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Legal Aspects of Land Tenure  
in Swaziland

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## LEGAL ASPECTS OF LAND TENURE IN SWAZILAND

### I. Introduction

This report attempts to compile laws relating to land in Swaziland, with particular emphasis on land used for agricultural purposes. It is assumed that the reader has a considerable amount of knowledge about Swaziland, its history, agriculture and development projects in the country, and the basic principles of customary land tenure as described by Hughes (1972). The report also assumes that the reader does not have a legal background, and therefore every attempt has been made to explain legal terms simply. However, it must be kept in mind that it is beyond the scope of this work to define all legal terms with the precision necessary for full understanding.

There are three sources of land law in Swaziland: Statute Law, Roman-Dutch common Law, and Swazi customary law. In general, statute law applies to all land, common law to Title Deed Land, and customary law to Swazi Nation Land. In addition, this report also looks at legal instruments, such as leases and cooperative agreements, relating to the use of land.

Statute law is legislation in the form of Acts of Parliament, Proclamations (of the High Commissioner prior to Independence), King's Orders-in-Council, and a few statutes of the Transvaal in force prior to Swaziland's becoming a British protectorate. Although statutes of South Africa do not apply in Swaziland, in many cases Swaziland legislation is derived from similar statutes in the Republic. Most statute law is found in the latest compilation of Swaziland Legislation (1976) and in the Swaziland Government Gazette. Statute law applies to all land in the country unless the statute explicitly excludes specific types of land.

Roman-Dutch common law is the law imported into Swaziland by the colonialists. Legal authority for the application of Roman-Dutch law is found in the General Administration Act (General Administration) 11/1905 which provides in Sec. 3: "The Roman-Dutch common law, save in so far as the same has been heretofore or may from time to time hereafter be modified by statute, shall be law in Swaziland." Sources for the common law are decisions of the courts in Southern Africa (primarily South Africa), and writings of Roman-Dutch commentators of the 17th and 18th centuries. Roman-Dutch common law, including certain statutes from the Netherlands, was introduced at the Cape of Good Hope in the seventeenth century. Since that time it has evolved into a unique system of Southern African common law, influenced both by historical Roman-Dutch law and by English common law. In practice, the courts of Swaziland apply this mixed system of Southern African common law, rather than strict Roman-Dutch common law as the term was understood at the passing of the 1905 Act.<sup>1</sup> Although South African cases are persuasive authority in Swaziland, the High court and Appellate Courts of Swaziland have the power to determine the content of the common law without being required to follow South African decisions. For the purposes of this report, South African legal textbooks have been used, with direct reference to court decisions only from Swaziland. Roman-Dutch common law as applied to land in Swaziland suffers from the problem that it has evolved primarily in

South Africa, where the land tenure situation is markedly different from that in Swaziland. Since the courts in Swaziland have never addressed most of the legal issues referred to in this report, the law is unsettled to the extent that it might be modified or rejected as inapplicable to Swaziland.

Swazi law and custom theoretically applies to all Swazi Nation Land and to all Swazis. The principles of Swazi law and custom referred to in this report are compiled from Fannin (1967, a Judicial Commissioner who recorded principles of customary law), Rubin (1965, an academic preparing a restatement of customary law), Kuper (1947, an anthropologist), Marwick (1940, a colonial administrator) and Hughes (1972, an anthropologist.) It is important to remember the limitations of this kind of information: a) the writers are all foreigners who bring with them their own preconceptions and terminology; b) the writers obtained their information from interviews or panels of Swazi headmen, who are likely to depict custom in ways which serve their purposes; c) the act of recording "customary law" has the tendency to imply that such laws are static when in fact customs are in a constant state of flux; d) customary law is not so much a set of rules as practices and processes of negotiation (which makes it difficult for a Swazi to answer a hypothetical question about the rule to be applied in a particular situation).

## II. Legal Basis of Land Tenure in Swaziland

### A. Private Tenure Land

There are three types of Land Tenure in Swaziland: Private Tenure Land (PTL), Swazi Nation Land (SML), and Crown (or Government) Land. The legal basis for this tri-partite division lies in legislation passed at the time of the notorious concessions.

By the end of the 19th century most of the land in Swaziland, as well as mineral rights and an assortment of other rights, had been given away in often conflicting concessions. The Organic Proclamation of 1890 (see, Concessions Act (Land) 3/1904) was the first piece of legislation to attempt to make order out of the chaos that had been created. That Proclamation set up a "Chief Court" of three members to examine the existing concessions. The Chief Court declared over 300 of the concessions to be legal and binding but failed to clear up most of the contradictions and inconsistencies. In 1904 the Swaziland Administration Proclamation (Sec. 11-19) provided that no concessions except those confirmed by the Chief Court would be recognized, and suspended the operation of all except land and mineral concessions.

The Proclamation set up a Commission, whose duties were, inter alia, to define the boundaries of land held under concession, to do everything that might be necessary "to put an end to all uncertainty and confusion" and to determine the nature, extent, and validity of the rights of respective holders of conflicting concessions. The decisions of the Commission were to become effective by registration in the Deeds Office, and thereafter no action was to be maintainable in any Court of law involving a dispute on any of the questions to be resolved by the Commission. (Explanatory Note to Sec. 2, Concessions Act (Land) 3/1904).

The decisions of the Chief court and the Commission form the foundation upon which all private tenure land titles in Swaziland now rest. A mass of

legislation, covering procedure, survey, costs, etc. was required to organize, confirm and register these concessions and the most important of these provisions are contained in the Concessions Act (Land) 3/1904. That Act also provides for the collecting of rents on the concessions, which rents accrue to the Ngwenyama (traditional siSwazi title for the king) in trust for the Swazi Nation, and form the financial basis for Tibiyo Taka Ngwane and Tisuka Taka Ngwane, two corporations investing funds on behalf of the Swazi Nation. Some private land owners must still pay yearly quit-rent, which dates back to the original concessions. The King also owns some Private Tenure Land in his private capacity.

Private Tenure Land may be held by freehold title or by concession. The Concessions Partition Act (Land) 28/1907 provides for the granting of freehold title to concessionaires holding title to ownership of land or leases for more than 99 years. Almost all concessionaires did convert to freehold title, but those who still held land under concession titles or leases in 1973 had the right of conversion to freehold taken away by the Land Concession Order, Kings-Order-in-Council 15 of 1973, which states explicitly that all concessions are held at the will and pleasure of the King and there is no right to freehold title in respect of land held under a concession title or lease. Therefore, in effect, land still held under concession is similar to land held under a long-term lease, and the land reverts to the King when the concession lapses. No compensation is given. Deeds Registry records show that very few of these concession titles still exist.

#### B. Swazi Nation Land

Some confusion exists as to the exact definition of Swazi Nation Land. The term has never been defined by legislation. What is now known as Swazi Nation Land derives from the "Swazi Areas" of the colonial period. The legal basis for the Swazi Areas is found in the Concessions Partition Act (Land) 28/1907. According to that Act one third of the area of each land concession was set apart for sole and exclusive use by Swazis. Under Sec. 4 of the Act all rights of Swazis to concession land were abolished, and all rights of concessionaires to the Swazi Areas were abolished. The land was actually set aside under the Definition of Swazi Areas Act (Swazi Affairs) 41/1916. Under that Act Sec. 3 the Swazi nation is entitled to exclusive use and occupation of such areas subject to:

- a. rights of way and outspans already established
- b. mineral concessions and ancillary rights under those concessions
- c. mineral rights (etc.) vested in the Ngwenyama or granted by him to others
- d. permission granted by the Ngwenyama under the Safeguarding of Swazi Areas Act (see below)

A "Swazi Area" has been defined in the Natural Resources Act (Natural Resources) 71/1951 as follows:

"Swazi area" means any land set apart for the sole and exclusive use and occupation of Africans under the Concessions Partition Act No. 28 of 1907 and land set aside for African land settlement in terms of the Swazi Land Settlement Act No. 2 of 1946, and shall include any land registered in the name of the Ngwenyama in Trust for the Swazi Nation.(my emphasis)

Therefore, according to the definitions section of that Act, any land registered in the name of the Ngwenyama in Trust becomes part of the Swazi Areas. The term "Swazi Area" is no longer used, presumably because of its implication that Swaziland is divided into one area for Swazis and one for non-Swazis, and the term generally used for the former Swazi Areas is Swazi Nation Land. The confusion arises because under the "Iifa Fund" and under the British Land Transfer Program (which still continues and is administered by the Ministry of Natural Resources), the Swazi Nation has re-purchased more than 1/2 of the land lost to concessionaires in the 19th century, and this repurchased land is registered in the name of the Ngwenyama in Trust for the Swazi Nation.<sup>2</sup> This land is given to chiefs and administered by them according to Swazi law and custom, used by Tibiyo or Tisuka<sup>3</sup> as agricultural projects, industrial projects or housing projects, or administered by the Ministry of Agriculture as agricultural projects. Working farms acquired in this way generally remain farms, worked by hired labour, rather than reverting to the traditional tenure commonly considered synonymous with Swazi Nation Land.

The confusion over whether repurchased land registered in the name of the Ngwenyama in Trust becomes Swazi Nation Land or remains title deed land is evident when talking to officials in various Ministries. The Government conveyancer, and officials of the Deed Registry Office and the Ministry of Natural Resources, explained in interviews with this researcher that private land registered in the name of King-in-Trust becomes Swazi Nation Land. However, other sources, such as officials interviewed at Tibiyo and at the Ministry of Agriculture, claim that the land remains Title Deed Land, and that Swazi Nation Land refers to land administered according to Swazi Law and Custom (whether registered or unregistered). Most statutes regulating land use refer not to "Swazi Nation Land" but to "land registered in the name of the Ngwenyama in Trust." For instance, the Control of Tree Planting Act (see p. 29) "does not apply to land held in trust by the Ngwenyama for the Swazi Nation" and the definition of "land" under the Land Speculation Control Act (see p. 10) "does not include land vested in the Ngwenyama in Trust for the Swazi Nation". (Therefore a new type of Swazi Nation Land has been created: Title Deed Land registered in the name of the Ngwenyama in Trust). This land is not treated like the "Swazi Areas" since it is not administered according to traditional land tenure, but neither is it treated like Private Tenure Land since it is excluded from most statutes regulating Private Tenure Land. Thus the land is virtually free of regulation from either the traditional or the "modern" sector.

All Swazi Nation Land is under the direct control of the King. It may be acquired, leased or sold by the King, and registered SNL may be mortgaged. Sec. 94(2) of the Constitution (Constitutional Law Act) 50/1968 provides that

the Ngwenyama may exercise all rights of ownership over such land (Swazi Areas) including the power to make grants, leases or other dispositions, subject to such rights and interests and to such conditions as he may think fit: Provided that no right to mortgage such land shall be exercisable save and except by a mortgage registered against land acquired by purchase or grant.

Swazi Nation Land is reserved for the exclusive use of Swazis. The Safeguarding of Swazi Areas Act (Swazi Affairs) 39/1910 provides that no person other than a Swazi may, without written permission, use or occupy a

Swazi area or allow his cattle or sheep to graze there. There are, however, cases of foreigners who "Khonta" to a chief (see IV. A., below) and receive land. The Act also empowers the Ngwenyama to grant permission to foreigners to do certain things in Swazi Areas, such as hunt game, etc.

### C. Crown Land

The third type of land tenure, Crown Land, is simply land owned by the Government. It may be registered as Crown Land or registered in the name of a particular branch of the government. The Government is empowered to deal with Crown Land, but not with Swazi Nation Land.

Technically, Crown Land is also owned by the King. Under the Vesting of Land in King Order (Land) 45/1973, all land and real rights to land in the name of the crown or the Government vests in the King. The Constitution Act (Constitutional Law) 50/1968 provides at Sec. 93:

Subject to the provisions of any law for the time being in force in Swaziland, the Government may exercise all rights of ownership over Government land accorded by law including the power to make grants, leases or other dispositions, subject to such rights and interests and to such conditions as the Government may think fit.

When the Constitution was repealed by King's Proclamation 12 April 1973, Sec. 93 was retained, subject to the following revision (Sec. 6 (a)):

All land rights in and to land previously vested in the Government shall now vest in the King and the reference in Chapter VIII [of the constitution] to the Government shall, where the context permits, be taken as a reference to the King.

The coexistence of Crown Land and Swazi Nation Land parallels the fundamental duality characterizing the Government of Swaziland. The traditional authorities, headed by the King and Royal Family, coexist with the Administrative Government, headed by the Prime Minister. During the political crisis of 1973, at the same time that the King was asserting his right to control the country by disbanding Parliament and repealing the Constitution, he was also asserting his power to control the land. In practice, however, there is a clear distinction between Crown (or Government) Land and Swazi Nation Land. Land is registered as Crown Land only if it is to be used to build government buildings, electricity projects, or other public uses. Other purchased land is registered in the name of the King-in-Trust. One overlap is the case of agricultural projects. If the Ministry of Agriculture buys private land for an agricultural project, it is registered as Crown land. The Ministry of Agriculture's "Government Farms," "Sisa Farms," etc., are on Crown Land. If the King-in-Trust buys the land, and allows the Ministry of Agriculture or Tibiyo to administer an agricultural project on the land, then it is registered in the name of the King-in-Trust and is therefore Swazi Nation Land.

### III. Registration of Rights in Land

The Deeds Registry Office is in charge of registering, inter alia, all deeds of transfer (also called "title deeds"), crown grants, notarial cessions of concessions, certificates of title, leases for more than ten years, mortgage bonds, servitudes and other real rights in land, township plans and ante-nuptial contracts. The system of land registration in Swaziland comes from South Africa, which has been influenced by Roman and Germanic law. The Deeds Registry Act follows the South African Act almost verbatim. Swazi Nation Land which originates from the land set aside for the Swazi Nation at the time of the original concessions is the only land in the country which is not registered. Swazi Nation Land which is repurchased private land remains registered in the name of the King-in-Trust.

#### A. Deeds of Transfer

The general rule is that ownership and real rights in title deed land pass only by registration of the deed of transfer in the Deeds Registry Office. (Deeds Registry Act 37/1968, Sec. 15). Registration of the Deed of Transfer must be accompanied by a Power of Attorney (in favor of a conveyancer), Transfer Duty Receipt, Certificate of Payment of Dues (i.e., urban rates or quit-rent), Certificate of Exemption or Consent under the Land Speculation Control Act (see below), and an affidavit as to the purchaser's date of birth (for identification). The Registrar is under a duty to examine all deeds lodged with the registry.

In most cases, the deeds registry is conclusive as to ownership of the land or real right in question. However, there are a few common law exceptions to transfer of ownership by registration. (Joubert, 1981, pp. 14-5.)

