

JOINT UNIVERSAL PERIODIC REVIEW SUBMISSION SWAZILAND

The Swaziland Positive Living (SWAPOL) leading a coalition of members of civil society.

1. Methodology

This report has been prepared by a coalition of civil society organizations in Swaziland after two national consultations were held. The following organisations took part in the compilation of the information contained herein: The Swaziland Young Women’s Network (SYMN), Women and Law in Southern Africa (WLSA), and the Foundation for Socio-Economic Justice.

2. Introduction

This civil society report is presented to the United Nations Universal Periodic Review on the basis of the Swaziland Constitution and the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW). Other instruments on which this report is based are the International Covenant on Civil and Political Rights (ICCPR), International Covenant on Social Economic and Cultural Rights (ICESCR), Convention against Torture and Other Cruel, Inhumane or Degrading Treatment or Punishment (CAT) as well as the African Charter on Human and Peoples’ Rights. Swaziland has acceded to all these conventions.

3. The rights of women

Swaziland is a patriarchal society, heavily steeped in custom and religion which to some extent fuel most gender-based differentiation. In terms of Swazi customary law, a woman is a perpetual minor, moving from the guardianship of her father as a child to that of her husband as a wife. Despite constitutional provisions aimed at ending such inequalities, social arrangements continue to manifest these gender-based differentiations.

4. Constitutional provisions

Gender inequality and discrimination against women still exists despite the provisions contained in sections 20 and 28 of the Constitution which call for equality. Section 28(1) further provides that a woman shall not be forced to undergo a custom to which she is by conscience opposed. Despite this provision, women continue to be forcefully subjected to customs and other traditional rituals they are opposed to by both State and non-State actors. An illustrative case here would be that of widows or women in mourning, who are customarily expected to wear black mourning gowns for the duration of the mourning period, which ranges from six months to two years. During this time, women wearing such gowns cannot participate in public gatherings or meetings. This hinders their participation in community life, as well as in the political and economic spheres.

Swaziland acceded to the Convention on the Elimination of all forms of Discrimination against Women (CEDAW) in 2004. Many other international human rights instruments to which Swaziland is party, such as the International Covenant on Civil and Political Rights (ICCPR), International Covenant on Economic, Social and Cultural Rights (ICESCR), and the African Charter on Human and Peoples’ Rights, also require equal treatment of women. They further provide for the equal participation of women in all spheres of life. However, that has not been realized so far. Women are under-represented in decision-making positions. Section 86(1) of the Constitution provides that if at its first meeting parliament realises that the number of women in parliament does not reach 30 per cent, then four women should be elected to the house to bridge the gap. This was not done, despite the fact that the current percentage of women in parliament is 23 per cent. Even the current Cabinet team is composed of only four women out of the seventeen

ministers. The excuse given by the State for this was that there was not enough space in parliament.¹ To date, this constitutional anomaly has not been corrected and there are no efforts that the government is making to correct this irregularity.

Whilst the Constitution purports to provide for equality under section 20 there is still manifest discrimination against women in Swaziland. Section 60(4) provides that the State shall ensure gender balance and fair representation. There is generally a lack of women representation in decision-making bodies.

There is a lack of equal opportunity at the work place that allows women to take high paying jobs. A few of them have attained the status of being company directors and there have been no meaningful attempts from the government of Swaziland to advance women's rights despite the provisions of section 60(8) of the Swaziland Constitution. In government parastatals there are no women directors and all these are headed by males. The banking sector has recently seen the first woman to head a bank as managing director. Women in most cases only deputize in these organizations. Even in the business sector, there are fewer women who own successful businesses. This may be caused by the fact that women are seen as not capable of owning some particular types of businesses.

5. Domestic violence

There is a high rate of domestic violence against women in Swaziland. Despite the negative effects of such violence, the State has not come up with mechanisms to curb this kind of brutality. Even where such matters have been reported to the police there are not taken seriously as there are said to be family issues that need to be dealt with at the family level. Thus a lot of women have died in the hands of their spouses.

