ALIGNMENT OF ESWATINI'S DOMESTIC LAWS WITH RECOMMENDATIONS OF UNITED NATIONS HUMAN RIGHTS MECHANISMS

Southern Africa Litigation Centre Research Report

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SALC RESEARCH REPORT

Alignment of Eswatini's Domestic Laws with Recommendations of United Nations Human Rights Mechanisms

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The Foundation for Socio Economic Justice (FSEJ) is a non-profit association established in 2004 in Eswatini. The organisation works to empower Swazis to improve their livelihoods by facilitating, building and organising community-based organisations for their own emancipation and development. FSEJ provides capacity strengthening and disseminates information to all partners and the public to enable them to effectively participate in the socio-economic justice agenda.

Authorship and Acknowledgement

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CONTENTS

List of Abbreviations vi

1. INTRODUCTION 1

2. GOVERNANCE, POLITICAL SYSTEM AND ELECTIONS 2

3. ACCESS TO JUSTICE FOR HUMAN RIGHTS VIOLATIONS 3
   - 3.1 Provision of Legal Aid 3
   - 3.2 Serving Justice through Traditional Courts and Common Law Courts 4

4. STATUS OF RATIFICATION OF HUMAN RIGHTS INSTRUMENTS 6

5. ALIGNMENT OF THE DOMESTIC NORMATIVE FRAMEWORK WITH RECOMMENDATIONS ISSUED BY UN HUMAN RIGHTS MONITORING MECHANISMS 10
   - 5.1 Civil and Political Rights – Recommendations from UN Human Rights Mechanisms 10
     - *Freedom of Expression, Association and Assembly* 10
     - *Death Penalty* 11
     - *Criminalisation of Torture* 12
     - *Persons Deprived of Liberty, Prison Conditions and Deaths in Custody* 13
       - A. Actions to Improve Human Rights 14
         - *The Suppression of Terrorism (Amendment) Act No. 11 of 2017* 14
         - *The Public Order Act No. 12 of 2017* 15
         - *The Police Service Act No. 22 of 2018* 16
         - *The Correctional Services Act No. 13 of 2017* 16
         - *The Swaziland Broadcasting Bill of 2016* 17
         - *The Refugees Act No. 15 of 2017* 19
       - B. Cases 20
         - *Maseko and Others v Prime Minister of Swaziland and Others [2016] SZHC 180* 20
         - *Mbongiseni Shabangu and Others v Elections and Boundaries Commission and Others [2018] SZHC 170* 22
       - C. What Still Needs to Be Done? 24
         - *Press Freedom* 24
         - *Freedom of Expression and Association* 25
         - *Access to Information* 26
         - *Extrajudicial Killings* 27
         - *Corporal Punishment and Conditions in Prisons* 27

5.2 Economic, Social and Cultural Rights – Recommendations from UN Human Rights Mechanisms 28
Right to Health 28
Rights of Persons with Disabilities 28
A. Actions to Improve Human Rights 29
The Persons with Disabilities Act No. 16 of 2018 29
Consumer Credit Act No. 7 of 2016 29
B. Cases 30
C. What Still Needs to Be Done? 30
Right to Health 30
Land Rights 31
5.3 Women and LGBTI Rights - Recommendations from UN Human Rights Mechanisms 34
Discrimination against Women 34
Cultural Practices 35
Sexual Violence and Domestic Violence 36
Discrimination against LGBTI Persons 36
Reproductive Health 37
Forced Labour 37
Equal Access to Employment and Services 38
A. Actions to Improve Human Rights 39
The Sexual Offences and Domestic Violence Act No. 15 of 2018 39
The Marriages Bill of 2017 42
The Matrimonial Property Bill of 2017 43
Regulation of Wages (Domestic Employees) Order, 2016 43
B. Cases 44
Attorney General v Master of the High Court [2014] SZSC 10 44
Sihlongonyane v Sihlongonyane [2013] SZHC 207 44
Attorney General v Doo Aphane [2010] SZSC 32 45
R v Shabangu [2007] SZHC 47 45
Mkhabela v The King [2017] SZHC 184 46
C. What Still Needs to Be Done? 47
Discrimination against Women 47
Discrimination against LGBTI Persons 47
Sexual Offences and Domestic Violence 48
Sexual Harassment in the Workplace 48
Challenges Faced by Women in the Workplace 49

5.4 Children's Rights – Recommendations from UN Human Rights Mechanisms 50
Child Marriages 50
Children in Conflict with the Law 50
Education 50
Corporal Punishment 51
Statelessness 51
A. Actions to Improve Human Rights 52
The Children's Protection and Welfare Act No. 6 of 2012 52
The Sexual Offences and Domestic Violence Act No. 15 of 2018 53
The Free Primary Education Act No. 1 of 2010 53
Prohibition of Corporal Punishment in Schools 54
B. Cases 54
Swaziland National Ex-mine Workers Association v Minister of Education and Others [2010] SZSC 3554
Alice Fikile and 45 Others v Swaziland National Provident Fund and Others [2011] SZSC 30 55
Masinga v Director of Public Prosecutions and Others [2011] SZHC 58 55
C. What Still Needs to Be Done? 56
Corporal Punishment 56
Child Justice 56
Statelessness 56
Education 56

6. FACTORS AFFECTING THE ALIGNMENT OF ESWATINI'S LAWS WITH UN RECOMMENDATIONS 58
6.1 Duality of the Law, Political Will and Customary Values 58
6.2 Challenges to Judicial Independence 60

7. SOME KEY HUMAN RIGHTS ACTORS 61
7.1 Civil Society 61
7.2 Judiciary 63
7.3 The Human Rights Commission 63
7.4 The International Community 63