- Marriage in community of property. Marriage in community of property confers on each spouse an undivided half-share in everything owned by the other. (See, Armstrong and Nhlapo, 1985.)<sup>4</sup> If a woman gets married in community of property while already owning land, then an undivided half-share in the land is transferred to her husband, who then has absolute power to deal with the property. This may be noted on the title deed, but is not automatically endorsed there. In this way, the registry is not an accurate reflection of the ownership of the land.

- Insolvency. Insolvency causes a transfer of all the property of the insolvent to the trustee of his insolvent estate without registration being required. Therefore the registry is not an accurate reflection of ownership of land registered in the name of an insolvent.

- Accession. Accession is a method of acquisition of ownership as a result of something being attached to the thing owned. For instance, if a person owns land through which a river flows, and an island grows in that river, then the person also owns the island. Sand and silt may be slowly and imperceptibly added to land bounded by a river. If the boundary of the land is the river itself, then the owner of land on one side of the river acquires land and the owner of land on the other side loses land by accession. Therefore the registry may not accurately reflect the land owned where there has been accession.

- Prescription. At common law, ownership of land and real rights to land can be acquired by open and peaceable possession of land as of right, without any interference from the real owner and without acknowledging him as owner, for a period of 30 (some say 33 1/3) years. The historical reason for the legal concept of prescription is that "penalties should be imposed on those who, through their negligence and carelessness about their own affairs and property, do an injury to the state by introducing an uncertainty as to ownership and an endless multiplicity of lawsuits." (Maasdorp, p. 76.) Prescription has never been applied in Swaziland, and is no longer governed by the common law in South Africa after the passing of the Prescription Act 18/1948 (now replaced by the Prescription Act 68/1969). Therefore it is difficult to state with authority the law of prescription in Swaziland. Prescription was recognized in Roman law and in Roman-Dutch law (Voet 44:3:1-7) and therefore a court in Swaziland would probably follow the principles laid down by the old Roman-Dutch authors. In a case where prescription applies, the deeds registry will not present an accurate description of the ownership of the land since prescription transfers ownership without registration.<sup>5</sup>

#### B. Crown Grants

The Government has the authority under the Crown Lands Disposal Act (Land) 13/1911 to sell, lease or otherwise alienate Crown lands. When this is done, the transaction is not called a transfer of title deed (as it is when one individual sells to another) but a Crown Grant. The Deeds Registry Office keeps a separate registry for Crown Grants. Most Crown Grants involve urban land, and occur when the Government extends the boundaries of a township (usually by taking over SNL which is not under the control of a chief) and then rents the plots to individuals.

#### C. Concessions

A Concession is in effect a long-term lease of either land or minerals. Concessions date from the turn of the century, as described above. Under the Concessions Act, a concessionaire had the right to have his land concession transferred into freehold. This right was abolished in 1973 and land concessions are no longer renewed. When a concession lapses, the land reverts to the Government. The Deeds Registry Office keeps a registry of land and mineral concessions and of cessions (transfers) of concessions.

In Swaziland, unlike in most countries and unlike in the Roman-Dutch common law, mineral rights do not vest in the owner of land where the minerals are to be found. According to the Constitution Act (Constitutional Law) 50/1968, Sec. 95 all minerals and mineral oils on any land in Swaziland vest in the Ngwenyama. Rights to these minerals are transferred from the King by concession, registered in the Deeds Registry Office, and the rentals go to the Ngwenyama-in-Trust for the Swazi Nation (and accrue to Tibiyo).

#### D. Certificates of Title

If a person wants to sell or lease or otherwise alienate a portion of land that he owns then he may acquire a certificate of title to that portion. That certificate is then registered. Since all sales, leases, or other alienation of a subdivided portion of land are regulated by the Subdivision of Land Act (See p. 10), a certificate of clearance from the Natural Resources Board is necessary.

## E. Lease for 10 years or more

The Transfer Duty Act (Revenue) 8/1902 provides that all leases for ten years or more must be by notarial bond<sup>6</sup> and registered in the Deeds Registry Office. (See Ex Parte T. K. Partingen, Civil case 159 of 1981, and Variety Instruments, Civil Case 2 of 1982, in which leases of land were invalidated because they were not notarially registered as provided by the Transfer Duty Act.) The Vuvulane leases, the Mhlume lease, and leases of land to Swazi Can (formerly Libby's) are the most important registered long leases.

## F. Mortgages

Every mortgage is registered in a special registry and endorsed on the title deed of the land encumbered.

## G. Servitudes and other real rights in land

For a right to be capable of registration it must be specially enumerated in the Deeds Registry Act or regarded as a real right by common law.<sup>7</sup> Most common real rights are servitudes. Common servitudes are roads over a person's property, grazing rights, and rights of way for electrical wires and water pipes. (See discussion p. 18).

## H. Township Plans

Under the Town Planning Act (Land) 45/1961 and the Private Townships Act (Land) 17/1961 all township plans must be registered. (The Private Townships Act will be repealed by the Human Settlements Authority Act 1985 (SGG 388) which will be passed by Parliament during the current session and is discussed under Sec. VII (D) below.)

## I. Ante-Nuptial Contracts

If a couple about to be married wishes to vary the common law proprietary consequences of their marriage, they must register an ante-nuptial contract (See, Armstrong and Nhlapo, 1985). The relevance of such a contract to land law is that it will apply to any land which the couple or either spouse owns.

# IV. Allocation and Alienation of Land

## A. Swazi Nation Land

All Swazi Nation Land is held by the King in trust for the Swazi Nation. There are two types of SNL holdings: registered and unregistered. Unregistered agricultural land is either governed by traditional land tenure or forms part of an agricultural scheme (usually irrigated) under the authority of a chief. Registered Swazi Nation Land may be under traditional land tenure, form an agricultural scheme under the control of a chief, be leased, or be administered as a private farm, industry or housing project by Tibiyo or Tisuka Taka Ngwane. (See Appendix 2, Diagram of Land Tenure).

### i. Traditional Land Tenure

The traditional land tenure system is described fully in Hughes (1972), and the details will not be repeated here. Traditional land tenure holdings

are under the control of chiefs who allocate land to individual homestead heads in areas under their control. Although it is sometimes said that every Swazi has a right to land, it is clear that the allocation of land is determined by the hierarchical structure of the society, and that not all rights to land are equal. Control over land and political control over the people are interlocked, and therefore the power of the chiefs to allocate land resources is jealously guarded. This has caused considerable problems in activating resettlement programs, and may also be linked to larger political struggles in the country between the traditional leaders, who control the land, and other political leaders seeking more power.

Land is acquired either by the formal ceremony of subjection to a chief's authority (kukhonta), which involves a gift to the chief, or by inheritance. Normally only a male may receive land, but recent informal interviews by this researcher indicate that in some chiefdoms unmarried females with children are receiving land both as grants from progressive chiefs and by inheritance (See Sec. IV. D., below). Within the family unit (umiti), the homestead head (umnumzane) distributes fields to his wives, descendants, collateral kin, or rarely, to non-family members for living and cultivation. Allocation is made after consultation with the family council of the umnumzane (his lusendo). Once acquired, the right to use land for occupation or cultivation may be defended against any person. (Rubin, 1965, p. 92-3.)

Swazi Nation Land held under traditional tenure may not be bought, mortgaged, leased, or sold. It may be lent (not for cash payment) to another Swazi. It may be expropriated by the Government under the constitution, Sec. 94(4) and the Acquisition of Property Act (See below) or by the King under Sec. 94(2) of the constitution and under the Swazi Administration Act Sec. 10. Traditionally, rights in Swazi Nation Land may be extinguished by banishment<sup>8</sup> of the holder of those rights. Although in practice it is very, very difficult to take away rights to land from someone who is using the land, the threat of banishment may still affect the use of the land. Some writers report that traditionally land may not be lost by abandonment (See Rubin, 1965, p. 94). However, this custom may be changing, primarily because of the increasing scarcity of land. Extension workers report that some homesteads feel the need to cultivate their plots each year in order to retain the right to use the plots, and that often this results in undercultivation of land to protect land rights.<sup>9</sup> In both these cases, rights to land are maintained by use of the land.

Land held under traditional tenure may be either part of the original "Swazi Areas" and therefore unregistered, or it may be repurchased land, registered in the name of the Ngwenyama in Trust for the Swazi Nation. There is no difference between registered and unregistered SNL under traditional tenure. The land purchased under the Swazi Land Settlement Scheme (See X.D., below) is now also governed by traditional tenure.

#### ii. Agricultural Schemes

There are two types of agricultural schemes on Swazi Nation Land: those on land controlled by a chief and those on leased or Tibiyo land. When an agricultural scheme is developed on Swazi Nation Land under the control of a local chief the land is not allocated according to the traditional principles of Swazi customary law and therefore the land cannot be said to be under "traditional tenure." Distribution of land in these schemes varies from

chiefdom to chiefdom. In some cases cooperatives have been formed, and the local chief has allocated land in bulk to the cooperative to distribute among themselves. In some cases, land is distributed directly to individual plot holders by the local chief. In both of these cases, the individual usually retains land rights for his dryland plots at his homestead. For some agricultural schemes, massive resettlement is organized under the Central Rural Development Board and land is redistributed through the imisumphe committees (see VII. B., below). No formal legal arrangements are made between the chiefs and the farmers, and no payment is made other than the traditional allegiance, including gifts and labor, which the commoner owes to the chief.

Agricultural schemes on leased or Tibiyo Swazi Nation Land are treated as if they are on Private Tenure Land. Examples of leased SNL are the Swaziland Irrigation Scheme (Vuvulane), and Impala Ranch (leased to Mhlume Sugar Company). In theory, there is no barrier to registered SNL being leased to an individual farmer. Leased land is subject to Roman-Dutch common law of lease.

Tibiyo land is administered directly by the company as a private farm, with hired labor. Tibiyo runs dairy projects, sugar plantations, tobacco and other agricultural projects. The land may be sold, leased or otherwise alienated just as Title Deed Land, however, many of the legal restrictions on the use of Title Deed Land do not apply to this land because it is registered in the name of Ngwenyama in Trust.

## B. Private Tenure Land

### i. Transfer Duty Act

Rights to Private Tenure Land and alienation of PTL are governed by the Roman-Dutch common law and by statute. According to the Transfer Duty Act (Revenue) 8/1902 (Sec. 31), transfer of Private Tenure Land must be by written contract. That Act also provides for the payment of transfer duty on the alienation of fixed property and leases of fixed property. This duty must be paid by any person acquiring property in any way other than inheritance. The duty is 3% on the first R10,000 of the value of the property and 4% on any additional amount.

### ii. Subdivision of Land (Land) Act 7/1957

Under this Act, no person shall subdivide land without the consent of the Natural Resources Board (established under the Natural Resources Act 71/1951). However, the consent of the board is not required, inter alia, for Crown land, land in urban areas (for which other regulations exist), land subdivided for the sole use of the owner and not sold or leased, or land subdivided for an irrigation scheme into portions of more than 42,827 hectares each and approved by the Minister. For the purpose of the latter, the Minister shall not approve of an irrigation scheme which provides for less than a rate of one cusec of water per 42,827 hectares.

### iii. Land Speculation Control Act 8/1972

This Act provides for contractual regulation of land transactions involving persons who are not citizens of Swaziland. Although the title of the Act suggests that its goal is to control speculative land transactions,

in effect it controls only transactions involving non-citizens, and makes no attempt to control speculative transactions by Swazi citizens. The goal of the Act is to shift land resources from foreign to local ownership by regulating contracts for the transfer of land.

Under section 14 of the Act, any person who is not a citizen of Swaziland or a private company or cooperative all of whose members are citizens of Swaziland must register any land which he owns, subject to penalties for failure to do so. This section has caused considerable confusion in recent years, due to the fact that the Citizenship Act stripped away the citizenship of many persons who considered themselves Swazi citizens, who then found themselves subject to the Act when they wanted to buy or sell land and subject to penalties for not registering their land.

Under Section 8 of the Act any person who wants to transfer private land in Swaziland must have an Exemption Certificate from the Land Speculation Control Board which will be issued upon proof that the land has been registered with the board (if required) and that it is either not a "controlled transaction," or, if a controlled transaction, has a Certificate of Consent from the Land Speculation Control Board.

The Act defines controlled transaction as:

- (a) the sale, transfer, lease, mortgage, exchange or other disposal of land to a person who is not:
  - (i) a citizen of Swaziland
  - (ii) a private company or cooperative all of whose members are citizens of Swaziland or
  - (iii) an exempted person;
- (b) The issue, sale, transfer, mortgage or any other disposal of or dealing with any share in a private company or cooperative which for the time being owns land in Swaziland, to or with a person who is not a Swaziland citizen. (Sec. 2.)

Land is defined to include any right, title, or interest in immovable property, but excludes leases of under 3 years. (Sec. 2.) Transfers by will or intestacy, donations to descendants, sales in execution of the judgment of a court, or in liquidation or insolvency are excluded from the operation of the Act. (Sec. 2.) The Schedule to the Act exempts certain organizations from its operation.

Under the Act any controlled transaction is void unless the Land Control Board has granted its consent. The Board is bound to grant its consent if it is satisfied that the transaction is "desirable for the development of the land or the continuation of an existing use of such land", and in all other cases-

- (i) have regard to the effect which the grant or refusal of consent is likely to have on the development of the land concerned and the surrounding area; and
- (ii) refuse consent if it is satisfied that the person to whom the land or share is to be disposed of does not intend in good faith to develop the land in the manner in which in the opinion of the board, is in the best interest of Swaziland.

In cases of reasonable doubt, the Board may grant consent subject to certain conditions which will curb the speculative nature of the transaction. The meaning of "speculative" is discussed in the case of Swaziland Iron Ore Development Co. Ltd v. Land Control Appeals Board and Land Control Board, 1970-76 S.L.R. 214, which makes it clear that the courts take a view of the meaning of speculation which centers on the intention of the party involved rather than the possibility of eventual profit. The Board must not "confuse a speculative profit with a contemplated profit made in the ordinary course of events." (At p. 221.)

The Land Speculation Control Board is under the Ministry of Natural Resources. Its 1 April 1984-31 March 1985 Annual Report details the board's work that year:

Registrations	105
Applications for Consent	112 (of which 52 approved)
Exemptions	277
Penalties	10
Appeals	1

Examples of recurring reasons given by the Board for denying consent include the following:

- a) the sale is not beneficial to Swaziland
  - b) applicant is not a citizen of Swaziland but a mere resident
  - c) insufficient financial details have been provided
  - d) the property has not been advertised to give citizens a chance
  - e) applicant already has a house
  - f) applicant already has undeveloped land which he can put to use
  - g) insufficient safeguards have been provided to the squatters who are, in any case potential buyers.
- (Takirambudde, p. 184)

When consent is obtained, the reason, when given, is usually that the purchaser intends to live on the land, or that the transaction is not speculative.