These violent tendencies are further fuelled by statements that are uttered by State agents from time to time. Of note is the statement of a judge of the High Court in a case involving a man who killed his wife on suspicion of that she was cheating on her husband. The judge in his judgment stated that the accused was provoked by his deceased's wife infidelity as he had invested heavily on the woman.

In Swazi Law and Custom women are still regarded as minors and therefore requiring corrective disciplinary measures such as corporal punishment. Some chiefs openly support this stance. An illustrative case would be that of Chief Malamlela Magagula who also doubles up as a presiding officer in a customary court, who was quoted in the national newspaper, *The Times of Swaziland* saying that it is customary for husbands to beat their wives.

The Minister of Sports, Culture and Youth Affairs, Hlobile Ndlovu also openly supported the marginalisation of women in parliament and stated that when a woman says no to sex she meant yes.² This perpetrates the continued abuse of women and underscores the prevailing negative perceptions on gender and women's rights. It also undermines the efforts being made to have women enjoy their right to equality with men.

Women carry the brunt of HIV/AIDS and poverty, as 69 per cent of the population lives below the poverty line. Sexual, health and reproductive rights of women are not respected, neither are they protected nor promoted. Widows are subjected to degrading and inhumane treatment when their husbands die, family members deprive them of their properties left by deceased husbands. They are also not allowed to visit

¹ Out of a total of 95 members of parliament, only nine are women.

² The Government did not comment or condemn such utterances, neither did the Minister withdraw her statement despite calls for a withdrawal from other members of parliament and civil society.

some public places during the period of mourning (as they are easily identified by the black mourning gowns they wear). For example, they are barred from visiting chief's kraal (*umphakatsi*) or any other royal household. This effectively means that they cannot participate in governance issues at the local level, since the chief's residence is where all issues are discussed by the communities. There is lack of protective legislation in this regard. Elderly women are the most affected as they are abandoned by children and the State is doing very little to protect and support them.

6. Legislation in conflict with the Constitution

To date, several legislation which pre-date the Constitution continue to be in place despite being openly unconstitutional. Efforts by the State to reform these pieces of legislation to be in line with the Constitution are almost non-existent. The minority status of women is still given effect to by financial institutions, which require a woman married in community of property to secure the consent of her husband before she can transact with that institution, e.g. for purposes of loan applications.

6.1 Marriage Act

The Marriage Act of 1964 violates the rights of women who are married under civil rites. It provides that the consequences of marriage shall be governed by the common law, subject to the marital power of the husband. Where both parties are Africans, it provides that the proprietary rights of the spouses shall be governed by customary law. This perpetuates the minority status of women.

6.1.1 Marriageable age

According to Convention on the Rights of the Child (CRC) children attain majority at 18, unless attained earlier in terms of domestic law. Swaziland has different ages of majority for different purposes. For consent to engage in sexual intercourse, it is 16, for marriage a child can marry at 16 with ministerial consent, at 18 with the consent of parents, and 21 in her own right. However, in accordance to Swazi law and custom majority for marital purposes is reached upon puberty. This has resulted in minor girls as young as 13 years to be married under customary law. This effectively shows that there is not enough protection for young girls in the country. Due to the high poverty rate, young women are forcefully married for the payment of the bride price (*lobola*). In September 2010, the Times of Swaziland reported a story of a 15 year old girl who was forced to marry a 60 year old man in exchange for a single-room house for her family.

6.2 Women's access to land

Whilst the Constitution seems to oblige parliament to enact laws that will advance women's rights, currently, no effort has been made to align national laws with the constitutional provisions. Swaziland's land tenure system divides land into privately owned and communally owned. The privately owned land is referred to as title deed land, whilst the communal land is known as Swazi nation land. In terms of customary law, which regulates access to communal land, women's access to such land is limited. They can only be granted user rights over land as either a wife, or a mother to a male applicant for such land. Even in such circumstances, rights to land are not necessarily given to the woman, but to the male relative in whose name she makes the application. Even though the Constitution guarantees equality of men and women, there are very few cases where women have been granted access to tribal land in their own right.