8. RECOMMENDATIONS 65
8.1 Recommendations Specific to the Government 65

List of Abbreviations

ACHPR	African Charter on Human and Peoples' Rights
AGOA	African Growth and Opportunity Act
AU	African Union
CEDAW	Convention on the Elimination of All forms of Discrimination Against Women
CMAC	Conciliation, Mediation and Arbitration Commission
CRC	United Nations Convention on the Rights of the Child
EIDHR	European Instrument for Democracy and Human Rights
EU	European Union
HRC	Human Rights Committee
HIV	Human Immunodeficiency Virus
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
LGBTI	Lesbian, Gay, Bi-sexual, Transgender, and Intersex
MISA	Media Institute of Southern Africa (Eswatini)
NERCHA	National Emergency Response Council for HIV and AIDS
NNLC	Ngwane National Liberatory Congress
OVC	Orphans and Vulnerable Children
PEP	Post Exposure Prophylaxis
PUDEMO	People's United Democratic Movement
SADC	Southern African Development Community
SODV Act	Sexual Offences and Domestic Violence Act
SWADEPA	Swazi Democratic Party
SWAYOCO	Swaziland Youth Congress
TUCOSWA	Trade Union Congress of Swaziland
UDHR	Universal Declaration of Human Rights
UN	United Nations
UNESCO	United Nations Educational, Scientific and Cultural Organisation
UNHRC	United Nations Human Rights Council
UPR	Universal Periodic Review
USAID	United States Agency for International Development

1. INTRODUCTION

It is more than seventy years since the Universal Declaration of Human Rights (UDHR) was adopted yet the struggle to achieve full realisation of human rights remains a pressing reality. One of the challenges hampering the enjoyment of human rights is the degree to which State parties to key human rights instruments comply with recommendations issued by mechanisms created to oversee the implementation of such instruments.

This contribution assesses how the domestic laws of the Kingdom of Eswatini align with recommendations issued by three UN human rights monitoring mechanisms: namely the Human Rights Council (UNHRC), the Human Rights Committee (HRC) and the Committee on the Elimination of Violence Against Women (CEDAW Committee). To keep the report to a manageable size, only recommendations relating to legislative action are discussed. The report does not address the wide range of recommendations relating to other subjects.

This report was developed based on a programme aimed at supporting Eswatini civil society organisations to engage with the UN human rights monitoring mechanisms outlined and to support the implementation of their recommendations. The programme falls under the 'Rights4All: Promotion and Protection of Fundamental Rights and Democracy in Swaziland' Project (Rights4AllProject) implemented by the Southern Africa Litigation Centre (SALC), the Cooperazione per lo Sviluppo dei Paesi Emergenti (COSPE) and Foundation for Socio Economic Justice (FSEJ). The programme is supported by the European Union (EU) and builds on previous work done by civil society in Eswatini to engage international and regional human rights institutions.

The Rights4All Project seeks to monitor the implementation of the recommendations made by UN human rights monitoring mechanisms. This research accordingly highlights some areas of success and identifies some shortfalls in the implementation of the recommendations.

2. GOVERNANCE, POLITICAL SYSTEM AND ELECTIONS

The Kingdom of Eswatini, formerly known as Swaziland,[1] is one of the few absolute monarchies existing in the world today and is ruled by King Mswati III.

Whilst the 2005 Constitution introduced significant reforms, the King maintains far more power than the electorate, making it very difficult for the electorate to hold parliament accountable. The King personally appoints the Prime Minister, the cabinet and two-thirds of members of the Senate.

The Constitution provides for the right to freedom of association. However, section 79 of the Constitution has been interpreted to exclude political parties from the electoral process, although individual members of political parties are able to contest the elections in their personal capacities. Lack of political opposition in parliament means that there are limited checks on the powers of the executive. Lack of opposition also heightens possibilities that key legislative decisions, including decisions relating to the national budget and human rights, are taken with little debate.

[1] The country's name change has since been challenged in court. *Institute for Democracy and Leadership and Others v Swaziland Government and Another*, High Court Case No. 996/2018.

3. ACCESS TO JUSTICE FOR HUMAN RIGHTS VIOLATIONS

3.1 Provision of Legal Aid

There are no laws governing the provision of legal aid in the Kingdom of Eswatini. However, the country has developed a Legal Aid Bill in 2016 which is expected to be the main instrument addressing this subject. The Bill provides for the establishment of the Legal Aid Board which is meant to manage and oversee a publicly funded legal aid programme.[2] In section 29(6), it sets out that "where the interests of justice so require, an indigent person who is arrested, detained or accused of a crime" has the right to legal information, advice and assistance and legal representation upon approval of their application by the Legal Aid Board.[3] Section 29(7) extends this assistance to the bringing or defending of a civil claim or other non-criminal matter.[4]

The "interests of justice" is defined under section 29(8) of the Bill as including: where a person cannot afford legal representation; where without legal representation the person could be potentially imprisoned; where if given a fine they would remain unpaid for two weeks; where the individual may not be able to understand the court proceedings; where the case involves substantial questions of law; where the proceedings may involve the examining and cross-examining of expert witnesses; where the person will not have a fair trial without representation; and where the person is a vulnerable person such as a child, youth, woman, older person, person with disabilities, including psycho-social disabilities, or a person who is terminally ill.[5]

The Legal Aid Board will determine who is an "indigent person" via a means test.[6] This means test will not be required if the person is a member of the vulnerable groups mentioned above, and "where their vulnerability results in their inability to generate an income".[7] For civil and non-criminal matters, a merits test is applied and legal aid will only be provided where "the matter has prospects of success on a balance of probabilities" and "substantial injustice would otherwise result".[8]

The Legal Aid Bill and Legal Aid Policy have not yet been finalised despite an initial timeline that anticipated their implementation by 2015. If it is passed into law, and the Legal Aid Board and the services it is meant to provide are properly funded, it will have the potential to increase access

2 The Legal Aid Bill 2016 s 3, s 17.
3 The Legal Aid Bill 2016 s 29(6).
4 The Legal Aid Bill 2016 s 29(7).
5 The Legal Aid Bill 2016 s 29(8).
6 The Legal Aid Bill 2016 s 39.
7 The Legal Aid Bill 2016 s 40.
8 The Legal Aid Bill 2016 s 41.

to justice in Eswatini. This is particularly important to protect the constitutional rights to liberty and a fair trial. However, the scope of the legal aid programme to cover direct court proceedings for violations of human rights under the Constitution may be limited. Section 31 provides a non-exhaustive list of matters that may be covered by legal aid, which includes "(h) within its available resources, the Board may also progressively grant legal aid to persons to implement the Bill of Rights enshrined in Chapter III of the Constitution of Eswatini".[9] Reference to 'within its available resources' appears as a caveat suggesting if not adequately funded, the Legal Aid program is unlikely to increase access to justice in constitutional and civil matters.[10]

There are non-government driven legal aid programmes. The University of Eswatini, Kwaluseni Campus, has introduced a legal aid programme under the Law Faculty. Part of the objectives of legal clinic is to enhance students' acquisition of skills in problem-solving; client-interviewing and confidentiality; cross-examination; advocacy and other aspects. The Council of Churches also runs a legal clinic on Mondays, under its Justice and Peace programme. It works mainly as a referral mechanism and at times provides legal representation to clients.