Several criticisms have been levelled at the Act, some substantive and some procedural. The substantive criticisms deserve mention in as far as they relate to agricultural development.

1) It has been said that the legislation is anti-developmental in that it creates so many complicated requirements for land transactions that investment in general and credit availability is discouraged. The length of time required to obtain consent can be over two years. Preliminary investigations show that many PTL owners have developed ways to circumvent the requirements of the Act by informal arrangements. Takirambudde (1983) argues that although the Act makes land transactions less efficient, at the same time it discourages underutilization of land by making it necessary for a purchaser to show that the land he purchases will be used for the benefit of the Nation. In practice, he argues, the Act has made more land available for purchase by the Swazi Nation, since sellers tend to offer the land for sale to the Swazi Nation rather than go through the trouble of finding an individual Swazi purchaser.

2) The second criticism is that the Act is discriminatory in that it seeks to prevent speculation by non-Swazis but does not regulate speculative transactions by Swazis. Thus the long term goal of a fairer distribution of land among the population as a whole may be prevented by widespread speculation by citizens. However, the alternative, regulation of ALL land transactions under the Act, would increase the complications of land transactions to such an extent that investment may be discouraged.

3) The third criticism is that "land" is too broadly defined to include even mortgages and short-term leases. However, Takirambudde (1983) argues that this is necessary in order to prevent loopholes in the legislation since a transaction could be masked as a lease arrangement or as a mortgage with a forced foreclosure and sale. As it stands, the Act already exempts the major banks and mortgage granting institutions from its operation.

Kowet (1978) gives an interesting account of the way that the Land Speculation Control Act was enacted. It was passed at a time when European land owners, particularly from South Africa, were speculating and driving land prices up out of the reach of potential Swazi land owners. The legislation was introduced by the new Swazi elite who, in spite of their high salaries, were blocked by inflated prices from owning land, and supported by the chiefs who had little land left to distribute to their subjects. Both were determined to get a larger share of the resources held by Europeans. The Act was discussed secretly and rushed through Parliament at a time when many European members of Parliament were absent. Reaction from the European community was strong, and the (South African) Financial Mail reported, "The Swaziland Government seems almost wilfully intent on driving away the foreign investment that is vital for economic growth. Its first measure to shake White confidence was the Land Speculation Control Act." (Kowet, p. 203.) Kowet also attributes this Act with causing the elite opposition to win 3 seats in Parliament, which in turn caused the King to suspend the constitution and disband all political parties in 1973. In the long run, he says, the Act served to increase the domination of Europeans by forcing the King to protect their interests. (Kowet, pp. 221-225.)

#### C. Crown Land

The Crown Lands Disposal Act (Land) 13/1911 empowers the government to dispose of Crown lands by grant, sale, lease or otherwise. The Crown Land (Temporary Occupation) Act (Land) 22/1964 provides for the granting of permit for temporary occupation of Crown Lands and forbids the unauthorized occupation of, or other encroachment on, Crown Land. As far as can be determined, this Act has not been used in recent years. The Acquisition of Property Act (see below) entitles the Government to acquire more land.

Crown land is put to agricultural use in the form of Government farms. The farms are sometimes used to train farmers, but usually are simply run as private farms with hired labor. Plots may also be rented to individual farmers on an agricultural scheme on Crown land, and sources indicate that Government policy is now directed toward establishing more of these leased smallholder schemes.

#### D. Women's Rights to Land

According to traditional Swazi law and custom, all land attached to a homestead belongs to the head of that homestead. The homestead head then

distributes fields to women of the homestead. The homestead head is usually a man, and the SiSwati term for homestead head, "umnumzane" has no feminine form. However, in some cases the grandmother of the homestead, or the most senior wife, may be designated as the homestead head. The Farm Dwellers Act 12/1982 recognizes this when it defines "umnumzane" to be "a person recognized by Swazi law and custom as the head of the homestead and includes a woman." (Sec. 2.)

In the ordinary Swazi homestead, although the land formally belongs to the homestead head, each individual field is said to belong to the woman who tills that field. She may defend her rights to that field against anyone seeking to take it away, including other members of the homestead. She has the right to the produce of her fields, although some of that produce must be contributed to the common stores of the homestead, and used to feed her husband.

As a general rule, land is allocated to families rather than to individuals. The customary law position is that only a man can acquire or hold land. Therefore a woman can only use land which has been acquired by a man. Normally this man is her husband. However, this principle seems to be flexible in the sense that chiefs in some areas allocate land to unmarried women with children to support, if the woman approaches the chief through a male relative.

Women also may be acquiring greater access to land in some areas through agricultural schemes developed on Swazi Nation Land. Carloni (1982) reports that women plot-holders in the northern irrigation schemes she surveyed outnumbered men by 2 to 1, (p. 11). Organizers of the schemes prefer to grant a plot to the person actually working the plot, usually a woman. Research into the operations of the schemes has shown that financial returns on such schemes are too low to attract men, who have greater opportunities in wage employment, but are attractive to women because of their lower off-farm wage earning capacity and opportunity costs. (Ibid., and Armstrong and Russell, 1985, pp. 31-2.)

Unmarried adult women, women married out of community of property, and women married only by Swazi law and custom may own Private Tenure Land. Officials from the Deeds Registry Office report that land may be registered in the name of any woman not married in community of property, but it is not known how many women are able to gain access to land in this way.

## V. Inheritance of Land

The only comprehensive study of inheritance laws in Swaziland was carried out by Rubin as part of the School of Oriental and African Studies' Restatement program (1965). Traditional rules of inheritance are also covered in Fannin (1967), Kuper (1947), Hughes (1972), and Marwick (1940).

### A. Swazi Nation Land

Inheritance of Swazi Nation Land held under traditional tenure is governed by customary law. In customary law, the pattern of inheritance of both land and movables is based on provision for a main heir and a number of lesser heirs. The eldest son of the principle wife in a polygamous household, and the eldest son of a man who has only one wife, is the main heir. The

eldest son of each household is the heir of that household. Provision is also made for the younger sons. A widow does not inherit land or movables, but has a right of use over the land of her household. Rubin (1965, p. 97) describes the order of succession when there is no son surviving and the man had only one wife. Where there are sons, daughters receive no share of the estate. There is some evidence that this custom may be changing, particularly with regard to unmarried daughters. Local newspapers report disputes over the right of inheritance of wives to both land and moveable property, handled by the Swazi National Courts. SNL cannot be devised by will. (Rubin p. 98). Land which is part of an agricultural scheme on SNL may be inherited according to customary law, or according to the Constitution for the scheme, or, perhaps, according to will. Since these schemes are new, the "traditional" rules regulating them are still evolving.

## B. Private Tenure Land

Inheritance of Private Tenure Land is governed by three statutes: The Administration of Estates Act (Estates) 28/1902, the Wills Act (Civil Law) 12/1955, and the Intestate Succession Act (Civil Law) 3/1953. Private Tenure Land owned by a non-ethnic Swazi (i.e., white, colored, or foreign) devolves according to the Roman-Dutch common law. The Roman-Dutch common law of intestate succession provides for equal distribution of all assets in the estate of a deceased person among his descendants (male and female), and if no descendants to an ascendant male or female, and if neither of these, to brothers or sisters or both sharing equally. The common law has been amended by the Intestate Succession Act which provides that a surviving spouse succeeds to a child's share in the estate if there are descendants, to one half share if there are no descendants but there is a brother, sister or parent, and is the sole heir in all other cases.

The Master of the High Court reports that in practice, private tenure land owned by a Swazi will devolve according to Roman-Dutch law if the Swazi was married by civil rights (or by both civil rights and customary rights) and will devolve according to Swazi law and custom if the owner was married by customary law only or is single. This is because of the Administration of Estates Act which provides at Sec. 68 (1):

If any African who during his lifetime has not contracted a lawful marriage, or who, being unmarried is not the offspring of parents lawfully married, dies intestate, his estate shall be administered and distributed according to the customs and usages of the tribe or people to which he belonged... .

"Lawful marriage" has been interpreted to mean civil marriage because at the time the Act was passed a civil marriage was the only form of lawful marriage, even though today customary marriages are fully lawful. When interpreted this way, the Act conflicts with the Marriage Proclamation of 1964 which provides that when two Swazis marry under the Act, the proprietary consequences of the marriage are governed by Swazi law and custom unless a special notation is made on the Marriage Register. In practice, the estates of all persons married under the Act—with or without the special notation—are administered according to the Roman-Dutch law. Private Tenure Land inherited under Swazi law and custom must be handled by the Swazi National Courts, and it is not clear how this would be dealt with since land is not ordinarily inheritable under Swazi law and custom. Presumably, the land would form part of the general estate and devolve upon the principle heir. There

has never been a case before the High Court to resolve these legislative conflicts. Since the Administration of Estates Act clearly conflicts with the Marriage Act, and fails to adequately recognize the situation in Swaziland since independence, the law needs revision.

Wills made by any competent adult are fully enforceable, subject only to the formal requirements of the Wills Act. However, a testator cannot, of course, bequeath Swazi Nation Land and a person married in community of property can only bequeath his or her half share in the property.

## VI. Government Acquisition of Land

The Government of Swaziland is empowered to acquire property by the following legislation:

### A. Acquisition of Property Act, Land: Act 10/1961

This act provides for the compulsory acquisition by the government of land or any real right in land for the following purposes:

- a) for any Government or quasi-Government constructions or undertakings financed wholly or partly from public funds;
- b) for, or in connection with the construction or maintenance of Government hospitals or sanitary improvements of any kind, including reclamations;
- c) for, or in connection with the laying out of any new township, urban area, as provided for in any law or village or the extension or improvement of any existing township, urban area or village;
- d) for obtaining control over land contiguous to any railways or roads, or to other public works of convenience constructed or about to be undertaken by the Government;
- e) for, or in connection with the construction and maintenance of any aerodrome, landing ground or airstrip and for providing access thereto;
- f) for the construction of any railway authorized by legislation or for the maintenance or working of any existing railway;
- g) for any requirements of the Swaziland Electricity Board.

Compensation must be paid either by agreement, or by referral to the Board of Assessment established under the Act, (Sec. 15). No provision is made for expropriating land without compensation. The amount of compensation is determined with regard to:

- a) the market value of the property;
- b) any increase, due to the acquisition, in the value of other property owned by the seller;
- c) any damage sustained by severing the property sold from other property owned by the seller;
- d) any damage sustained due to the acquisition of the property injuriously affecting other property owned by the seller;
- e) reasonable expenses incurred in change of business or residence.

The standard of compensation, therefore, is based on market value rather than amount of investment.

The King is immune from compulsory acquisition of property he owns in his private capacity. (Constitution, Sec. 33.)

B. National Trust Commission Act (Cultural Institutions) 9/1972

This Act empowers the Deputy Prime Minister to declare National Parks and Nature Reserves. Any land which is not private land may be declared a National Park, but the permission of the Ngwenyama must be obtained before declaring SNL to be a National Park. Under Sec. 14 the Minister may acquire private land for this purpose by purchase or by expropriation. Any land, whether SNL or TDL, may be declared a Nature Reserve. An owner or occupier of land within a reserve may continue to use and enjoy the land subject to regulations laid down by the Ministry (sec. 21). In practice, land declared to be a Nature Reserve is often sold to the Government. The Act (sec. 27) also empowers the Deputy Prime Minister to acquire land by expropriation to proclaim a monument, relic or antique (e.g., Bushman paintings).

C. Swazi Nation Land

The power of compulsory acquisition of Swazi Nation Land is clarified in Sec. 94(4) of the Constitution, which states:

For the avoidance of doubt it is hereby declared that Swazi nation land is subject to compulsory acquisition for public purposes under the law for the time being in force relating to the compulsory acquisition of land for such purposes.

Under the constitution it is the Government which has the power to appropriate Swazi Nation Land. The King also has the power to regulate the use of Swazi Nation Land under Sec. 10 of the Swazi Administration Act. This power includes the right to use portions of the land for public purposes and to resettle persons living there if necessary.

Since the constitution states that compulsory acquisition is made subject to the "law for the time being in force", the Acquisition of Property Act also applies to SNL. Therefore, compensation is made on the basis of the criteria laid out above (Sec. VI. A.). Compensation is on the basis of market value, which has no application to Swazi Nation Land under traditional tenure, since it cannot be bought and sold. The only one of the five criteria listed by the Act which is applicable to SNL is (e) "reasonable expenses incurred in change of business or residence." Under the Act, no reference is made to compensation for the amount that a farmer may have invested in building a home, planting crops, providing inputs, or any other expenses. Therefore, compensation is inadequate. The failure of the Acquisition of Property Act to adequately deal with the situation on Swazi Nation Land has led to serious complaints by Swazis who have been moved from their land, to resistance to the Government's resettlement policies, and probably to a reluctance to invest in long-term improvements to land.

D. The Electricity Act (Fuel and Power) 10/1963

This Act provides in Sec. 11 that the Electricity Board may acquire land by agreement with the owner of the land, or if the land cannot be acquired by agreement then it may be acquired under the Acquisition of Property Act. Government land may be placed at the disposal of the Electricity Board at the

discretion of the Minister of Local Administration (now, Interior). Sec. 32 of the Act provides for servitudes over or under land for electrical works.

E. Swaziland Railways Act (Railways) 15/1962

This Act provides (sec. 33) that Swaziland Railways may acquire land by agreement or compulsorily under the Acquisition of Property Act.

VII. Administration of Land and Land Use

A. Private Tenure Land

1. Common Law

Restrictions on the use of land may be imposed by common law or by statute. The most frequent common law restrictions are imposed by virtue of the provisions of a will, by conditions in the title deed, or by contract. A restriction based solely on the grounds of race is not allowed, and shall be of no effect. (Immovable Property (Race Discrimination) Act 46/1968). Restrictions on land may be real rights if registered against the title deed (see above) or personal rights. The High Court has inherent common law powers to remove or amend restrictions in the following instances, inter alia,:

- a. where there is no beneficiary ("nude" restrictions)
- b. for necessity, convenience, or greater utility
- c. where the reason for the restriction has fallen away
- d. with the consent of the person who imposed the restriction
- e. if the removal will benefit minor or unborn beneficiaries  
(Joubert, p. 90)

Most common law restrictions on ownership are servitudes. Many servitudes were already known in Roman and Roman-Dutch law, but there is no limit to the types of servitude that may be registered. Servitudes over land are called praedial, or real, servitudes and exist over a servient tenement in favor of a dominant tenement. In most cases the lands are adjacent. Rural servitudes are mostly concerned with rights of way, water and grazing. A servitude holder may enforce his right with the actio confessoria, which is a action which may be instituted against the owner of the servient property or any other person who infringes the holder's right. The servitude holder also is entitled to an interdict (an action to prevent someone from doing something) or a delictual action for compensation. (See Hosten, 347-352 and Hall.) Grazing servitudes are common in Swaziland, but many of these are arranged informally and are not registered. For instance, the Anglican Mission reports that it distributes grazing servitudes over its Mission land, arranged by the local parish priests for their parishioners.