These regulations which are a hindrance to the promotion of women's rights are not only limited to access to communal traditional land. For instance, the Deeds Registry Act of 1968 does not allow women to own title deed land on their own. In order for women to realize the right to own land (title deed land), there had

to be a legal challenge to the Deeds Registry Act in a legal action which was vehemently opposed by the government of Swaziland.

The Deeds Registry Act is based on Swaziland's common law which states that a woman married in community of property is under the marital power of her husband. This renders the woman (wife) a minor and her husband the sole administrator of their joint estate. Consequently, section 16(3) of the Act provides that

Immovable property, bonds or other real rights shall not be transferred or ceded to, or registered in the name of, a woman married in community of property, save where such property, bonds or real rights are by law or by a condition of a bequest or donation excluded from the community.

On 28 July 2009, an unprecedented case for women's rights was presented before the High Court of Swaziland. The applicant, Mary-Joyce Doo Aphane, was challenging the discriminatory title deed laws. The applicant actually wanted to register her property jointly with her husband, with both their names appearing on the title deed. The registration if successful would have allowed the applicant to own the property in equal shares with her husband and in the times of their death (her and her husband) their children would benefit. The applicant was successful at the High Court, but the state subsequently appealed the decision.

Section 34 of the Constitution protects the rights of spouses to inherit from their partners. However, the marital position of women married in terms of custom is uncertain. There are conflicting theories of when the contract of marriage is actually concluded under customary law. It is worth noting that under this system the contract is not between two consenting parties, but it involves the family council (*lusendvo*) who are fond of property grabbing and claiming inheritance in the Office of the Master of the High Court. Swaziland still adheres to the rule of primogeniture, which basically stipulates that the eldest surviving male heir receives the inheritance. This results in women being dispossessed of their property. This uncertainty in the context of customary law further on violates Article 8 of the SADC Gender Protocol which the country is a signatory to.

7. Women and citizenship

In terms of the Constitution, women cannot pass citizenship onto their children. Children can only acquire citizenship from their fathers. The only exceptions are cases where the mother is a Swazi citizen and the father a foreigner and the father has denounced the child. This goes against the equality provisions of the Constitution and of the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) to which Swaziland is a party. It also renders Swazi children born of Swazi mothers and foreign fathers stateless. This action violates the CRC provisions.

8. Lack of commitment to women's empowerment

Whilst it is appreciated and commended that the State introduced section n28 of the Constitution which seeks to remedy past imbalances in women's rights, the weak language in which it is couched is lamented. Section 28 basically provides that women's rights shall be respected, subject to the availability of resources.

9. Ministerial utterances in conflict with gender equality

In 2010, the Minister of Youth, Sports and Culture, Miss Hlobisile Ndlovu made a statement inside parliament, to the effect that when women say NO they actually mean YES. In her own words, she said that when women said 'do not touch me' they actually meant 'touch me further'. Such statements serve to fuel

the hidden culture of rape that perceives women's NO as an instruction to go ahead. It further perpetuates discriminatory stereotypes about women. The Minister refused to retract or withdraw her statement even when called upon to do so by one woman member of parliament and civil society organisations. To date, no withdrawal of the statement has been made.

10. Women and freedom of expression

The minority status of women prevents them from exercising their fundamental rights and freedoms to the fullest. They cannot freely express their views on issues that even affect them, largely because of the social perception that men are there to decide on their fate. For example, in matters of family planning and the use of contraceptives men have an upper hand on deciding on those issues. At community level women's voices are not considered when community issues are deliberated. It is perceived unSwazi or taboo for a woman to speak amongst men. In 2008, an organised group of women who had organised a protest march against royal spending were frustrated and belittled by the State. They had planned to march whilst wearing black mourning gowns to express their displeasure. The then Governor of Ludzidzini, a high ranking traditional leader labelled the planned action as unSwazi and against customary principles. According to him, women are not supposed to engage in a protest march. The State of Swaziland has failed to protect women in this regard.