In 2017, the Human Rights Committee (HRC) which monitors the implementation of the International Covenant on Civil and Political Rights (ICCPR) reviewed Eswatini's compliance with the Covenant. The review process occurred in the absence of an official report submitted by the State party concerned. In its Concluding Observations, the HRC raised concerns about the lack of a Legal Aid Policy in the country and the failure of the State to pass the Legal Aid Bill into law.[11] It recommended that Eswatini "should ensure that free legal aid assistance is available in any case where the interests of justice so require".[12]

Similarly, in its 2014 Concluding Observations on Eswatini, the Committee on the Elimination of Discrimination Against Women (CEDAW Committee), which monitors the implementation of the Convention on the Elimination of Discrimination Against Women, also expressed concerns about the lack of a legal aid scheme in Swaziland, excessive legal costs and the geographical barriers that impede women's access to justice.[13] The Committee recommended that Eswatini fast-track the enactment of the Legal Aid Bill in order to provide a comprehensive legal aid scheme that encompasses legal assistance to women and girls in both criminal and civil matters.[14]

3.2 Serving Justice through Traditional Courts and Common Law Courts

The Kingdom of Eswatini has a dual legal system characterised by the co-existence of traditional courts operating alongside common law courts recognised under the Swazi Courts Act No. 80 of 1950. Notably, the traditional courts apply customary law to address disputes brought to their attention. While customary courts have an important role to play in resolving disputes, they represent a threat to access to justice in the country, to the extent that they apply customary laws in a manner that discriminates against women. The traditional courts are spread out across

9 The Legal Aid Bill 2016 s 31(h).
10 The Legal Aid Bill 2016 s 31(h).
11 Human Rights Committee 'Concluding Observations on Swaziland in Absence of a Report' UN Doc CCPR/C/SWZ/CO/1 (2017), para 40.
12 Human Rights Committee 'Concluding Observations on Swaziland in Absence of a Report' UN Doc CCPR/C/SWZ/CO/1 (2017), para 41.
13 Committee on the Elimination of All Forms of Discrimination Against Women 'Concluding Observations on Swaziland' UN Doc CEDAW/C/SWZ/CO/1-2 (2014), para 12.
14 Committee on the Elimination of All Forms of Discrimination Against Women 'Concluding Observations on Swaziland' UN Doc CEDAW/C/SWZ/CO/1-2 (2014), para 13 (a)-(b).

the country and have jurisdiction to hear both civil and criminal matters.[15] They do not have jurisdiction in criminal cases where a death has occurred, or in matters concerning civil marriage. Section 11 of the Act provides that a Swazi Court shall administer: Swazi law and custom, in so far as it is not repugnant to natural justice or morality or inconsistent with the provisions of any law in force in the country; rules and orders made by the Ngwenyama or a Chief under the Swazi Administration Act No. 79 of 1950; and the provisions of any law which the Court is by law allowed to administer.

Where criminal matters arise, it is up to State Prosecutors to decide whether the issue is to be heard in the common law or traditional courts. Reports have stated that such decision will be made based on the strength of the case. Admittedly, if evidence is strong the matter will be sent to the Magistrates Court (common law system), but if the evidence is weak it will be referred to the traditional courts.[16] This is because it is easier to obtain a conviction in the traditional courts, sometimes even on the most tenuous evidence, as opposed to common law courts which are seen to have stricter evidence requirements.[17] There is a small safeguard giving the individual the possibility to request that the matter be referred to the Magistrates Court, which is granted in some cases. In other cases, convictions may be appealed to the Magistrates Court.[18]

A key issue with the traditional courts system is that under section 23 of the Swazi Courts Act, legal representation is prohibited, and legal practitioners may not appear or act for any party in any proceeding before these courts. Women are not allowed to preside in customary courts, with the presiding officers consisting of men thought to have high levels of knowledge in matters of Swazi law and custom. Under Swazi customs, women are perceived by the traditional courts as second-class citizens and they are expected to play a submissive role within the system.

Often traditional courts remain the only avenue for women in criminal and in civil matters alike. These courts are far more accessible for individuals seeking redress in civil matters than the common law courts. Traditional courts are also cheaper to access than common law courts which involve transport to urban centres where they are located and the cost of legal representation.[19]

However, there are challenges using traditional courts because they do not follow any codified procedures, they are based on patriarchal traditional norms and fail to consider common law, the Constitution, constitutional rights and recognised human rights standards.[20]

[15] Thomas Masuku, 'Women and Justice in Swaziland: Has the Promise of the Constitution Been Fulfilled' in Perspectives – Political Analysis and Commentary from Africa Issue 3 (December 2013) pg. 25. See also United Nations in Swaziland Webpage, 'Governance', http://sz.one.un.org/content/unct/swaziland/en/home/about-the-country/governance.html.

[16] Thomas Masuku, (2013) 'Women and Justice in Swaziland: Has the Promise of the Constitution Been Fulfilled' in Perspectives – Political Analysis and Commentary from Africa, Issue No. 3, pg. 25.

[17] Thomas Masuku, (2013) 'Women and Justice in Swaziland: Has the Promise of the Constitution Been Fulfilled' in Perspectives – Political Analysis and Commentary from Africa, Issue No. 3, pg. 25.

[18] As above, pg. 25.

[19] See the 2016 Report of the Human Rights Commission of Eswatini, pg. 47.

[20] Thomas Masuku, (2013) 'Women and Justice in Swaziland: Has the Promise of the Constitution Been Fulfilled' in Perspectives – Political Analysis and Commentary from Africa, Issue No. 3, pg. 25. See also 2016 Report of the Human Rights Commission of Swaziland, pg. 47.

4. STATUS OF RATIFICATION OF HUMAN RIGHTS INSTRUMENTS

The Kingdom of Eswatini has ratified major international and regional human rights instruments. At the international level, Eswatini ratified the International Covenant on Civil and Political Rights (ICCPR), the International Covenant on Economic, Social and Cultural Rights (ICESCR), and the Convention on the Elimination of All Forms of Racial Discrimination. Moreover, Eswatini ratified the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), and other relevant human rights core instruments. The country must still ratify other prominent international human rights treaties such as the Optional Protocols to the ICCPR, the Optional Protocol to the ICESCR and the Optional Protocol to CEDAW. If ratified, these instruments will increase human rights protection for the people of Eswatini, recognising the competence of each Committee to receive and consider communications from individuals or groups. The protection of human rights in Eswatini would be further enhanced if other pending international and regional treaties were ratified and the UN Special Procedures allowed to visit the country.