Several statutes also regulate servitudes. Sec. 20 of the Concessions Act (Land) 3/1904 provides that all land concessions are subject to whatever rights of way and outspan, rights to take water, wood or reeds, and other rights as were established by the Special Commission of 1908. These rights should be endorsed on the title deed or concession title of the land in question. Sec. 32 of the Electricity Act provides for servitudes over or under land for electrical wires, etc. The Rights of Way (Cancellation) Act (Land) 16/1962 establishes a Rights of Way Advisory Board and provides the machinery for the cancellation of rights of way which have fallen in disuse or

have been replaced by roads. Such cancellations are to be published in the Gazette and noted in the Deeds Registry. The Roads and Outspans Act (Roads) 40/1931 provides for servitudes for public roads and for outspans in favor of the public. "Outspan" is not defined by the Act but is defined by Wille (1977) as "the right to allow one's draft animals to rest, graze and water on the land of another." (p. 221.) The Minister may beacon off outspans over which public roads pass, and the Registrar of Deeds keeps a register of those outspans which have been beacons off.

Since the acquirer of land receives only as good a title as was vested in his predecessor, all limitations on ownership to which the predecessor's title was subject are operative against the transferee. Normally these real rights will be registered against the property.

Another common law restriction on the use of Title Deed Land is found in the law of Delict (similar to the English law of Torts). Under the principles of "neighbor law" an owner of land may not use his right of ownership in such a way as to harm his neighbor. An important High Court judgment discusses neighbor law in Swaziland, and deviates from the law in South Africa by following the English and American concepts of reasonable user. The case of Johnson v. Commonwealth Development Corporation, 1979-1981 S.L.R. 233, involved the use of water and held that under the common law the owner of land from which water is discharged unnaturally onto another's land can be held liable for damage done even if negligence cannot be proved. One of the three judges based the decision on the English concept of nuisance, while the other two relied on the Lex Aquilia of Roman-Dutch law. The case discusses rights and duties of land owners towards each other, particularly with regard to the use of water.

ii. Land Tax Order, Revenue: King's Order in Council 35/1974

The purpose of this Act is "to provide for the establishment of a Land Taxation Board with power to impose a tax on undeveloped or underdeveloped land." It is administered by the Ministry of Finance and Economic Planning, but as far as can be determined has never been applied, reportedly due to the failure of the Government to hire personnel to enforce the Act. However, it may serve as a deterrent to those who would fail to develop their land. Under the Act, the onus is upon the Ministry of Agriculture, in the case of rural land, and the Ministry of Local Administration (Interior) in the case of urban land, to summon land owners before the Board in order to determine whether a tax should be charged and how much. The Act applies only to Title Deed Land.

The Board is required to determine whether tax should be imposed with regard to the following: (Sec. 5 (5))

- a. the extent of any development of land
- b. the date when the owner acquired the land, either as owner or under any other title
- c. the cost of such land to the owner
- d. the amount of capital expenditure incurred by the owner from the time of his acquisition thereof either as owner or under any other title
- e. the best use to which the land could have been put, and the reasons, if any, for the failure so to use it
- f. the potentiality of proper development of the land
- g. the annual income accruing to the owner from the land.

The land in question may be divided for the purposes of the Act, and a tax imposed only on the undeveloped or underdeveloped portion. The tax is based on a rate per hectare of land, and the Board's decision may be altered as the owner subsequently develops the land.

111. Natural Resources Act, (Natural Resources) Act 71/1951

This Act establishes a Natural Resources Board to supervise the use of natural resources in non-SNL areas, stimulate public interest in natural resource conservation, recommend conservation legislation, etc. Under the Act (Sec. 20), the Board may make orders for the conservation of natural resources relating to:

- a. construction and maintenance of soil conservation works
- b. preservation and protection of the source, course and banks of rivers and streams
- c. depasturing or limitation of stock
- d. the method of cultivation and irrigation of land
- e. prohibition or restriction of cultivation or irrigation of any part of the land
- f. control of water, including storm water
- g. construction of roads
- h. control of grass burning

Failure to obey an order of the board is an offence. The Act, and the regulations promulgated under Sec. 32 of the Act, create two further offences:

1. Any person who by act or neglect causes damage to another whether by diverting storm water from its natural course or by any other act or omission or who injures any soil or water conservation work, shall be guilty of an offence (Act, Sec. 31).

2. No person shall without the permission of the Board cultivate or plant any crops or injure or destroy any natural vegetation in any area within one hundred feet of either bank or of the verge of a public stream. (Regulation, Sec. 3.)

Although not explicitly stated, presumably penalties for such offences may be enforced through the Magistrate's Courts. Penalties are outlined in Sec. 33: a maximum fine of R50 or one month imprisonment for a first offence and a maximum fine of R100 or 3 months imprisonment for a second or subsequent offence.

In addition, under Sec. 17, the Minister of Natural Resources has the power to construct and maintain waterworks for specified conservation purposes. The Act also provides for the setting aside of land for conservation or improvement of natural resources, including intensive conservation areas. (Sec. 16, 21.)

According to the secretary of the Natural Resources Board (interview 21/8/84) the Board seldom uses its powers to oversee the conservation of natural resources since most of its time is spent administering the Land Subdivision Act and the Control of Tree Planting Act (see below). At one time there were inspectors to go onto private farms and ensure that the owners were following conservation principles, but these inspectors are no longer employed and therefore this aspect of the board's functions has been

neglected. The Secretary therefore attributes this failure to insufficient manpower. The reasons that this Board has not been provided with adequate manpower should be explored. It is possible that the reasons are linked to the fact that the persons in power are the very persons whose land is to be regulated by this Act, including both individuals and the Government itself on its Government farms.

iv. Farm Dwellers Control Act 1982, Act 12/1982 (SGG 166) and Farm Dwellers Control (Agreement) Regulations 1983 (SGG 225)

This act and regulations control the relations between farm owners (on TDL) and persons residing on their farms. It spells out the rights of farm dwellers, including an agreement with the farm owner which must outline the conditions of the farm dweller's tenancy, limitations on eviction of farm dwellers, and provision for a District Tribunal to resolve disputes between farm dwellers and farm owners. Provisions of the Act are as follows:

The Act does not apply to Royal Villages or Chief's homesteads. "Farm" is defined by Sec. 2 of the Act as "an area of land used for, or in connection with, animal husbandry, forestry or agriculture, but does not include-

- a. Crown or Government land; or
- b. land vested in the Ngwenyama in trust for the Swazi Nation; or
- c. stands, lots or erven (Dutch word meaning lot) in urban areas."

The Act applies to all farm dwellers, which is defined by the Act, Sec. 2, as a person who resides on a farm other than-

- a. the owner thereof; or
- b. a usufructuary or fiduciary; or
- c. a lessee under a written agreement of lease; or
- d. the holder of a registered servitude which gives the right of occupation; or
- e. the manager or agent of a person referred to in paragraph a, b, c, or d; or
- f. a member of the family or a guest of a person mentioned in paragraph a, b, c, d, or e; or
- g. a person who is in the whole time employment of an owner if it is a condition of his employment that the owner shall provide him or his family with residential accommodation;

Farm Dwellers are therefore what is commonly known as squatters. Historically, these squatters have often worked for farm owners (usually with no cash payment) in exchange for their residence on the farm.

Sec. 3 of the Act sets out the rights of Farm Dwellers. An umnumzane (head of a homestead) who is a farm dweller at the time the Act comes into operation or who comes into occupation with the permission of the farm owner after the Act comes into operation, is entitled to an Agreement within 90 days. The section further outlines the procedures for making such Agreement, including the role of the District Tribunal described below, and creates an offence for either an umnumzane or farm owner to fail to comply with the section.

Sec. 4 of the Act, read with the schedule to the Act and the regulations under the Act, sets out the terms and conditions which must be included in the agreement. These include, inter alia,

- the agreement must be in writing and in English
- the agreement must include
  - a. name and number of farm and district
  - b. names of persons liable for labor
  - c. periods for which labor is to be supplied
  - d. payment for labor
  - e. payment of tax
  - f. acreage to be plowed
  - g. number and type of stock allowed
  - h. rations supplied by owner
  - i. date of expiry of agreement

-labor supplied in excess of the agreement must be paid for at rates prescribed by regulation

-bona fide temporary guests of the farm dweller may visit the farm, but any strangers must be reported immediately

-the owner shall keep a register of the stock of the dweller

-the the farm dweller has a right to use manure from his homestead

Sec. 5-9 of the Act establish District Tribunals and a Central Tribunal under the Regional Administrators (former District Commissioners). The District Tribunals are to

hear and decide upon any dispute between an owner and an umnumzane concerning the rights and liabilities under an Agreement or as to who are dependents of the umnumzane, attempt conciliation and failing conciliation make such order (including an order as to costs) relating to the dispute, including cancellation of the Agreement and the removal of the umnumzane and his dependents from the farm as it deems necessary;

The Central Tribunal hears appeals from the District Tribunals and advises the Minister (of the Interior) as to measures to be taken for the gradual elimination of the farm dweller system. Sec. 9 ousts the jurisdiction of courts to hear or determine disputes under the Act.

Sec. 10 of the Act limits the owner's power to eject a farm dweller. A dweller may not be ejected unless the Tribunal is satisfied that-

- a. the farm dweller is not entitled to an Agreement
- b. the farm dweller has wilfully, or without good cause, committed a material breach of the Agreement
- c. the farm dweller has committed an act which, in the opinion of the Tribunal, is an act which makes his continued residence on the farm undesirable
- d. the farm is reasonably required for intensive development Provided that a Tribunal shall not make an order under this paragraph unless it is also satisfied that-
  - i) reasonable alternative accommodation for the farm dweller is available and
  - ii) reasonable arrangements have been made by the owner to pay to the farm dweller compensation for disturbance, including

- the value of unreaped crops and to provide for the transport of the farm dweller to that accommodation
- e. the Agreement has terminated without being renewed and the farm dweller continues to reside on the farm.

Subsection (2) of Sec. 10 provides that no farm dweller shall be ordered to vacate between 1 Sept. of one year and 31 May of the following year (the summer growing season). Sec. 11 provides that after the commencement of the Act no person shall reside on a farm without permission of the owner. Sec. 12 provides that the owner must provide facilities for the dipping of stock. Sec. 13-16 provides for penalties, making of regulations, power to summon witnesses, and procedures as to pending court proceedings, etc.

In order to understand the need for this legislation, it is necessary to understand the history of "farm dwellers" in Swaziland. A Committee of Enquiry set up in 1967 reports (Report, p. 2-3) that the existence of farm dwellers is due to the massive granting of land concessions at the end of the last century. When the land was conceded, Swazis continued to live on the land, and in many cases today's farm dwellers are direct descendants of those inhabitants. There is historically a strong sense of moral injustice about the concessions, and a corresponding sense of moral right to the land inhabited. This sense of moral right has also been extended by association to families who have become farm dwellers since the time of the original concessions and even to those who move onto farms well knowing that the land is privately owned. As land pressures become more and more acute, the problem intensifies.

The farm dwellers have traditionally lived on the land, grown their crops and grazed their stock, and in exchange provided labor for the farm owner (without cash payment in most instances). Under common law, these farm dwellers may be evicted without any problem, and therefore in the 1950's and 1960's, when private tenure farms were beginning to be overcrowded and owners began to wish to develop their land, a number of eviction cases were brought before the courts. However, the farm dwellers considered that they had rights to the land under Swazi law and custom and resisted eviction. Three committees were set up to look into the problem, in 1961, 1964 and 1967.

The third committee, in 1967, recommended the abolition of the farm dweller system by forbidding the creation of new farm dwellers and gradually evicting the old ones. It considered that the system was an impediment to development since it prevented individual tenure farmers from developing their land intensively. (Report, p. 10.) At the same time, it was impossible for Swazi Nation Land to absorb all the farm dwellers evicted. Therefore, the committee suggested the purchase of land for resettlement and restrictions on a farm owner's power to evict farm dwellers unless land was available upon which the farm dwellers could resettle. As a result of this committee's report, the Farm Dweller's Act 21/1967 was passed.

The farm dweller problem did not end with the 1967 Act, primarily because of the scarcity of land available for resettlement and the continued emotionally-charged resistance to resettlement on the part of farm dwellers. The current Act was passed in 1982. It makes few changes from the 1967 Act. Discussion by members of Parliament prior to the passing of the Act indicates the extent to which the farm dweller issue is still very much alive. Some comments made during the debate:

This is a national issue indeed in so much that a Swazi patriot will always wonder why we have so many farms when our land is so limited and for no good reason to a Swazi." (Hansard, 17 Feb 1982-30 April 1982, p. 522.)

"If you want to die and die very fast go to a Swazi and tell him to move out of the land that he is occupying and you will see what will happen." (Ibid., p. 536.)

"No doubt the people will always remain rebellious towards any farm or owner in their area because when we go back to history how farms were created, people find themselves about to burst into tears because they regard farms as the land of their forefathers." (Ibid., p. 536.)

"...people were so highly optimistic that after the attainment of independence there will be no farm ownership in the country." (Ibid., p. 537.)

Emotions ran very high during these debates. On the one side, some Ministers argued that farm dwellers must be removed to encourage development, for "who is going to take money out of his pocket to buy a farm to try and improve the economy of the country if tomorrow I am going to lose that farm?" (Ibid., p. 528.) On the other side, Ministers evoked images of mass demolition of homes, confiscation of crops and stock, and "sinister motives" of farm owners. It is clear from the debates that although when the farm dweller problem first arose it was a struggle between Swazi dwellers and white farm owners, now issues have been complicated by new farm owners who are Swazis who "care very little about the lives of our fellow Swazis who are dwelling on their farms." (Ibid., p. 524.) Additional problems are created since the local chief is more likely to try to assert his authority over a Swazi farm owner. The problem may grow worse as a result of the government's "back to the land" policy, when there is not enough rural land for those who wish to settle there.