11. Discrimination

Men are allowed to marry more than one wife under custom which is not the case with regard to women. This creates a lot of social, economic, and legal problems for the women and the State has not done much to discourage polygamy or to encourage monogamy. On matters of health, again women cannot make their own decisions. For instance, they cannot approach a traditional healer for consultation without the authorisation of the husband or husband's family. Under custom this could earn the woman eviction and divorce.

The customs of the levirate union (*kungena*) and the sororate wife (*inhlanti*) are still protected and practiced. Under the *kungena* custom, the woman is given to her husband's male relative to marry after the husband's death. In the sororate wife arrangement, the man is given a young maiden to marry as a replacement of his deceased wife. This custom also applies in cases where the wife is unable to conceive. It is often the wife's younger sister that is offered for the position of sororate wife.

When a husband dies, the wife is made to take up mourning for a period of approximately two years, during which time she wears only specially designed black mourning gowns. For men this is not the case. They only mourn in the heart, and are not forced to wear any symbol of mourning. Widowed women are also not allowed to participate in public events and are barred from mixing with royalty or setting foot in royal premises. This means that public offices like the Commission on Human Rights and the Elections and Boundaries Commission which are located within a traditional capital are out of bounds for these women. The commission's office is located in a traditional arena (Enkhanini) where even women wearing pants are not allowed. Therefore women are cut out from the services that are offered by the commission.

Women are also not allowed into traditional positions like being chiefs or even being a leader of the country. So far there has not been a single woman Prime Minister save for a Deputy Prime Minister who was appointed to fill up a post that had been left vacant by the demise of the previous office bearer. Women can, however, serve as regent for a young chief-in-waiting or a young heir to the throne.

The judiciary also lacks women representation as there are only three women judges out of a bench of ten. Even then, only one of the women judges is a local, the other two are on contract from foreign States. There is no woman judge in the Supreme Court as it is currently constituted, and there is no record of a woman judge forming part of the bench there since the court was established. The Industrial Court is also composed of male only judges.

12. Culture and tradition as vehicles for human rights violation

The Constitution in section 28 seeks to acknowledge the imbalances that existed in the past by providing for the protection of women. However, practically women are still the most vulnerable in terms of human rights violations in the country. For instance, a woman who fails to take part in a sacred cultural event bears the risk of being fined by the chief. The traditional events include the annual reed dance/*umhlanga*. Other oppressive customs include wearing chastity tassels by young virgins. This is done irrespective of the woman or girl's personal beliefs or ethnicity. Furthermore, at the chieftaincy level women are forced to perform tribute labour at the chief's place, such as the weeding and harvesting of the chief's fields, cutting grass and reeds for the maintenance of the royal household, as well as brewing and delivering marula beer every year. These customary duties are not only done at the chieftaincy level, as women are expected to perform same as tribute to the king. Failure to comply is often visited with a fine collected by the king's footstools, the chiefs.

Swaziland also has a tradition which seriously violates women's rights in the form of a cultural group known as the water party (*banftu bemanti*) that harass women for being improperly dressed. It is important to note that this group insists on the wearing of long skirts and covering of heads by women as a result violating women's rights not to be subjected in a culture that they are by conscience opposed to as provided by the Constitution in section 28(3). The water party not only insists on women wearing long skirts, but these skirts must be made of a particular traditional material (*sidziya*). Further offending behaviour that the water party harasses women for include painted fingernails, wearing pants, sunshades, facial make-up, earrings and clothes that bare the woman's shoulders. A recent case is that of a young girl who was violated by these men and called the police who responded that they don't have authority over such cases. This literally means that no matter how serious a violation of a woman's right by the water party, there is no legal recourse because the State police cannot bring the offender to book. What compounds this particular problem is that some of the members of the water party are also members of the State police and the army. Further, they also boast of being above the law since they are acting on instructions from the king. There are also cases of street vendors who are harassed and beaten for selling in the street by these men in the name of culture.