The call for Eswatini to ratify outstanding international human rights instruments has been raised by UN human rights monitoring mechanisms as will be discussed in the next section. In its reply to the UPR 2016 recommendations, the country accepted the recommendations to ratify the Optional Protocol to CEDAW and the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment (CAT), but did not support those recommendations on ratification of the Second Optional Protocol to the ICCPR aimed at the abolition of the death penalty.

The table below shows the status of ratifications of key international and regional human rights instruments, including instruments that must still be ratified:

TREATY	RATIFICATION STATUS	DATE ACCEDED
International Convention on the Elimination of All Forms of Racial Discrimination (ICERD)	Yes	Acceded - 7 April 1969
International Covenant on Civil and Political Rights (ICCPR)	Yes	Ratified - 26 March 2004
Optional Protocol to the ICCPR (ICCPR – OP1)	No	
Second Optional Protocol to the International Covenant on Civil and Political Rights, on the abolition of the death penalty (ICCPR – OP2)	No	UPR – Eswatini did not accept the recommendation to accede to Protocol.
International Covenant on Economic, Social and Cultural Rights (ICESCR)	Yes	Acceded - 26 March 2004
Optional Protocol to the ICESCR	No	
Inquiry Procedure under the Optional Protocol to ICESCR	No	
Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW)	Yes	Acceded - 26 March 2004
Optional Protocol to CEDAW	No	UPR – Eswatini accepted the recommendation to accede to Protocol.
Inquiry Procedure under the Optional Protocol to CEDAW	No	
Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment (CAT)	Yes	Acceded - 26 March 2004
Optional Protocol to CAT	No	UPR – Eswatini accepted the recommendation to accede to Protocol and indicated it would do so before its 3rd UPR.
Inquiry Procedure under CAT	Yes	Acceded - 26 March 2004
Convention on the Rights of the Child (CRC)	Yes	Ratified - 7 September 1995
Optional Protocol to CRC on the Involvement of Children in Armed Conflict (OP-CRC-AC)	Yes	Acceded - 24 September 2012
Optional Protocol to CRC on the Sale of Children, Child Prostitution and Child Pornography (OP-CRC-SC)	Yes	Acceded - 24 September 2012
Optional Protocol to CRC on a Communications Procedure (OP-CRC-IC)	No	
Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families	No	UPR – Eswatini did not accept recommendation to accede to Convention.
Convention on the Rights of Persons with Disabilities (CRPD)	Yes	Ratified - 24 September 2012
Optional Protocol to the CRPD	Yes	Ratified - 24 September 2012

Inquiry Procedure under the CRPD	Yes	Acceded – 24 September 2012
Convention for the Protection of All Persons from Enforced Disappearances	No	Signed - 25 September 2007
Inquiry Procedure under the International Convention for the Protection of All Persons from Enforced Disappearances	No	
OAU Convention Governing Specific Aspects of Refugee Problems in Africa	Yes	Ratified – 16 January 1989
OAU Convention on the Preventing and Combatting of Terrorism	No	Signed – 7 December 2004
African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa	Yes	Ratified - 5 October 2012
African Union Convention on Preventing and Combatting Corruption	No	Signed – 7 December 2004
African Union Convention on the Conservation of Nature and Natural Resources	No	Signed 7 - December 2004
African Union Convention on Cyber Security and Personal Data Protection	No	
African Charter on Democracy, Elections and Governance	No	Signed – 29 January 2008
African Charter on Human and Peoples' Rights	Yes	Ratified - 15 September 1995
Protocol on the Rights of Women in Africa	Yes	Ratified - 5 October 2012
Protocol on the Rights of Older Persons	No	
Protocol on the Rights of Persons with Disabilities	No	
African Charter on the Rights and Welfare of the Child	Yes	Ratified - 5 October 2012
SADC Protocol on Gender and Development	Yes	Signed – 17 August 2018
Selected ILO Conventions		
ILO Forced Labour Convention	Yes	Ratified – 26 April 1978
ILO Freedom of Association and Protection of the Right to Organise Convention	Yes	Ratified - 26 April 1978
ILO Equal Remuneration Convention	Yes	Ratified – 5 June 1981
ILO Abolition of Forced Labour Convention	Yes	Ratified - 28 February 1979
ILO Discrimination (Employment and Occupation) Convention	Yes	Ratified – 5 June 1981
ILO Minimum Age Convention	Yes	Ratified – 23 October 2002
ILO Worst Forms of Child Labour Convention	Yes	Ratified – 23 October 2002

Eswatini made the following Declaration in relation to the Optional Protocol to the Convention on the Rights of the Child relating to children in armed conflict:[21]

> *"As regards Article 3 of the Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict, the Government of the Kingdom of Swaziland states that the minimum age at which it permits recruitment of volunteers in the armed forces is eighteen (18) years (see section 17 (3) of the Umbutfo Swaziland Defence Force Order No. 10 of 1977 on recruitment in the Kingdom of Swaziland). The Government of the Kingdom of Swaziland further states below the safeguards it has adopted to ensure that such recruitment is by no means done by force or under duress: A) The recruitment procedure in the armed forces of the Kingdom of Swaziland is committed by an advertisement in the press and national media for young people (boys and girls); B) The record consists of recruitment as appropriate, inter-alia, a birth certificate, certificate of education, and/or a certificate of apprenticeship; C) The inclusion of young people takes place in public, on a sports field or a similar place; D) All recruits undergo rigorous medical examination."*

At the regional level, Eswatini ratified the African Charter on Human and Peoples' Rights (ACHPR), the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Maputo Protocol) and it is a State party to the African Union (AU) Convention Governing Specific Aspects of Refugee Problems in Africa. It has signed, but not ratified, other regional human rights instruments such as the Protocol to the ACHPR on the Establishment of the African Court on Human and Peoples' Rights, the African Charter on the Rights and Welfare of the Child and the African Charter on Democracy, Elections and Governance.