## B. Swazi Nation Land

### i. Swazi Administration Act (Swazi Affairs) 79/1950

Control of Swazi Nation Land is vested in the King. Under Sec. 10 of the Swazi Administration Act, Swazi Affairs, Act 79 of 1950, the King has the power to issue orders, inter alia,...

- e. preventing the pollution of the water in or injury to any dam, stream, watercourse, etc.
- f. prohibiting, restricting or regulating the cutting or destruction or planting of trees
- g. preventing the spread of infectious or contagious diseases, whether of human beings or animals...
- i. prohibiting or restricting the sale, supply, use, possession or cultivation of poisonous or noxious plants
- j. preventing overstocking, regulating grazing and setting aside areas as reserve grazing
- k. prohibiting, restricting or regulating the burning of grass or bush
- l. prohibiting, restricting or regulating the migration of Swazis from or to any particular area or areas under his jurisdiction...

- n. prohibiting, restricting or regulating the movement, sale, disposal or acquisition of livestock of any description
- o. for the purpose of exterminating or preventing the spread of locusts mosquitoes, or any other pest
- p. requiring any Swazi to cultivate land to such an extent and with such crops as will secure an adequate supply of food for the support of such Swazi and of those dependent upon him
- q. preventing soil erosion and for the protection and construction of anti-soil erosion works
- r. for the purpose of the improvement of livestock and their products...
- x. establishing, maintaining and regulating the use of tribal or communal grain reserves
- y. regulating the provision, maintenance and use of tribal or communal water supplies
- z. prohibiting, restricting or regulating wasteful methods of agriculture and eradicating noxious and harmful weeds...
- cc. providing for the harmonious and coordinated development of Swazi areas, including, where necessary, the settlement or resettlement of any part which has already been settled, in such a way as will most effectively tend to promote the health, safety, order, amenity, convenience and general welfare of the Swazi people.

A chief in libandla may also issue orders under this section (Sec. 10(2)). Such orders are to be made known in such matter as is customary among Swazis, and an order to an individual shall become binding when he is notified thereof. (Sec. 17.) A person who fails to follow an order issued is guilty of an offence and subject to a maximum fine of R50 or imprisonment for 6 months or both. Offences may be enforced in the Swazi courts or in the Magistrates Courts (Sec. 13 (5)).

This Act, obviously designed for colonial times, greatly restricts the power of the Government over Swazi Nation Land controlled by chiefs. Because the colonial administration intended to allow the King to control these areas, the Government was not given power over them. Since independence and the assumption of control of the Government by the Swazi people, this duality is unreasonable, but is still present. The same duality is found in most sectors of Swazi public life, since the administrative Government and the traditional royal government rule side by side.

Swazi Administration (Amendment) Act 6 of 1979 amends the Swazi Administration Act of 1950 so that it now applies to "every person, whether Swazi or not, ordinarily resident on land situated in a Swazi Area." It provides for the removal of persons from one Swazi area to another (Sec. 10 (3)) and for the right of such persons to apply for review within 30 days. It would appear that the Human Settlements Bill (SGG 388, 1985) may supercede this section by providing that all new human settlements are controlled by a Human Settlements Authority (see VII. D., below).

#### ii. The Central Rural Development Board (CRDB)

The CRDB, which administers and regulates land use on SNL on behalf of the traditional authorities, was formed in 1954 by Order-in-Council No. 4 of 1954. This Act, plus Sec. 10 of the Swazi Administration Act which outlines the powers of the Ngwenyama on Swazi Nation Land, also form the legal basis of the Rural Areas Development Program. It has been impossible to find a copy

of the 1954 Order, as it is not included in any compilation of laws in Swaziland or possessed by any of the officials this researcher contacted.

Membership of the Central Rural Development Board consists of the indvune (chairman) appointed by the King, and eleven members appointed to represent the eleven sub-districts of the country. In addition there are seven Rural Development Officers (RDO's) and a Secretary. The Board is not a government ministry and has no formal connections to any government ministry. It is an arm of the traditional, not the administrative, government. Its members are not civil servants.

The CRDB's functions are, inter alia,

- a. to hold district and area meetings throughout the country for the purposes of studying, discussing and where appropriate approving resettlement as well as other agricultural projects
- b. to submit to His Majesty the King periodic reports covering the state of the country's natural resources, i.e., soil, water, flora and fauna, and thereafter recommend steps to be taken in the preservation and enhancement of the country's natural resources
- c. to submit to the King reports covering methods of settlement present and proposed division of land into arable, residential and grazing areas; to ensure proper land use throughout the entire kingdom
- d. to issue, as and when appropriate, Orders designed to ensure proper implementation of approved resettlement proposals
- e. to guard against violations affecting approved resettlement plans, such as the unplanned and haphazard construction of homesteads
- f. to ensure at all times that the chiefs, their imisumphe and emabandla are involved throughout all the stages of their resettlement programs
- g. to implement and/or assist in the implementation of the Orders-in-Council no. 2 of 1953, no. 3 or 1953 and no. 4 of 1953. In brief these orders were established to ensure proper preservation and enhancement of our natural resources in particular of our soil, water, flora and fauna.

(CRDB Annual Report, 1982/3, Sen. B.M. Nsibandze, SSRU No. 840235) (Note: these orders also cannot be found.)

The major role of the CRDB is to administer the resettlement of persons on Swazi Nation Land. Nkambule (1983) pinpoints the "threat of resettlement" as one of the adverse effects of customary land tenure in Swaziland. He notes that when the state takes land and relocates homesteads, there is no compensation for land (which is a communal asset) and only modest compensation for mud huts (p. 65). Under the CRDB, imisumphe committees assist resettlement by helping to prepare the resettlement program and to implement it. The latest annual report of the CRDB cites the following problems encountered in resettlement:

1. "As a result of the existing pressure on available land the CRDB has found it extremely difficult to accommodate resettlement programs. Particularly [this is due to] scarcity of available grazing land. Chiefs continue their haphazard kukhontisa program, leading to unplanned homesteads

mushrooming up in all corners of the country, particularly along major highways and district roads." (CRDB Annual Report 82/3, p. 10-11.)

2. Boundary disputes are the "biggest single delaying factor for resettlement in that as soon as adjoining areas begin mobilizing for resettlement an age-old boundary dispute crops up. The problem is aggravated by increases in both human and livestock population and further complicated by the kukhontisa system and the fact that some areas remain for a long time without the hereditary chief, a factor which in some areas results in a complete breakdown of order, morale and area discipline." (P. 11, CRDB Annual Report.)

It appears that the Human Settlements Authority established by the Human Settlements Bill (SGG 388, 1985) may take over the functions of this Board. (See VII. D., below.)

#### iii. Regional Councils Order (Constitutional Law) 22/1978

This Act sets up councils with the following functions, inter alia,

- a. coordinate national and economic activities at the District level
- b. implement national and government policies and projects at the District and tinkhundla levels
- c. through the Induuna Yetinkhundla, liaise with the Swazi National Council on all matters of policy affecting Swazi law and custom...
- f. initiate and identify priority projects and the needs of people residing in their districts in accordance with National Development Plans.

Although the Attorney General's Office reports that Regional Councils have been set up and are functioning, their role is currently a minor one. These councils are part of the "Tinkhundla" system, initiated by the King but still not fully functional.

#### C. Crown Land

The Crown Lands (Conditions) Act (Land) 2/1968 empowers the Minister of Local Administration (now, Interior) to enforce conditions in grants, leases and other disposals of Crown and Government lands. In all other respects, the use of Crown Land is subject to the same restrictions as Private Tenure Land and governed by the Roman-Dutch common law.

#### D. Human Settlements Authority Bill 1985

This Bill was presented by the Minister for Natural Resources and Energy in September 1985, and is expected to be passed before the end of 1985. It establishes a Human Settlements Authority to assist the government in formulating policy towards human settlements, ensure orderly development of human settlements, regulate real estate transactions, prepare appropriate standards for human settlements, and establish a finance mechanism for improved shelter and infrastructure throughout Swaziland, etc. Under Sec. 10 no person may establish a human settlement, housing scheme, or private housing scheme without the written permission of the Authority. "Human Settlement" is defined as "the grouping of people, shelter, services, and working places both in urban and rural areas comprising land, infrastructure, shelter, social and economic facilities." (Sec. 2)

The Bill applies to all land in Swaziland. On its face, it would appear to effect not only the existing town planning legislation (ie, the Private Township Act, which it expressly repeals), but also the mechanisms set up to assist with resettlement under the CRDB. It would appear that when persons are being resettled under the CRDB's program, permission must be obtained from the Human Settlements Authority. If the Act is interpreted in this way, then it may be another example of the struggle between the traditional authorities (represented by the CRDB) and the administrative Government for control over the land.

#### E. Other laws regulating land

##### i. Forest Preservation Act (Agriculture) 14/1910

This Act protects trees and forests growing on Government land and Swazi Nation Land. The Act makes it an offence to cut down, damage, remove, sell or purchase indigenous or government timber without permission, or to cultivate within 30 yards of such timber, or to set fire to such timber. Sec. 3(b) of the Act provides that nothing in the Act shall prevent persons living on Swazi Nation Land from cutting brushwood (bushes, underwood, etc.) or taking dead wood for fuel.

##### ii. Grass Fires Act (Agriculture) 3/1951

No owner or occupier of land shall set fire to standing or uncut grass without a permit at a shorter interval than 24 months from the date the grass was previously burned or during May through September. On SNL such permits are issued by a person appointed by the Ngwenyama. Two exceptions to the Act are that land required for cultivation and actually cultivated within 3 months of the burning does not need a permit, and sponge land requires a permit at all times.

##### iii. The Plant Control Act 1981, SGG 119 (1981)

This Act regulates the control, movement and growing of plants. It consolidated (and repealed) a number of miscellaneous statutes found in Swaziland Statutes 1976: The Noxious Weeds Act 1929, The Locust Destruction Act 1924, The Importation of Bees Act 1910, The Plant Protection Act 1959, and The Wild Mushroom Control Order 1973. The Act, including schedules, is 134 pages long.

Part II establishes a Nursery Registration Board under the Ministry of Agriculture. Every nursery in Swaziland must be registered with this Board. The inspection and quarantining of nurseries and the disinfection and destruction of plants are provided for. Part III provides that the Permanent Secretary for Agriculture may declare "proclaimed areas" in which destruction or treatment of plants, insects or animals shall be compulsory. Part IV sets out the requirements for importing plants and animals, including the prohibition of certain items. Part V sets out the requirements for exportation of plants and animals. Part VI controls the growing and collecting of mushrooms. Part VII controls noxious weeds by providing for weed inspectors, destruction of noxious weeds, clearance of land from noxious weeds, and offences. Noxious weeds are specified in the first schedule to the Act. Part VIII provides for the control of locusts. Part X provides for inspectors to enforce the Act. Part XI provides for incidental matters such as compensation. Part XII provides for offences and penalties.

iv. Control of Tree Planting Act (Natural Resources) 7/1972

This Act controls the planting of commercial trees grown for wood or bark (not fruit trees). It is administered by the Natural Resources Board. 5.8% of the land in Swaziland was under commercial forests in 1983. (Annual Statistical Bulletin 1983.) There is still a great deal of resentment in Swaziland over the acquisition of large quantities of Swazi Nation Land and private land by timber companies and the massive removals of Swazi homesteads in order to plant the trees. This Act was passed to curb the excesses of the timber companies and to protect good agricultural land. Under Sec. 3 of the Act the Board classifies land into three types: agricultural, intermediate and marginal. No person is allowed to plant commercial trees on agricultural or intermediate land except with the permission of the Board (Sec. 7). In practice, no permission is given for agricultural land. In deciding whether to grant permission for the planting of commercial trees on such land the Board must apply the principle that "a permit ought generally to be issued unless it appears that the planting of commercial trees on such land would inhibit or interfere with the agricultural land use capability of the area in which such land is situated." (Sec. 8.) No license is required to plant on marginal land. According to the Secretary of the Natural Resources Board, the major drawback of the Act is that the large timber companies are exempt with regard to land already under cultivation or already owned by companies (see the Schedule to the Act). The intention of the Act was only to check the spread of timber plantations, not to reclaim land already taken over by timber companies.

v. The Fencing Act (Lald) 7/1904

This Act provides that a landowner may erect a dividing fence along his boundary and claim one half the cost from the adjoining owner. The Act applies only in districts proclaimed by notice in the Gazette, and only to Title Deed Land. It has not been possible to determine how many districts have been proclaimed or whether the Act is still used. The Act was debated in the first parliamentary session of 1964. The debate indicates the extent to which the concept of fencing is contrary to the principles of Swazi customary law, and even the fencing of Private Tenure Land is resented as an attempt to keep Swazi people off land which is rightfully theirs. The speakers complained that "it is very common that much of Swazi Nation Land is cut by farmers when they fence their land" and explained, "This fencing law is against the Swazi custom and the wishes of the people, in the whole of Swaziland one cannot find fenced kraals." (Hansard, 11-25 Nov. 1964.)

vi. Swazi Graves Act (Swazi Affairs) 18/1909

Sec. 2 of this Act provides that any land in the neighborhood of the graves of chiefs or the relations of chiefs and enclosed in the way specified in the Act, can be declared by the Minister to be a grave site and set aside for the sole and exclusive use of the Swazi Nation. Sec. 3 provides that Swazis have right of access to these grave sites, but if the sites are not maintained the right is lost. The Concessions Partition Act and the Mining Act also make similar provisions for the protection of gravesites. It is not known to what extent these provisions still function, since there are no records of gravesites.

## VIII. WATER RIGHTS

### A. Water Act, (Natural Resources Act) 25/1967

Under this Act the government is empowered to set up Government Water Control Areas (hereinafter GWCA's). Five GWCA's have been declared and these cover almost the entire country including SNL, TDL and Crown Land. All rights to public water (water flowing in a known and defined channel) in these areas are vested in the Government (Sec. 69(1)) and no one may abstract, store or use public water or construct or alter waterworks without a permit. Rights to private water (water arising naturally or artificially on land such as springs and under-ground water) are owned by the proprietor of the land. Only water for primary purposes (daily use for domestic purposes, the support of animal life, or gardens) may be used without a permit. The distribution of water on Swazi Nation Land is regulated by the Ngwenyama in Libandla in terms of Sec. 9 (1) (y) of the Swazi Administration Act (Water Act, Sec. 5(6)).