13. Customary marriages

There are two forms of marriage recognised by Swazi law, viz the civil rites marriage under the Marriage Act of 1964 and marriage under Swazi customary law. Registration of a civil rites marriage is predominantly easy, since the officiating officers are mostly sophisticated religious leaders or government officers. Registration of customary marriages on the other hand can be quite difficult, if not impossible for some women. This is primarily because the woman alone is not able to complete the registration process, but requires the involvement of the area's traditional authorities, her in-laws and the old woman who acts as the officiator. As a result, a large number of Swazi women married under customary law do not have marriage certificates. This often creates problems once the husband dies, as the woman is denied access to inheritance on allegations that she was never married to the deceased.

There are also conflicting legal positions on when a woman is considered to be legally married under custom. One position is that as soon as the *teka* process is finished and red ochre is smeared on the woman's face, a marriage has been concluded. The other position is that unless *lobola* is paid, the woman cannot claim to be legally married. The general price of *lobola* is 17 head of cattle for a first born girl, and 15 for other girls. The latter position effectively means that those who cannot afford to pay *lobola* remain unmarried even if they live together. Their relationships are therefore not protected by law and do not benefit from the normal benefits that accrue to married couples. A clear example would be where either spouse dies, the surviving spouse's rights to bury or to inherit from the deceased remains in limbo.

Although the Constitution clearly outlaws the status of illegitimacy of children born out of wedlock, customarily this determination still exists. Customary law still differentiates children born within wedlock from those begotten outside. As a result, where the parents' marital status is uncertain, as in the case of women married under custom, the legitimacy or otherwise of the child is affected.

14. Sexual Reproduction Health Rights

The Constitution of Swaziland limits women's rights to sexual reproductive health. In terms of section 15(5), no woman is permitted to terminate her pregnancy save in situations where a doctor has certified that the continued pregnancy will endanger the life or constitute a threat to physical and mental health of the woman, or the child will be irreparably seriously handicapped. This effectively means that if a woman wants to terminate a pregnancy for any reason other than those provided by the Constitution such termination will be unlawful and faces the highest wrath of the law. Consequently, the mortality rate of both women and children is escalating because the laws do not provide for the termination of unwanted pregnancies.

Also with the high infection rate of HIV/AIDS women are exposed to the risk of wilful transmissions because there are no laws that punish people who wilfully infect others with the virus. It is, however, notable that the government is currently in the process of passing a sexual offences law which seeks to protect women from all forms of sexual violations. Although this process is being protracted at the detriment of women who are sexually violated almost every day, it is consoling that the proposed legislation intends to provide stiffer sentences for offenders. The Sexual Offences Bill seeks to curb sexual offences such as domestic violence, rape, sexual harassment, and marital rape, has remained in draft form for more than four years, hence the need for its speedy conclusion by the State.

15. Violence against women outside the domestic sphere

Swaziland has failed to eliminate gender-based violence. Women are still exposed to both physical and sexual violence by men. Even though the Constitution in section 28 and CEDAW provide for the right of women to equal treatment with men, women are still viewed as minors who are subject to correction by men. Therefore, women are the most common victims of torture and domestic violence. The judiciary which is tasked with the enforcement of the rights of citizens encourages men to use force on women through their statements and the imposition of minor sentences. This was evident, as mentioned earlier on, in the statement of a judge, that a man who had murdered his wife was provoked by her infidelity.