Eswatini has been a member of the ILO since 20 May 1975. On 26 April 1978, Eswatini ratified 15 ILO conventions, of which 13 are still in force, including the Freedom of Association and Protection of the Right to Organise Convention, 1948, and the Right to Organise and Collective Bargaining Convention, 1949.

When a country ratifies international law instruments it voluntarily accepts to become bound by those provisions and adopt measures to implement them. The Kingdom of Eswatini is thus required to adopt political, legislative, administrative and other measures to fully protect, promote and respect the enjoyment of the rights recognised in the instruments it ratified. The next section looks at the extent to which legislative measures have been adopted based on the recommendations of the treaty bodies, the Committees that monitor the implementation of the core human rights treaties ratified by the Kingdom of Eswatini.

[21] The status of ratification of treaties and any declarations made to it are available online at http://indicators.ohchr.org/.

5. ALIGNMENT OF THE DOMESTIC NORMATIVE FRAMEWORK WITH RECOMMENDATIONS ISSUED BY UN HUMAN RIGHTS MONITORING MECHANISMS

This section assesses the extent to which the domestic normative framework of Eswatini reflects recommendations issued by UN human rights monitoring mechanisms. For ease of reference, the analysis addresses recommendations targeting the implementation of civil and political rights, economic, social and cultural rights; and the rights of vulnerable groups including persons with disabilities, women, children, and lesbian, gay, bi-sexual, transgender, and intersex (LGBTI) persons.

5.1 Civil and Political Rights – Recommendations from UN Human Rights Mechanisms

Freedom of Expression, Association and Assembly

The rights to freedom of expression, freedom of association and freedom of assembly are fundamental human rights entrenched in several human rights instruments ratified by the Kingdom of Eswatini. Eswatini was reviewed by the HRC in 2017 and it was last reviewed by the CEDAW Committee in 2014. Both the Concluding Observations of the HRC and the CEDAW Committees raised concerns about the enjoyment of the rights to freedom of expression, association and assembly in the country. Similar concerns were raised during the UPR and by the African Commission on Human and Peoples' Rights.

The African Commission on Human and Peoples' Rights in *Lawyers for Human Rights v Swaziland* also expressly stated that the 1973 proclamation banning political parties "violated Articles 1, 7, 10, 11, 13 and 26 of the African Charter." Significantly, article 10 of the Charter deals with the right of every individual to free association and article 13 deals with the right of every citizen "to participate freely in the government of his country, either directly or through freely chosen representatives in accordance with the provisions of the law."[22]

The most recent position of the government conveyed to the HRC is "that the 2005 Constitution replaced the 1973 King's Proclamation and that the proclamation is thus no longer in force".[23]

[22] Communication No. 251/2002 (2005).
[23] Human Rights Committee 'Concluding Observations on Swaziland in Absence of a Report' UN Doc CCPR/C/SWZ/CO/1 (2017), para 16.

Eswatini has however noted that:

> *"the State is not yet ready to allow political parties to register and contest political power. The majority of Swazis do not want political parties to contest elections. However, individual members of political parties are able to contest elections in their personal capacities".*[24]

During the 2016 UPR process of Eswatini, many recommending States urged the country to amend the Suppression of Terrorism Act No. 3 of 2008 so that it is not used to suppress political movements. Recommending States also asked Eswatini to ensure greater protection for persons who want to exercise their right to peaceful assembly and freedom of expression (potentially through the adoption of the proposed Public Order Bill). Some of the recommendations also called on Eswatini to enable political parties to register and contest elections and political power, as well as, the need to establish laws governing access to information.[25]

The HRC stated that the Suppression of Terrorism Act was being used to "counter political opposition and social protests instead of addressing legitimate terrorism threats".[26] The HRC raised concerns about reports of violence against unionists, human rights defenders, political opponents and members of the media, as well as reports "that proposed amendments to the Public Order Act will severely restrict freedom of expression, assembly and association, impose cumbersome requirements for obtaining permits before holding a meeting or hosting an activity and give law enforcement officers discretionary powers to interrupt meetings".[27] The Committee also recommended that the State should "foster a culture of political pluralism, ensuring freedom of genuine and pluralistic political debate, and allowing the registration of opposition political parties, including to contest elections, field candidates and participate in the formation of government". The Concluding Observations of the CEDAW Committee recommended that Eswatini undertakes a comprehensive study on the impediments that the Tinkhundla electoral system presents to women who seek to stand for political office.[28]

Death Penalty

The right to life is categorically protected in all human rights instruments and is a *jus cogens* which must be respected. Section 15 of the Constitution permits the death penalty, although it is not mandatory. Section 297 of the Criminal Procedure and Evidence Act No. 67 of 1938 provides for hanging where a death sentence has been imposed and section 299 sets out the procedure for carrying out the death sentence. Section 298 of the Act provides that women cannot be sentenced to death but to life imprisonment with hard labour instead.

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[24] Human Rights Council 'Report of the Working Group on the Universal Periodic Review Swaziland- Addendum' UN Doc A/HRC/33/14/Add.1 (21 September 2016), para 32.

[25] Human Rights Council 'Report of the Working Group on the Universal Periodic Review- Swaziland' UN Doc A/HRC/33/14 (13 July 2016) - for Suppression of Terrorism Act- See Rec, 109, 66 (Canada), Rec 109, 68 (Mexico), Rec 107, 56 (Czech Republic); for Greater Protections and Public Order Bill- See Rec 109, 61 (France), Rec 109, 63 (Netherlands); for Registration of Political Parties - See Rec 109,70 (Norway), Rec 109,71 (Czech Republic), Rec 109,72 (Australia); for Freedom of Information - See Rec 109,64 (Portugal), Rec 107,60.

[26] Human Rights Committee 'Concluding Observations on Swaziland in Absence of a Report' UN Doc CCPR/C/SWZ/CO/1 (2017), para 35.

[27] Human Rights Committee 'Concluding Observations on Swaziland in Absence of a Report' UN Doc CCPR/C/SWZ/CO/1 (2017), para 44.

[28] Committee on the Elimination of All Forms of Discrimination Against Women 'Concluding Observations on Swaziland' UN Doc CEDAW/C/SWZ/CO/1-2 (2014), para 27.