Water is apportioned by the Water Apportionment Board. Anyone who wants to use public water, on TDL or SNL, must apply to this Board for a permit. On SNL, the application must first have the approval of the agricultural extension officer for the area concerned, and of the Ministry of Agriculture, before it will be considered by the Board. The Board is required by the Act to allocate rights according to the following principles:

1. persons beneficially using water under rights acquired prior to the passing of the Act, either through common law or through allocation under one of the previous statutes, retain these rights.
2. a riparian proprietor (proprietor of land bordering or traversed by a public stream) is entitled to an apportionment of an amount for reasonable use of normal flow (unstored water) even if he has not yet used his water.

If any water is left over after satisfying these prior rights, the board will reserve a portion to the Government, and then allocate the rest according to principles laid down in the Act. There is no provision in the Act for the imposition of water charges. There is no right of property in public water, and therefore water permits cannot be bought or sold.

Part V of the Act sets up a Water Court to determine existing and future rights to water, but this Water Court is not currently in operation and its functions have been taken over by the Water Apportionment Board. Part VI provides for Government waterworks. Part VII provides for Water Sport Control areas. Part VIII provides for Irrigation Boards, but none have ever been set up. Part IX provides for servitudes relating to the use of water.

Criticisms of the 1967 Act are as follows:

1. Blocks development of Swazi Nation Land.

Swazi Nation Land, as a unit, has been allocated water rights in each of the GWCA's. S.G. Heilbronn (1982), writing on Water Laws in Swaziland, explains how the amount allocated to SNL is necessarily small (8.5% of the total amount), due to the need for the Board to first accommodate prior rights on irrigation schemes which were already beneficially using water before the Act was passed and the need to accommodate riparian user rights. He describes how this happened historically, and how under this system surface

water resources have been entirely allocated, concentrated in the hands of irrigated estate owners located mainly on Title Deed Land. He argues that the apportionment process, by favoring prior rights, discourages the development of SNL since there is more irrigable SNL than there is water available to provide for maximum development. Even in GWCA's the Government's power to regulate the distribution of water is limited by the requirements of the apportionment process as laid out in the Act.

2. There is no provision for water charges.

Because most run-of-river resources have already been allocated to existing projects, storage facilities are urgently needed to provide water for future development. Money earned from water charges could be used to construct storage facilities. Water charges also discourage wastefulness. (Heilbronn, 1982, and Information Paper on Water Resources Bill 1985.)

3. Lack of adequate control over water use.

In the 1967 Act the only controls on new uses of water are the requirements that in control areas the use must be beneficial and efficient (not wasteful). Other factors affecting current and future users and the national interest should be taken into account (Information Paper, Supra).

4. Lack of control over private and ground water.

Use of private water and ground water necessarily affects the rights of other users as it depletes water which would otherwise be available (Information Paper, Supra).

5. Central water control on SNL.

Heilbronn (supra) argues that the central control of water resources on SNL has on some occasions resulted in individual initiative being stifled. He says,

Theoretically this is because the Traditional Authorities do not wish to see the emergence of rural inequality due to wealthy irrigators monopolizing a communal resource. In reality, wealthy irrigators prevent reallocation of land to new applicants for residential land and prevent the expansion of the grazing area. Politically, they are a threat to the chief's status, authority and power to effect tribute labor.

#### B. Water Resources Bill 1985

Soon after the 1967 Act was passed it was recognized that it was likely to frustrate development of SNL. In 1973 the Economic Planning Department felt that,

the 1967 Act needs to be changed, because it tends to be biased towards prior-dated claims or pre-established water users and this makes establishing new water using schemes difficult, as run of river water is already committed. Consideration has to be given to imposing charges on water users. (Memo EPD (1973) file W.A.B. I/V MWIC Mbabane, cited in Heilbronn.)

A consultant was employed to draft a new law, and the Draft Water Resources Order (1974) was offered. It was passed by the Cabinet but drew opposition from the King and Traditional Authorities. According to Heilbronn (1982) there are three reasons for this opposition:

1. The Order gave rights both on TDL and SNL, to alienate water and water rights, and this is clearly contrary to customary law which prohibits the alienation of community resources.
2. The Swazi Nation's commercial arm, Tibiyo Taka Ngwane, which runs irrigated estates on SNL and has substantial holdings in estates on TDL, opposed the introduction of water charges.
3. SNL holds apportioned water rights under the 1967 Act which would be abolished under the Draft Order, and there is no guarantee that SNL will benefit from the proposed storage facilities.

A fourth reason is that the King was unwilling to give the Government control of all water, including rivers and streams which are sacred according to Swazi law and custom (Information Paper 1985).

Since that time several consultants have been retained and a new Water Resources Bill 1985 drafted. It has still not been gazetted but is expected to be presented before Parliament during 1986. According to an information paper on the bill its purpose is to implement the following principles:

1. to retain the basic structure of present authority and administration
2. to extend the permit system to the entire country
3. to extend authority over use and control to all water resources, eliminating "private water" and riparian rights, and substituting the concept of "public interest"
4. to confirm existing beneficial uses
5. to set out criteria and procedures for granting permits, establishing priorities and transferring permits
6. to control pollution by industrial effluents and other deleterious discharges, and
7. to provide for the imposition of charges for water to be paid into a special Water Resources Development Fund and used primarily to finance storage facilities. (Information Paper, p. 1.)

The proposed law retains many parts of the 1967 Act, with the following important changes:

1. All water is declared to be the property of the Kingdom of Swaziland.
2. Riparian rights are abolished.
3. Private water is subjected to government control.
4. All water can be used only under permit, which will be issued after notice is given to the public and Government agencies so that interested persons have an opportunity to contest its issuance. Permits may be denied or limited to protect the interests of others or the public interest.
5. Low flows which have not been appropriated by existing users will be reserved for future development of irrigation schemes for the Swazi people. (Sec. 17(10) (b).)

6. Water can be set aside to be used for future Swazi development projects (sec. 18(8)(c), 18(12) and 24(5)).
7. Water charges are to be made, to provide funds for storage facilities (sec. 29, 36).
8. A water permit will be issued for the life of the water using activity it serves, subject to cancellation for nonuse, cause, or expropriation with compensation. (Sec. 20(2), 22, 23.) These permits will be transferable and alienable (sec. 21(1-5), sec. 21 (6-8).)
9. Water Resources Board replaces the Water Apportionment Board and the Water Court is abolished. The new Board will consist of members of the old Board representing the Swazi Nation, private industry, the Electricity Board, the Water Resources Branch, Ministry of Finance and the Central Rural Development Board. (Sec. 6.)
10. Sections pertaining to irrigation districts are omitted (no irrigation districts have been set up).
11. The Government does not have the power to interfere with streams, rivers, etc. or areas of land which are sacred under Swazi law and custom.

Other sections of the Act, such as those pertaining to servitudes, pollution controls, water sport areas, etc. are retained unchanged.

#### C. International Water Agreements

Three committees are currently involved in negotiations for international water agreements affecting Swaziland: the Joint Permanent Technical Committee (JPTC) with South Africa, JPTC with Mozambique, and the Tripartite Permanent Technical Committee involving Swaziland, Mozambique and South Africa. These committees meet regularly and make decisions involving rivers of common interest to the countries including apportionments, pollution controls, cross border flows, water schemes, etc. If agreement is reached in one of these committees, a memorandum is channeled to the respective governments for the signing of treaties. Swaziland has been a party to two international agreements. In 1968, upon independence, Swaziland acceded to a 1964 Bipartite agreement between South Africa and Portugal adopting the principle of best utilization of water in rivers of common interest. On 1 September 1976 Swaziland reached agreement with Mozambique concerning use of water from the Umbeluzi River (vital to the Simunye Sugar Estate and water supply to Maputo). That agreement was modified on 24 August 1981. The terms of the current agreement, as amended, are as follows:

1. Mozambique promises to complete construction of Pequenus Libombos Dam on the Umbeluzi river by 30 Sept. 1985.
2. Until the filling of that dam and at the latest until 31 Dec. 1985, Swaziland promises to operate the Mnjoli reservoir in a manner which will permanently guarantee the necessary flow for the Maputo water supply and for irrigation in Mozambique (technical details in appendix).
3. After filling the dam or after 1 January 1986 Swaziland guarantees to pass to Mozambique in perpetuity 40% of the flow of the Black and White Umbeluzi Rivers.
4. Until 2015 Swaziland guarantees free flow to the border of all water originating downstream of the Mnjoli Dam.

5. Swaziland promises to take all necessary measures to prevent pollution of the rivers.
6. The Joint Permanent Technical Committee was established. (Agreed Minutes between delegations of People's Republic of Mozambique and the Kingdom of Swaziland on apportionment of the Umbeluzi River Flow, from files of Ministry of Natural Resources.)

Negotiations have been underway since Swaziland's independence for international water agreements with South Africa but no agreement has been reached. Since 1979 the JPTC has been investigating a plan for the Komati River Basin and consultants were employed to identify demand areas, future prospects, recommend dam sites, etc. These consultants have finished a Reconnaissance study and are now preparing feasibility and pre-investment studies. The JPTC has agreed in principle that a series of 7 dams will be built on the river, with construction to begin in 1986.

## IX. MINERAL RIGHTS

Sec. 95(1) of the Constitution Act (Constitutional Law) 50/1968 provides that:

All minerals and mineral rights in, under or upon any land in Swaziland shall continue to vest in the Ngwenyama in trust for the Swazi Nation, subject to any subsisting rights and interests...

and at Sec. 95(2):

The Ngwenyama may make grants, leases or other dispositions conferring rights or interests in respect of mineral oils in Swaziland, but the Ngwenyama shall not exercise any such power except after consultation with the Minerals Committee established by Subsection 3.

Mineral rights are granted in the form of concessions and registered in the Deeds Registry Office (see section on Registration, above). Mining is controlled by the Mineral Concessions Commutation Act (Mines, Minerals, Works and Factories) 38/1912 and the Mining Act (Mines, Minerals, Works and Factories) 5/1958.

## X. LEGAL ARRANGEMENTS ON AGRICULTURAL SCHEMES

### A. Types of Irrigation Schemes

There are four types of irrigation scheme in Swaziland. The first is the "Plantation Scheme". Land is either owned in freehold (PTL) or leased from the Swazi Nation (SNL). The only registered long-lease of Swazi Nation Land is held by the Mhlume Sugar Company. It is a 25 year lease with an option to renew for a further 25 years which specifies that the land must be used for agricultural purposes.

The second type is the "Cooperative Scheme". On this type of scheme there are common fields either worked by the members or by hired labor. On

Swazi Nation Land, the land is allocated by a chief. According to an Irrigation Officer of the Ministry of Agriculture, the Magwanyane Cooperative is the only registered cooperative having this type of irrigation scheme. The By-laws of the Magwanyane Cooperative follow the standard Ministry of Agriculture and Cooperatives bye-laws for farmer's cooperatives, which emphasize marketing and the introduction of modern agricultural methods, but say nothing about the holding of land, irrigation or the organization of farming on the common plots.

The third type of irrigation scheme is the "Small-holder Scheme." These are primarily Government-funded schemes on Swazi Nation Land, on which farmers are allocated irrigated plots in addition to their dryland plots by the local chief. The farmers have no control over each other, no formal legal arrangements with the chief or with each other (other than the principles of traditional land tenure) and it is very, very difficult to oust a farmer from land acquired in this way. On some of the Schemes cooperatives have been formed, either registered or unregistered, and through this means some form of control is exerted. Many of the schemes have constitutions. On some of the schemes the local chief allocates land in bulk to the cooperative and allows the members to divide the plots among themselves. Several small irrigation schemes consist of a group of local women who ask for and receive land from the chief, or from some other landholder such as a Mission or the local school (which has already installed water pipes). Existing small-holder schemes are characterized by a lack of formal legal arrangements regulating access to and use of the land. Participants in these schemes say that informal arrangements do exist, and that control over land use is maintained primarily by social control within the group. Irrigation officers complain that much of the allocated land in these schemes lies fallow, and therefore whatever forms of control do exist seem not to be sufficient.

The fourth type of scheme is the individual irrigation scheme on Private Tenure Land or Swazi Nation Land. These schemes are fully funded by the individual. No formal legal arrangements are made with the chief for such a scheme on SNL, but a water permit must be acquired from the Water Board, and permission for the scheme must be acquired from the Central Rural Development Board, if it is on Swazi Nation Land.

#### B. Cooperative Societies Act (Companies and Associations) Act 28/1964

This Act provides for the registering of cooperatives with or without limited liability, with the Ministry of Agriculture and Cooperatives. Sec. 7 of the Act sets out specific requirements for cooperatives, which many associations (particularly if members are illiterate) find it difficult to meet. The Act is obviously designed to meet the needs of companies involved in agricultural production and wishing to regulate marketing and other aspects of the industry, as for example in the case of the Cotton Growers Cooperative. There is no legal machinery for the development of less sophisticated cooperatives, and for this reason many associations formed for agricultural production on a small scale do not register. All of the farmers cooperatives which are currently registered with the Ministry are concerned primarily with marketing. Ministry records show the following numbers of registered farmers cooperatives:

Hhohho	23
Lobombo	16
Manzini	25
Shiselweni	26

Other types of registered cooperatives are Consumer, Savings and Credit, Business, and Transport.

C. Swazi Land Settlement Act (Swazi Affairs) 2/1946

Swazi Land Settlement Areas were initiated under this Act in 1946. Freehold farms were purchased by the Government and vested in the Ngwenyama as Swazi Nation Land. Over 130,000 acres of land were set aside for the scheme. Leasehold tenure was applied. The Act and regulations under the Act provide for registration of allocation of plots, inheritance, size of allotments, buildings, stock and grazing regulations, limitations on ukusisa (the lending of cattle under traditional law), conditions of occupation, action upon absence from holding, contour grass strips, cancellation of rights, repair and maintenance of roads, water furrows, sanitation, etc. The scheme was administered by the Ministry of Agriculture and Cooperatives. It was not a success and has been virtually abandoned. In practice the land is now subject to traditional land tenure. (Whittington, 1969, p. 2.) The Act has never been repealed, and therefore theoretically may still be used for future schemes.