Shockingly, the policing force which is mandated to protect all citizens from violence of any form also torture women. The Times of Swaziland on 18 January 2011, reported a case where a pregnant 18 year old woman who suffered abuse at the hands of the police. The Centre for Human Rights and Development visited the victim at her place of residence on 29 January 2011 for an interview. According to the victim she was taken to the police station by her step father on allegations that she aborted her first pregnancy. At the

station, the victim alleged that she was forced to undress in front of a male police officer. The two police officers, a female and a male then assaulted her on her buttocks with a bush knife. She also claimed one of them sat on her stomach while the other covered her face with a plastic bag. During the torture she began to excrete water and when she told the police they said it was not their problem. This was a violation of the woman's right not to be subjected to torture, inhuman and degrading treatment as provided for by section 18 of the Constitution, CEDAW and the Convention against Torture. It is worrying that State agents tasked with protecting vulnerable members of society are now the perpetrators of violations.

16. Issues affecting lesbians, gays, bi-sexuals, transgendered and inter-sexed people

Swaziland does not provide a conducive environment for persons belonging to the lesbian, gay, bi-sexual, transgendered and inter-sexed (LGBTI) sector. The Constitution does not protect LGBTIs; it only prohibits discrimination on the basis of gender. LGBTIs are discriminated and condemned openly. This is manifest in negative statements uttered by influential people in society e.g., religious leaders, traditional and political leaders. Traditionalists view LGBTIs as unSwazi and ungodly. There have been several incidents where traditionalists and religious leaders have issued negative statements about lesbians. After an engagement by two lesbians in 2009 there was uproar from both traditionalists and religious leader condemning the act.

There is no legislation recognising LGBTIs or protecting the right to sexual orientation and as a result people cannot openly manifest their orientation for fear of reprisals. For example, homosexual people cannot marry under the Marriage Act which only recognizes a union between a man and a woman. Because of the absence of a law allowing homosexuals to conclude civil unions, it is apparent that homosexual partners cannot adopt children in Swaziland. The Sexual Offences Bill mentions that consensual sex is between two partners which if passed into law can address the current common law position that sex is between a male and a female. However, that does not cure the problems raised by the common law position that marriage can only be concluded by a male and a female.

In Swaziland sexual rights of homosexuals are not protected. For instance, there is no public availability and distribution of dental dam and finger condoms yet heterosexuals are provided with free condoms countrywide. This therefore means that their right to health is infringed as they are exposed to infections including HIV/AIDS and the State is not taking any steps to ensure the protection of such people.

Owing to the social stigma and prejudices, LGBTI organisations are not able to register and operate freely. As a result, the one organisation that seeks to advance the rights and welfare of LGBTI people, House of Our Pride, is now housed as a department of a larger organisation Swaziland Positive Living (SWAPOL) dealing with HIV/AIDS issues.

17. Recommendations

In order to comply with international human rights obligations and commitments to protect and promote women's rights, civil society recommends that Swaziland should take action to:

- a. Establish a law reform commission to evaluate and review the laws that undermine women's rights in particular and human rights in general and conflict with the Constitution.
- b. Finalise the Sexual Offences Bill and criminalize wilful transmission of HIV.

- c. Condemn utterances and other forms of hate speech that are made by politicians and public officials from time to time.
- d. Allow the registration of organisations of marginalised group like LGBTIs.
- e. Ensure prosecution of State agents who violate women's rights.
- f. Ensure that the number of women in parliament meet the 30 per cent stipulated in the Constitution.
- g. Ensure that the State police machinery offers protection to women who are harassed by the water party.
- h. Ensure that discriminatory and invasive customary laws are abrogated.
- i. Undertake civic education on human rights in general, and women's rights in particular.
- j. Ensure that the practice of early childhood marriages is abolished and offenders are punished.
- k. Relocate public offices such as the Human Rights Commission and the Elections and Boundaries Commission away from traditional capital to allow women to access them.
- l. Adopt legislative and other measures to eliminate uncertainty of the status of women married under custom.
- m. Facilitate registration of customary marriages countrywide.
- n. Amend laws to enable women to access land.
- o. Ensure that the status of illegitimacy of the child is done away with in practice, and undertake civic education in that regard.