The country has not implemented capital punishment in many years and there is no evidence that it would do so any time soon. Many recommending States in the 2016 UPR process urged the country to "establish a formal moratorium on the death penalty and ratify the Second Optional Protocol to the International Covenant on Civil and Political Rights, with a view to abolishing the death penalty both in practice and in law".[29] These recommendations were not supported by the government. It noted that although Eswatini does not support the recommendation, the country "does not carry out capital punishment and will not do so in the foreseeable future" and a "factual moratorium on the application of the death penalty will remain in place".[30] The State indicated that no death penalty has been executed since 1983.[31] In its 2017 Concluding Observations on the report of Eswatini, the HRC expressed concern that Eswatini has not set a timeline for ratification of the Second Optional Protocol.[32]

Criminalisation of Torture

Section 57 of the Constitution protects everyone against torture and other forms of cruel, inhumane or degrading treatment or punishment.[33] However, like other countries, Eswatini has come under the spotlight for failing to take legislative steps to eradicate torture. To this end, during the 2016 UPR of Eswatini, recommendations were made for the country to adopt legislation that specifically criminalises torture.[34] Canada recommended that Eswatini takes "necessary steps to prevent torture and other human rights violations by law enforcement and security services in accordance with Swaziland's obligations under the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, including by ensuring impartial investigations of all allegations, prosecuting perpetrators, and implementing human rights training programmes".[35]

This recommendation was accepted by Eswatini, but remains to be implemented. Other recommendations[36] that explicitly asked for the criminalisation of torture in the legislation were noted by Eswatini. Eswatini explained that "the criminal law of Swaziland is broad enough to prosecute and punish perpetrators of torture without creating a new statutory offence. Furthermore, perpetrators may be held liable for damages under our civil law".[37] Generally, the protection from torture and other cruel, inhumane or degrading treatment and punishment remains weak.

In its 2017 Concluding Observations on Eswatini, the HRC expressed concern that section 41 of the Criminal Procedure and Evidence Act and certain provisions of the Public Order Act "leave it to the discretion of the individual police officer to decide whether it is expedient to use force".[38] Appeals were made for the country to address these normative gaps. The Committee also recommended that Eswatini creates an independent body with "a confidential mechanism for

[29] Human Rights Council 'Report of the Working Group on the Universal Periodic Review- Swaziland' UN Doc A/HRC/33/14 (13 July 2016) Rec 109,6 (Portugal). See also Rec 109,2 (Namibia), Rec 109,7 (Mexico), Rec 109,8 (Australia).
[30] Human Rights Council 'Report of the Working Group on the Universal Periodic Review- Swaziland' UN Doc A/HRC/33/14/ Add. 1 para 3, 11.
[31] OHCHR, 'Human Rights Committee Discusses Implementation of Civil and Political Rights in Swaziland' (10 July 2017).
[32] Human Rights Committee 'Concluding Observations on Swaziland in Absence of a Report' UN Doc CCPR/C/SWZ/CO/1 (2017), para 30.
[33] Human Rights Council 'Report of the Working Group on the Universal Periodic Review Swaziland- Addendum' UN Doc A/ HRC/33/14/Add.1 (21 September 2016), para 17.
[34] Human Rights Council 'Report of the Working Group on the Universal Periodic Review' UN Doc A/HRC/33/14 (13 July 2016) Rec 109,45 (Brazil) and Rec 109,46 (Togo).
[35] Human Rights Council 'Report of the Working Group on the Universal Periodic Review- Swaziland' UN Doc A/HRC/33/14 (13 July 2016) Rec 107.34 (Canada).
[36] Recommendations 109.45 and 109.46.
[37] Par. IV "Criminalisation of Torture" A_HRC_33_14_Add.1_AV_Swaziland.
[38] Human Rights Committee 'Concluding Observations on Swaziland in Absence of a Report' UN Doc CCPR/C/SWZ/CO/1 (2017), para 30.

receiving and processing complaints lodged by persons deprived of their liberty".[39] If addressed, these recommendations will help Eswatini take concrete steps to improve its human rights record.

Persons Deprived of Liberty, Prison Conditions and Deaths in Custody

During the 2016 UPR process of Eswatini, recommending States urged the country to "implement measures to improve prison conditions". They also recommended that the country takes "immediate and effective measures to bring conditions at all detention facilities into line with the United Nations Standard Minimum Rules for the Treatment of Prisoners" (UN Rules for the Treatment of Prisoners).[40] Eswatini accepted these recommendations and stated that the country was in the process of creating new correctional facilities and rehabilitating facilities that were dilapidated. Eswatini also stated that offenders are provided with three meals a day and "all correctional facilities have clinics [staffed] by matrons and nutritionists who look into the menu of offenders".[41]

The 2017 Concluding Observations of the Human Rights Committee also expressed concerns about deprivations of liberty, prison conditions and deaths in custody in Eswatini. These recommendations included the need for the country to act to ensure that prison conditions are consistent with the UN Rules for the Treatment of Prisoners,[42] and to investigate and punish perpetrators that caused death in custody.[43] Recommendations relating to child justice are discussed in the section on children below.

The recommendations of the UPR on corporal punishment has had mixed reaction from the Kingdom of Eswatini. It accepted that corporal punishment should not be allowed in school and in relation to children in conflict with the but did not accept it in relation to corporal punishment of children at home. The country noted that while legislation still provides for corporal punishment of offenders, "in practice the courts do not impose corporal punishment as a sentence for offenders".[44] Limited access to prisons by monitoring bodies and civil society remains a concern.

[39] Human Rights Committee 'Concluding Observations on Swaziland in Absence of a Report' UN Doc CCPR/C/SWZ/CO/1 (2017), para 33.
[40] Human Rights Council 'Report of the Working Group on the Universal Periodic Review- Swaziland' UN Doc A/HRC/33/14 (13 July 2016) Rec 109.47 (Angola), Rec 109.48 (Canada).
[41] Human Rights Council 'Report of the Working Group on the Universal Periodic Review Swaziland- Addendum' UN Doc A/HRC/33/14/Add.1 (21 September 2016), para 18, 19.
[42] Human Rights Committee 'Concluding Observations on Swaziland in Absence of a Report' UN Doc CCPR/C/SWZ/CO/1 (2017), para 34, 35.
[43] Human Rights Committee 'Concluding Observations on Swaziland in Absence of a Report' UN Doc CCPR/C/SWZ/CO/1 (2017), para 33.
[44] Human Rights Council 'Report of the Working Group on the Universal Periodic Review Swaziland- Addendum' UN Doc A/HRC/33/14/Add.1 (21 September 2016), para 22-24.