D. Swaziland Irrigation Scheme (Vuvulane)

When the Vuvulane Irrigation Scheme was initiated it was intended to introduce a new approach to farming and land use in Swaziland: payment for the use of land and for water, complete dependence on arable crops rather than livestock, and leasing land rather than receiving land from chiefs. The scheme has been fraught with problems since its inception. The smallholders have been involved in numerous disputes with the Commonwealth Development Corporation, which started the scheme. Two items, in particular, caused trouble in the early years: inheritance on the death of a settler and compensation on cancellation of a tenancy. (Tuckett, p. 11.) Politically, the scheme is seen as an area of opposition to the traditional authorities (perhaps due to its isolation from the control of chiefs), and this opposition continues into the present. CDC sold out to the Swazi Nation, and the land has become Swazi Nation Land and is rented to farmers. However, the farmers are unhappy with this arrangement and have continued to protest. Legal Notice No. 76 of 1985 (SGG 370) set up a Commission of Enquiry into the Grievances of Vuvulane Irrigated Farms (Smallholders) to:

- "a. examine and inquire into the terms and conditions of the agreements entered into between the Vuvulane Irrigated Farms Smallholders and the Commonwealth Development Corporation since inception up to the transfer of Vuvulane Irrigated Farms Scheme to the King-in-Trust for the Swazi Nation;
- b. examine and inquire into the terms and conditions of any agreement between the Vuvulane Irrigated Farms Smallholders and the Swaziland National Agricultural Development Corporation (Pty) Limited on the transfer of the Vuvulane Irrigation Scheme to the Swazi Nation;
- c. to examine and inquire into any other related agreement relevant to the grievances of the Vuvulane Irrigated Farms Smallholders;
- d. examine any other matter relating to the grievances of the Vuvulane Irrigated Farms Smallholders as the Commission may consider relevant to the foregoing; and

- e. recommend appropriate action as a response to the Vuvulane Irrigation Smallholder's appeal to the Swaziland Government."

The Commission commenced on 1 July 1985 and was to submit a report by 1 September 1985 (now extended to 31 October 1985 by SGG 389). As the meetings were held in camera, it is impossible to find out at this stage what decisions were made. Nevertheless, it may be useful to look at the historical complaints from the smallholders about legal arrangements on the scheme, and at the existing leases on the scheme.

J.R. Tuckett, who was manager of the Scheme for CDC during its first 10 years, wrote a report in 1975 which outlines the legal insufficiencies influencing the problems at Vuvulane. He stresses the need for agricultural legislation to meet the requirements of settlement schemes, dealing with:

- a. procedure in the case of dispute (any dispute can only be dealt with in the courts or under traditional Swazi procedure by appeal to the National Council)
- b. inheritance on the death of a tenant
- c. compensation on cancellation of a tenancy
- d. enforcement of rules and standards
- e. debts to the Corporation and deductions
- f. rights in the event of damage to the tenant resulting from the Corporation's negligence.

Tuckett also recommends that land ownership be vested in a government agency with authority to administer and control the scheme, supported by the necessary legislation. The advantage of legislation to cover these items is to eliminate the need for the existing detailed form of lease and allow a simpler form of land allocation agreement. The conditions attached to the leases have given rise to considerable misunderstanding between the Corporation and the smallholders.

In the absence of legislation, many of these items were dealt with in the new leases implemented in 1975. These were 20 year leases, with rent re-negotiable after the first 10 years. The main provisions of the leases are:

4. The property must be used for agricultural purposes only and no animals may be kept there without permission.
5. The tenant must adopt agricultural standards according to instructions of the Corporation regulating:
  - a. the demarcation, use and control of grazing areas
  - b. the introduction or removal of stock and the control of numbers and kind of stock
  - c. the construction, maintenance, repair and demolition of buildings and other structures
  - d. the construction, use, maintenance and care of contour grass strips, dividing access lanes, roads, water furrows, drainage channels and other waterworks, and the use, maintenance and care of the property generally
  - e. the use of wheeled vehicles and sledges
  - f. the prevention and control of diseases, insect, plant, and other pests

- g. the prevention and control of fire, soil erosion and the adoption generally of sound and modern methods of agriculture
  - h. the preservation and control of fire, soil erosion and the adoption generally of sound and modern methods of agriculture
  - i. the adoption of adequate sanitary arrangements and satisfactory hygiene control.
- 6. The lease may not be assigned without permission, and only the tenant, his family and his workers may live there.
  - 7. The Corporation is entitled to deduct from amounts owed to Tenant.
  - 8-11. Access for repairs, etc.
  - 12. Tenant must reside on property 10 months of the year and construct and maintain housing for himself and his family.
  - 13. No dams or boreholes may be built without permission.
  - 14-15. Corporation's liability for damage from water is limited.
  - 16. If Tenant fails to comply with any lawful and reasonable instruction given by the Corporation, the Corporation may do the work required at Tenant's expense.
  - 17. Corporation's rights not prejudiced by relaxing rules.
  - 18. The Corporation is entitled to cancel the lease if:
    - a. tenant fails to pay rent within 30 days
    - b. tenant breaches a condition of the lease and fails to remedy within prescribed time
    - c. tenant fails to comply with reasonable regulations, commands or instructions
    - d. tenant fails to implement the provisions of any agreements relating to water or to pay sums owed
    - e. tenant is guilty of any conduct which may be reasonably judged to cause a nuisance or annoyance to the Corporation or other tenants.

(There is no provision under this section or any other section as to who determines whether the Corporation is entitled to cancel or as to appeal from that decision. The Arbitration Clause, par. 21, refers only to financial matters.)

- 19. Procedures on death of tenant. Generally, the Corporation has the right to name a successor, subject to compensation to the family of the tenant for approved improvements and growing crops. If the corporation fails to choose a successor, then the family may nominate one, subject to approval of the corporation (with provision for arbitration in the case of failure to agree).
- 20. If the lease is cancelled by time lapse or for reason, the tenant is entitled to compensation for approved improvements.
- 22. Tenant must comply strictly with the terms of his Sucrose permit and must insure his crops if the Corporation demands it.

There are other agreements between the tenants and the Corporation, but due to the sensitive political nature of the current disputes and the existence of the Commission of Inquiry this researcher has been unable to gain access to these documents.

#### E. Mission agricultural schemes

A considerable amount of Private Tenure Land in Swaziland is owned by Missions. It appears that much of this land is not used by the Missions, and

is either inhabited by squatters or grazing rights are allocated over the land by local parish priests. Several missions run agricultural training programs which do not allocate land holdings (eg, the Lutheran Farmer's Training Center in Pigg's Peak area and the Manzini Industrial Training Center (MITC) in Manzini). Three Mission projects do allocate land, and are therefore worthy of discussion here.

The World Lutheran Federation has been allocated land by the Swazi Government to run an agricultural project for refugees in the Ndsevane area. The project is run as a cooperative, registered with the Ministry of Agriculture and Cooperatives. Each farmer is allocated a plot of land on which to grow cotton. There is no irrigation. Pigs and poultry are also produced. Each farmer signs a "Cotton Production Agreement" with the cooperative which entitles him to one hectare of cotton for each 1/4 share in the cooperative. Each share in the 1984/85 season was E50. The regulations of the Scheme provide that members must reside in the settlement and have no other farming activities outside the settlement. Membership can be terminated by, inter alia: death, insanity, failure to pay for shares, failure to adopt recommended farming methods, failure to sell produce through the society, or an act of dishonesty. Although not explicitly stated, loss of membership would result in loss of land since land is allocated on the basis of shares in the cooperative.

Manzini Industrial Training Center, organized by Sister Judith of the Anglican Mission, runs the Usutu Young Farmer's Cooperative. The land is leased from the Anglican Mission (although the lease, after two years, has still not been approved by the Land Speculation Control Board). This cooperative is designed to meet a need often not mentioned in criticisms of the Swazi traditional land tenure system, that of young farmers for land. Under the traditional system land is allocated only to married persons, often with families. It is difficult for a young farmer to acquire the funds (and cattle) necessary to marry without access to land, and it is difficult to acquire land without being married. This project was started to provide land temporarily to the graduates of agricultural training projects so that they can raise funds to acquire land elsewhere. Each farmer is allocated a plot of land for which he signs a lease agreement and pays rent for three years. At the end of three years, or for cause, he must leave the land. Each farmer also signs an Agreement on the buying of cattle, and has access to communal grazing lands. MITC is considering the initiation of another similar project on Mission land in the Mahamba region.

MITC also allocates community garden plots on Mission land, most notable at KaTsabedze Rural Community Development Center. In that case, the local chief "gave" land to the Mission for training unemployed young people. In addition to training projects, Sebenta classes, etc., the Mission allocates irrigated garden plots to anyone from the area who wants one. Twenty-three women now hold plots. Inputs, but no marketing facilities, are provided. Similar projects are contemplated in other areas.

#### F. Other Agricultural Schemes

As far as can be determined, there is no list of agricultural schemes in Swaziland. Most of the schemes that do not fall under one of the categories listed above are schemes run by Donor organizations. Land is given to the organization by the King or by the government, and the only legal arrangement made between the two parties is the Aid Agreement signed between the two

countries or between Swaziland and the Donor Organization. For example, the Taiwanese government runs several agricultural projects in the country--one as a training center and the others as smallholder schemes. Land on the schemes is allocated to individual plot holders by the local chief. Several schemes are also run for refugees in this way. It is likely that on some of the schemes a lease or other formal agreement is made between the smallholder and the organization, but this has never been researched adequately. Interviews suggest that the Government intends to initiate several smallholder agricultural schemes on Government land, in which the plot-holders will lease their land, and that Tibiyo may do the same.

## XI. TAXATION

There is no property tax on agricultural land in Swaziland, other than transfer duties. Some land titles derived from the original concessions still owe a nominal yearly quit-rent, and holders of mineral concessions must also pay rent. The Land Tax Order, described above, is not so much a tax as a penalty imposed on undeveloped or under developed land. Urban land is subject to urban rates under the Rating Act (Local Government) 24/1967.

Income is taxed with special provisions made for income derived from farming. The Income Tax (Consolidation) Order (Revenue) at Sec. 10 provides for the taxation of income derived from farming. Taxable income from farming is determined by the first Schedule. The Act does not apply to income derived from farming operations conducted mainly on SNL. (Amendment by KOIC 2/1977.)

Property owned by the King in his private capacity is exempt from taxation. Constitution Act (Constitutional Law) 50/1968.

Under the Swazi Administration Act (Swazi Affairs) 79/1950 the King has the power to "impose a local rate of money or in kind to be paid by Swazi subject to his jurisdiction for such purposes and at such rates as he may approve."

## XII. SUMMARY AND CONCLUSIONS

In conclusion, this report has attempted to compile, for the first time, laws affecting land in Swaziland. The emphasis has been on laws which are actually being used, rather than out-dated statutes or Roman-Dutch common law principles which have never been applied in the Kingdom. Although Swazi customary law has been discussed, it has not been outlined in detail since to do so would require extensive fieldwork to determine the extent of the changes which have occurred in recent years.

Three major themes run through this report. The first is that much of the law--statute, common law, and customary law--needs revision. There are statutes on the books which are not being used, there are statutes which contradict each other, there are major gaps which should be filled by new statutes, there are common law and customary law principles and practices which are vague, ill-defined, and may cause confusion. The law on the books is often very very different from the law in practice. It is clear that all forms of land law must be looked at seriously if agricultural development is to be successful.

Secondly, unused land is becoming increasingly scarce in Swaziland and therefore the land issue is assuming ever greater importance. The recent Land Speculation Control and Farm Dweller's Acts are two examples of the struggle for control over what land there is available.

Third, land is a highly political issue and any attempts to influence land-holding by legal or extra-legal means will be dependent upon political configurations in the country. From the time of the concessions, to the King's Proclamation of 12 April 1973, to the current protests at Vuvulane, access to and control of land has assumed political importance.

The following options for further research and legal reform might be considered as a result of this report:

1. Three laws clearly need revision. They are the Water Act, the Administration of Estates Act, and the Cooperative Societies Act. They should be studied further, and new legislation should be drafted.
2. Several laws have been pinpointed as inactive. They should be investigated further, reasons for their inactivity should be determined, and they should be either repealed or revised accordingly. These laws are the Swazi Land Settlement Act, the Natural Resources Act (except for provisions setting up the Natural Resources Board), the Land Tax Order, the Fencing Act, the Swazi Graves Act, and the common law principle of prescription.
3. Several laws need to be studied further to determine whether they are actually being enforced, whether they are serving the purpose for which they were enacted, and whether they are detrimental to agricultural development. These are the Forest Preservation Act, the Grass Fires Act, the Control of Tree Planting Act, the Land Speculation Control Act, the Acquisition of Property Act and the Farm Dwellers Control Act.
4. The question of resettlement of persons and compensation for expropriation of property is important in as far as it affects a farmer's sense of security of tenure. The CRDB's resettlement program and legislation affecting resettlement (the Acquisition of Property Act, the Swazi Administration Act) should be investigated fully, as well as the "Farm Dweller" issue.
5. Security of tenure may also be influenced by the extent to which chiefs can banish their subjects, and by whether rights to land can be lost by abandonment. This report suggests that custom with regard to these two issues is changing or has changed. The two topics should be investigated in depth.
6. Although in principle every Swazi has a right to land, it seems that many people who want land remain without land. This landlessness, and the reasons for it, should be further investigated.
7. Private farms bought in recent years by the Government and by the King-in-Trust are not handed over to chiefs but continue to be run as private farms with hired labor. These farms are resented to some extent, since their existence limits the land available under traditional tenure arrangements. Research should focus on these farms, and alternative ways by which land might be distributed more equitably to individual Swazis should be explored.

8. Women play the dominant role in agriculture in Swaziland. Initial investigations indicate that their access to land may be changing in the traditional tenure system, on agricultural schemes, and on Private Tenure Land. This should be studied further to determine the extent to which custom is changing.

9. Although the lease seems to be emerging as an important tenure arrangement for agriculture schemes, no studies so far have examined leases in Swaziland. The major scheme which has used leases, Vuvulane, has encountered considerable problems. A study of leases may avoid future problems of a similar nature.

In conclusion, this attempt to compile land laws, and to describe and analyze the most important of them, must be accompanied by more indepth investigation into the administration of the law as well as extra-legal forces which influence and direct the application of the law. Much analysis of land law still remains to be done on the basis of newly collected empirical data as well as further studies of available documents.

Alice K. Armstrong  
Kwaluseni, Swaziland  
September, 1985

## APPENDIX

### TABLE OF LEGISLATION CITED

The following legislation has been cited as relevant to land tenure, land use or agriculture in Swaziland. Where the statute is to be found in the 1976 compilation of the Laws of Swaziland, the title under which it is found is noted in parenthesis. Where the statute is not found in that compilation, the Swaziland Government Gazette (SGG) number is cited. Legal Notices which are enacted under the statutes have not been listed. They can be found in A Guide and Index to the Swaziland Government Gazette (1978) and the Swaziland National Bibliography 1978-1982. After 1982 there is no index.

