumstances, it is not unusual for some officials to use, and even misuse, the advantage. Those advantages may be detrimental not only to individuals who become victims of injustice, but to society as a whole. That is what happened in Swaziland in the period under review and there are no indications that the situation has changed.

In the discussion above an attempt has been made to sketch some of the salient processes in the administration of the criminal justice in Swaziland in the 1990s and link them to other developments in the country. Putting all the pieces together and determining what might have influenced or shaped the decisions to prosecute, or not to prosecute, has not been easy, and might not give a complete picture of the administration of criminal justice in Swaziland. Where gaps come to light, however, the reader should treat the discussion as a sketch map of what happened and signpost towards a study of an otherwise complicated situation. From all that has been said above, there are many lessons to be drawn from and pitfalls to be avoided by criminal justice administrators not only in Commonwealth jurisdictions but also all around the world.

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