A. ACTIONS TO IMPROVE HUMAN RIGHTS

What follows is an analysis of legislative actions taken by the State in response to concerns raised by human rights mechanisms.

The Suppression of Terrorism (Amendment) Act No. 11 of 2017

The Suppression of Terrorism Act No. 3 of 2008 was cited by various UN human rights monitoring mechanisms as one of the laws that undermine the enjoyment of human rights in Eswatini. Concrete steps needed to be taken to address this challenge. In *Maseko and Others v Prime Minister and Others*,[45] the High Court declared several provisions of the Suppression of Terrorism Act unconstitutional.[46] Subsequently, the Suppression of Terrorism (Amendment) Act No. 11 of 2017 made changes to sections 2, 11, and 28 but not in a way that fully complies with the High Court's decision to strike out these provisions or its reasons to do so. The State has appealed the High Court judgment.

The High Court judgment declared as unconstitutional paragraph 1 of section 2, which included in the definition of a terrorist act "an act or omission which constitutes an offence under this Act or within the scope of a counter-terrorism convention".[47] This section was retained in the Amendment Act. This part of the definition is problematic because it includes conduct which might be criminal under the Act but does not necessarily comply with the internationally accepted definition of a terrorist act. The Suppression of Terrorism Act further included under the definition of a terrorist act an act that "involved prejudice to national security or public safety". This section was held to be vague and overly broad by the High Court. This part of the definition has been removed from the Amendment Act.

An act is excluded from being an act of terrorism if it is committed as part of an advocacy, protest, demonstration, dissent or industrial action and is not intended to result in any harm.[48] That said, the Suppression of Terrorism Act is so loosely worded that it inhibits the right to freedom of expression, association and assembly. For example, where a legitimate protest or demonstration is organised by a designated terrorist group, a person who attends such an event could still potentially be guilty of the offence of giving support to a terrorist group, even though no terrorist act is planned for or at the event, and risk 15 years' imprisonment.[49]

Section 11 of the Suppression of Terrorism Act specifies that it is an offence to knowingly solicit for a terrorist group. Section 11 has accordingly been used to arrest individuals who have supported an organisation without having actual knowledge that the organisation is involved in terrorism. This results in 'guilt by association' which violates the presumption of innocence. The High Court declared sections 11(1)(a) and (b) unconstitutional. They were, however, retained in the Amendment Act. The Amendment Act also made other changes to the definitions which potentially broadens their scope.

Section 28 of the Suppression of Terrorism Act addresses the powers of the Attorney General and the Minister to declare an organisation a 'specified entity' – i.e. an entity that is believed to have participated in the commission of a terrorist act. Of concern is the low threshold that

[45] *Thulani Maseko and Others v Prime Minister of Swaziland and Others* (2180/2009) [2016] SZHC 180.
[46] See further discussion below.
[47] Suppression of Terrorism Act 2008 s 2(j).
[48] Suppression of Terrorism Act 2008 s 2(3)(b), Money Laundering and Financing of Terrorism (Prevention) Act 2011 s 5(2).
[49] Suppression of Terrorism Act 2008 s 11(a), s 20.

the Attorney General and Minister can base their initial decision on when to designate an organisation as terrorist, i.e. "reasonable grounds to believe". Given the serious consequences of such a declaration and the fact that once designated the members of the organisation can be liable to criminal charges, this threshold is too low. No allowance is given for the organisation in question to have an opportunity to make representations before a decision is made. Section 28 was declared unconstitutional by the High Court and the section was since amended to allow a judge to order the Minister to revoke an order designating an organisation a 'specified entity'. Section 28 however still retains other clauses that are problematic. For example, section 28(6)(b) allows the court to hear evidence in the absence of the applicant organisation and its legal representative if hearing the evidence would disclose information that is "prejudicial to national security or endanger the safety of any person". What the section fails to do is provide an alternative, for example permitting the organisation to make a statement prior to the proceedings; to publish the reasons for the exclusion of the applicant organisation from hearing certain evidence; or for someone to be appointed to represent the applicant organisation in court in its absence. Section 28 further allows the High Court hearing the review to accept any evidence that would otherwise be inadmissible.

Section 29(4) states that where there are "reasonable grounds" under section 28 to believe that an entity is engaged in terrorist activity, that entity shall be deemed with effect from the date of the notice to have been declared a specified entity. Since the High Court declared section 28 unconstitutional, it also declared section 29(4) unconstitutional. Section 29(4) has been retained in the Amendment Act.

The Public Order Act No. 12 of 2017

The Public Order Act No. 12 of 2017 replaces the Public Order Act No. 17 of 1963 and has been commended as a positive step towards ensuring the right to freedom of assembly in Eswatini. Under the Public Order Act of 1963, police were given broad powers to prevent, disrupt and close down public gatherings including protests and meetings.[50] The existence of repressive legislation such as the 1963 Act impacted on Eswatini's eligibility under the African Growth and Opportunity Act (AGOA).[51] It meant that Eswatini had to pass a new Public Order Act to re-qualify for AGOA status.[52] The new Act still contains certain restrictions on public gatherings, but it differs from the old legislation in that it does not give police such wide powers to use force and disrupt gatherings.

A public gathering is defined under the new Act as an assembly or procession of 50 or more people in a public place. The Act requires that if one plans to hold a gathering or march to protest a government policy or hand over a petition, which is likely to involve 50 or more people, then notice should be given to the Local Authority of the intended gathering at least 4 days prior to the event. To hold a gathering without at least giving 48 hours' notice is an offence. The Local Authority must consult with the parties. After the consultation, the Local Authority may grant permission for the gathering subject to certain conditions and should then issue a Compliance Certificate. Any condition placed on a gathering or prohibition of a gathering must be necessary to achieve the aims of national security, public safety, public health or morals and be proportionate to avoid any harm. A decision of the Local Authority may be taken on review to the Principal Magistrate in the district where the gathering is to be held.

[50] Public Order Act 1963 Part II s 10, s 11.
[51] African Growth and Opportunity Act 'Swaziland Reforming Laws to Regain AGOA Status' (13 April 2016), https://agoa.info/news/article/6092-swaziland-reforming-laws-to-regain-agoa-status.html.
[52] As above.

Police may only intervene in a gathering if it is in line with the law and only if failure to do so would create an immediate danger to public order or safety. The Act makes it an offence for a participant in a gathering to incite hatred or violence, possess weapons, use threatening language with intent to provoke public disorder, or damage property. It is further an offence to burn or destroy any national insignia or emblem or to incite hatred or contempt "against the cultural or traditional heritage of the Swazi Nation". This latter provision is overly broad.