Acquisition of Property Act (Land) 10/1961  
Administration of Estates Act (Estates) 29/1902  
Animal Disease Act (Animals) 7/1965  
Cane Growers Act (Agriculture) 12/1967  
Cattle Dipping Charges Act (Animals) 46/1950  
Cattle Export and Slaughter Tax (Revenue) 32/1968  
Cattle Routes Act (Animals) 15/1918  
Citrus Act (Agriculture) 12/1967  
Concessions Act (Land) 3/1904  
Constitution Act (Constitutional Law) 50/1968  
Control of Tree Planting Act (Natural Resources) 7/1972  
Cotton Act (Agriculture) 26/1967  
Crown Lands (Temporary Occupation) Act (Land) 22/1964  
Dairy Act (Agriculture) 28/1968  
Definition of Swazi Areas Act (Swazi Affairs) 41/1916  
Electricity Act (Fuel and Power) 10/1963  
Farm Dwellers Act 1982, SGG 166  
Farm Dwellers Act (Land) 21/1967  
Fencing Act (Land) 7/1904  
Forest Preservation Act (Agriculture) 14/1910  
General Administration Act (General Administration) 11/1905  
Grass Fires Act (Agriculture) 44/1955  
Great Stock Brands Act (Animals) 64/1937  
Human Settlements Authority Bill 1985 (SGG 388)  
Income Tax (Consolidation) Order (Revenue) 21/1975  
Intestate Succession Act (Civil Law) 3/1953

Land Speculation Control Act (Land) 8/1972  
Land Survey Act (Land) 46/1961  
Land Tax Order (Revenue) 35/1974  
Marriage Act (Family) 47/1964  
Mineral Concessions Commutation Act 38/1912  
Natural Resources Act (Natural Resources) 71/1951  
Pineapple Act (Agriculture) 3/1967  
Plant Control Act 7/1981 (1981 SGG 119)  
Plant Protection Act (Agriculture) 10/1958  
Pounds Act (Animals) 24/1966  
Private Forests Act (Agriculture) 3/1951  
Private Townships Act (Land) 17/1961  
Rating Act (Local Government) 24/1967  
Registration of Pedigree Livestock Act (Animals) 11/1921  
Rights of Way (Cancellation) Act 16/1962  
Roads and Outspans Act (Roads) 40/1931  
Safeguarding of Swazi Areas Act (Swazi Affairs) 39/1910  
Sale of Wool Act (Agriculture) 29/1942  
Subdivision of Land Act (Land) 7/1957  
Sugar Export Levy Order (Revenue) 7/1973  
Swazi Administration Act (Swazi Affairs) 79/1950  
Swazi Graves Act (Swazi Affairs) 18/1909  
Swazi Land Settlement Act (Swazi Affairs) 2/1946  
Swaziland Railway Act (Railways) 15/1962  
Tobacco Act (Agriculture) 52/1933  
Town Planning Act (Land) 45/1961  
Transfer Duty Act (Revenue) 8/1902  
Water Act (Natural Resources) 25/1967  
Wattle Bark Control Act (Agriculture) 38/1960  
Wills Act (Civil Law) 12/1955

## BIBLIOGRAPHY

For convenience in locating the documents, the accession number used in the Documentation Center of the Social Science Research Unit of the University of Swaziland is included where possible. Many of these documents are also found in the Library of the University of Swaziland and at the National Archives at Lobamba.

Adelstal, Brent. Cooperative Development in Swaziland. 1980, SSRU # 810468.

Amoah, P.K. Some Legal Aspects of the Customary Land Tenure Systems of Botswana, Lesotho, and Swaziland: A Case Study, presented at the Workshop on Rural Environment and Development Planning in Swaziland. Ezulweni, 1978, SSRU # 840315.

Armstrong, A.K., and Nhlapo, R.T. Law and the Other Sex: The Legal Position of Women in Swaziland. Kwaluseni, 1985.

\_\_\_\_\_. and Russell, M. A Situation Analysis of Women in Swaziland, Kwaluseni. 1985.

Bonner, Philip. Kings, Commoners and Concessionaires: the Evolution and Dissolution of the Nineteenth-century Swazi State. Johannesburg, 1983.

Brower, Hendrik. De jure connubiorum. Amsterdam, 1665.

Carloni, Alice. Social Analysis of an Agricultural Investment Project with Emphasis on the Role of Rural Women: A Case Study of the Credit and Marketing Project for Smallholders in Swaziland. FAO, 1982.

Devitt, Paul. Usutu and Ngwanvuma River Basin Reconnaissance Study. Discussion Paper No. 1, (script), SSRU # 820260.

Doggett, Clinton. Land Tenure and Agricultural Development in Lesotho and Swaziland: A Comparative Analysis. USAID, Dec. 1980, SSRU # 830426.

Fair, Murdock, and Jones. Development in Swaziland: A Regional Analysis. Johannesburg, 1969.

Fannin, J.M.A. Principles of Swazi Customary Law. (script) Lozitha, 1967, SSRU # 830406.

Grotius, Hugo, translation by R.W. Lee. The Jurisprudence of Holland. London, 1926.

Guma, Xolile, and Simelane, Vakashile. Small Farmer Credit and Small Farmer Attitudes Towards Cooperatives. SSRU Research Paper No. 8, 182, SSRU # 830155.

Heilbrom. "Water Laws, Prior Rights and Government Apportionment of Water in Swaziland." Journal of African Law, Vol. 25, No. 2 (1981) p. 136-149, SSRU # 810309.

- \_\_\_\_\_. Swazi Nation Land Irrigation Development, (script), SSRU # 810564
- \_\_\_\_\_. Water Law Development and Irrigation in Swaziland, 1910-1980, Ph.D. thesis Cambridge University, 1982, SSRU # 830314.
- Hosten, Edwards, Nathan and Bosman. Introduction to South African Law and Legal Theory, Durban, 1980.
- Hughes, A.J.B. Land Tenure, Land Rights and Land Communities on Swazi Nation Land in Swaziland, Monograph, University of Natal, Durban, 1972, SSRU # 820356.
- \_\_\_\_\_. Some Swazi Views on Land Tenure, in Economy, Morality and Anthropology, SSRU # 820418.
- Hunting Technical Services. Review of the Rural Development Areas Programme, Mbabane, 1983, SSRU # 830694.
- Joubert. The Law of South Africa, Vol. 14, Land to Libraries and Archives, Durban, 1981.
- Jones. The Law and Practice of Conveyancing in South Africa, Cape Town, 1976.
- Komet, Donald Kalinde. Land Labour Migration and Politics in Southern Africa: Botswana, Lesotho, and Swaziland, Uppsala, 1978.
- Kuper, Leo. An African Aristocracy, London, 1947.
- Kuper, Hilda. The Swazi: A South African Kingdom, New York, 1963.
- Lawrance, J.C.D. Report on Squatters on Farms in Swaziland, SSRU # 810243.
- Lea, John P. Underlying Determinants of Housing Location: A Case Study from Swaziland, SSRU # 820333.
- Maasdorp. Institutes of South African Law, Vol. II, The Law of Property, 10th Edition by Hall, Cape Town 1976.
- Maina, G.M., and Strieder, G.G. Customary Land Tenure and Modern Agriculture on Swazi Nation Land, Mbabane, 1971, SSRU # 810631.
- Marwick. The Swazi, London, 1940.
- Nkambule, Noah Mtsenjwa. A Diagnosis of Adverse Effects of Customary Land Tenure on Land Use in the Kingdom of Swaziland: Is a Land Privatisation Policy the Answer?, University of Wisconsin, 1983, SSRU # 840332.
- Paine, J.H. The reception of English and Roman-Dutch Law in Africa with reference to Botswana, Lesotho and Swaziland, in XI Comparative and International Law Journal of Southern Africa 1978, pp. 137-167.

- Portch, N.C. Irrigation Schemes on Swazi Nation Land, presented at the conference of the Royal Swaziland society of Science and Technology, 1980, SSRU # 830010.
- Rubin, N.N. The Swazi Law of Succession: A Restatement, Journal of African Law, Vol. 9, no. 2, Summer 1965, SSRU # 830633.
- Russell, M. Landlessness in Swaziland: A report to the FAO, August, 1985.
- Silberberg and Schoeman. The Law of Property, 2nd Edition, Durban, 1983.
- Swaziland Government. Report of the Committee of Enquiry into Farm Dwellers, Mbabane, June, 1967, SSRU # 810244.
- \_\_\_\_\_. Report of the Committee on Squatters on Farmers, 6 Sept. 1961 (available at National Archives).
- \_\_\_\_\_. Report of the Commission of Enquiry on the Water Laws of Swaziland, Mbabane, 1965, SSRU # 810426.
- \_\_\_\_\_. Report of the Land Mission ("The Hobbes Report"), Mbabane, March, 1969.
- \_\_\_\_\_. Memorandum: Swaziland Government's General Policy on Land Purchase and the Land Planning and Development, 1970 (confidential), SSRU # 840092.
- \_\_\_\_\_. Official Report of Parliamentary Sessions (Hansard) 1968-1985.
- \_\_\_\_\_. Swaziland Government Gazette, 1978-1985.
- Swaziland Government and Government of United Kingdom. The Report of the Land Commission, 1969, SSRU # 810556.
- Takirumbudde, P.N. A Framework for Understanding Property Legislations and Policy in the Period 1890-1980, (script) 191, SSRU # 810315.
- \_\_\_\_\_. The Swaziland Contractual Regulation of Land Transactions: trading efficiency for social justice, in Comparative an International Law Journal of Southern Africa, Vol. 14 (July 1981) p. 179-95, SSRU # 830079.
- Times of Swaziland.
- Tuckett, J.R. Vuvulane Irrigated Farms: An Historical Report on the 1st 10 years, (script), 1975, SSRU # 820309.
- U.S. Army Corps of Engineers, Swaziland: Water and Related Land Resources, Framework Plan, Mbabane, 1981, SSRU # 830647.
- \_\_\_\_\_. Review and Analysis of Water Resources Planning and Development in Swaziland, Mbabane, 1979, SSRU # 840007.

University of Swaziland. Swaziland National Bibliography 1978-1982,  
Kwaluseni, 1982.

. A Guide and Index to the Swaziland Government Gazette, compiled by  
D.R. Steinhauer, Kwaluseni, 1978.

Voet, translation by P. Gane. The Selected Voet, being the Commentary on the  
Pandects, Durban, 1955.

Whittington and Daniel. 16 Problems of Land Tenure and Ownership in  
Swaziland, in Thomas, M. F., Environment and Land Use in Africa, London,  
1969, SSRU # 820327.

Way, H.J.R. Mineral Ownership as affecting Mineral Development in  
Swaziland, Mbabane, 1955, SSRU # 810670.

Wille. Principles of South African Law, 7th Edition, Cape Town, 1977.

World Bank. Report on Mophobeni Irrigation Scheme, Mbabane, 1972,  
SSRU # 840094.

Other documents collected and now deposited with the SSRU Documentation  
Centre:

Notarial Deed of Lease between Commonwealth Development  
Corporation and Mhlupheki Nkambule (sample Vuvulane lease)

Bylaws of the Magwanyana Farmers Cooperative

Cotton Production Agreement 1984/85 Season between Ndzevane  
Farmers Cooperative and individual farmers

Constitution and Farmer's agreement for Ususu Young Farmer's  
Cooperative

Information Paper on the Proposed Water Resources Act

## ENDNOTES

1. For a discussion of the reception of common law in Swaziland see Paine (1978) and for the history of the common law in South Africa see Hosten (1980).

2. Land Ownership 1980-81 (Thousands of Hectares)

Swazi Nation Land	965.08	(55.9%)
Title Deed Land		
Individually held-Swazis	284.99	(16.5%)
Individually held-non-Swazi	283.47	(16.4%)
Major companies	191.51	(11.1%)

Source: Fourth Development Plan.

3. Tibiyo and Tisuka are companies founded to invest royalties from mineral concessions, which accrue to the King in Trust for the Swazi Nation. They are sometimes referred to as "the financial arm of the Royal Family" (see Heilbronn 1981).

4. If a man is married in community at the time he receives transfer of land this is not endorsed on the title deed. This, however, does not create problems for the purchaser of land, since the husband may alienate the land free from any claim of his wife to the land. A woman married in community cannot own property, since her husband must act as her legal guardian. An unmarried woman, a woman married according to customary rites, or a woman married out of community of property may own private tenure land. All civil marriages between two Swazis are governed in their proprietary consequences by the customary law, unless the couple makes a notation on the registry that they wish the marriage to be governed by common law. All civil marriages governed by common law are in community of property unless the couple registers an ante-nuptial contract. Research shows that of 365 ante-nuptial contracts registered in Swaziland during the period 1970-84, all but 2 were marriages in which at least one partner was not an ethnic Swazi. (Armstrong and Russell (1985), p. 61.)

5. The concept of prescription has never been used in the case of squatters on title deed land, but there seems to be no reason why it should not be used, particularly in the case of absentee landowners (see discussion of Farm Dwellers Control Act p. 21).

6. A notarial bond is a bond attested by a notary public. A bond is a legal instrument in which one person binds himself to do something, usually pay a sum of money to another. In property law, a notarial bond over movable property can be used to secure a debt, or a notarial bond can be used to transfer one person's legal rights to another. In the context of long leases, the requirement that the lease be in the form of a notarial bond means that it must be attested by a notary public.

7. A real right is a right in a thing which is enforceable against the world at large, as opposed to a person or persons. Ownership, servitudes, mortgage, long-lease, and mineral rights are real rights. A contract is a personal right. A servitude is a limited real right over another person's property, giving the holder certain powers of use and enjoyment over the property, or the power to prevent the owner of the property from doing something. Some examples are right of way to walk or drive over someone else's property, the right to graze one's cattle on someone else's property, or the right to prevent your neighbor from building a high rise structure which would spoil your view. A personal servitude is created when one person agrees with another to do or refrain from doing something. If this servitude is registered, then it becomes a real right and is enforceable by the holder's successors in title. A servitude may also be created by prescription or by statute. Fideicommissum is another right which becomes a real right upon registration. Fideicommissum is defined as "a grant of an interest in property to one person subject to the interest passing to another on the happening of a condition" (Wille, p. 283). An example is a grant of land to the Anglican church "as long as it is used as a mission" to revert to the State whenever the land is no longer used as a mission. A fideicommissum must be endorsed on the title deed of the land in question.

8. There is some evidence that banishment still occurs, but no systematic investigation has been made. Newspaper reports of January and October 1984 describe incidents of banishment and the threat of banishment (see also, Russell, 1985, p. 19).

9. "Undercultivation" was not precisely defined in my informal interviews, but appears to mean that farmers plant crops sparsely in all their fields, rather than using the land intensively, just to make sure that a particular field is not given to another. There is no evidence as to whether land has ever actually been taken away because of non-use. Further investigation into abandonment and banishment would be appropriate in an intensive survey.