Civil society has raised concern that police officers may not yet be familiar with the new normative dispensation under the new Public Order Act of 2017. For example, when the Swaziland Economic Justice Network held a march to deliver a petition responding to the National Budget, the march was interrupted and stopped by police.[53] To address this, police need to be trained on the new Public Order Act and the Code of Good Practice on Gatherings issued in terms of section 28 of the Public Order Act.[54]

It appears that the judiciary has also not fully internalised the objectives of the new Public Order Act. For example, on 23 September 2018, the Attorney General's Office took the Swaziland National Association of Teachers (SNAT) to the Industrial Court to interdict a strike demanding a Cost of Living Adjustment. The Industrial Court held that the strike was lawful but could not proceed because the new government post-elections was not yet in place.[55]

The Police Service Act No. 22 of 2018

Section 49(i)(ii) of the Police Service Act No. 22 of 2018 makes it a disciplinary offence to use violence or unnecessary force or to intimidate a prisoner or other person with whom the officer may be in contact with in the execution of duty. Section 10(3) of the Act provides that:

> *"a member of the Police Service may not inflict, instigate or tolerate any act of torture or other cruel, inhuman or degrading treatment or punishment, nor may any member of the Police Service invoke superior orders or exceptional circumstances as a justification for torture or other cruel, inhuman or degrading treatment or punishment".*

Given past concerns around police abuse, these provisions are welcomed. Training for police on the provisions of the law should be prioritised.

The Correctional Services Act No. 13 of 2017

The new Correctional Services Act has important provisions which emphasise the need to treat prisoners with dignity and respect. The Act repeals the Prisons Act No. 40 of 1964. The Act is lean on detail in terms of the required standards for nutrition and conditions in detention and various other provisions are also too cursory to provide sufficient detail to implementing officers in the absence of additional regulations.

[53] Sibusiso Zwane 'Petition Delivered Outside Parly After Police Block March' Times of Swaziland (16/03/2018), http://www.times.co.sz/news/117534-petition-delivered-outside-parly-after-police-block-march.html.
[54] Legal Notice No. 201 of 2017.
[55] Sisho Magagula 'Teachers Strike Stopped by Court' Swazi Observer (24 September 2018), http://new.observer.org.sz/details.php?id=6795.

The Act prohibits Correctional Service Members from instigating, inflicting or tolerating any acts of torture or cruel, inhuman or degrading treatment.[56] The Act also prohibits discrimination and requires that all prisoners be treated equally, irrespective of race, colour, gender, language, religion, political or other opinion, national or social origin, property, birth or any other status.[57] The Act further emphasises that health services must be provided without discrimination.[58]

The Act has extensive provisions on the granting of parole. The Minister can also appoint an independent body for the inspection of Correctional Services facilities.[59] Complaints can be taken to the Commissioner General and thereafter to the Correctional Services Commission.[60]

The provisions around health care for prisoners are adequate and supplements Correctional Services' HIV and AIDS Policy of 2008, which provides for antiretroviral and other treatment for prisoners. The Act further allows for the Commissioner General to release terminally ill offenders on the recommendation of the medical officer.[61] The Act refers to the Mental Disorders Act No. 48 of 1963, particularly in relation to detention at the President's Pleasure.[62] The latter Act was repealed by the Mental Health Order of 1978.

The Swaziland Broadcasting Bill of 2016

Eswatini passed a number of Acts and proposed a Bill which are aimed at providing greater freedom for the media and increasing diverse viewpoints. These are generally positive developments.

In 2013, Eswatini enacted the Swaziland Communications Commission Act No. 10 of 2013. The functions of the Commission relate to supervising and regulating radio and television broadcasting services. The Commission's functions include ensuring "freedom of provision of communications services and further ensur[ing] that those services are not limited, except when strictly necessary" and ensuring "non-discrimination and equality of treatment in all matters under the remit of the Commission".[63] The Commission must further establish minimum quality and security standards for any communications services and "determine issues concerning monopoly and discriminatory practices.[64] The Commission allocates the use of radio frequency spectrum on approval by the Minister.[65]

The Electronic Communications Act No. 9 of 2013 provides a framework for the further development of electronic communications networks and services in Eswatini. The Act does not apply to the content of messages transmitted through an electronic communications network.[66] The Act allows the Commission to immediately amend a licence without notice to the licensee if there is likely to be a risk to national security or the amendment is essential to the public interest.[67] There is however provision for an appeal process. The Act allows the Commission to impose obligations of non-discrimination in relation to interconnection or access.[68]

[56] Correctional Services Act 2017 s 6(2).
[57] Correctional Services Act 2017 s 6(3).
[58] Correctional Services Act 2017 s 63.
[59] Correctional Services Act 2017 s 123.
[60] Correctional Services Act 2017 s 25.
[61] Correctional Services Act 2017 s 75.
[62] Mental Disorders Act 1963 s 72(4).
[63] Swaziland Communications Commission Act 2013 s 6(e) and (h).
[64] Swaziland Communications Commission Act 2013 s 7(o) and (t).
[65] Swaziland Communications Commission Act 2013 s 7(k).
[66] Electronic Communications Act 2013 s 2(2).
[67] Electronic Communications Act 2013 s 12(4).
[68] Electronic Communications Act 2013 s 25.

The Swaziland Broadcasting Bill of 2016 has as its objectives to: [69]

a) "Safeguard, enrich and strengthen the cultural, political, social and economic fabric of Swaziland;
b) Contribute to the development of society, gender equality, nation building and provision of education;
c) Encourage the development of local programming content;
d) Ensure fair competition in the broadcasting sector;
e) Provide for public, commercial and community broadcasting services;
f) Ensure the development of human resources and capacity building within the broadcasting sector; and
g) Promote investment in the broadcasting sector."

The Broadcasting Bill elaborates further on the responsibilities, powers and function of the Swaziland Communications Commission established under the Swaziland Communications Commission Act No. 10 of 2013.[70] Primarily, the Commission is responsible for regulating broadcasting activities in the country and it has powers to issue licenses in a manner that fits with the objects of the Bill. The Broadcasting Bill adds that when issuing a licence, the Commission shall be guided by the need to safeguard the rights of citizens to be informed freely, truthfully and objectively on all matters of public interest, national or international; and ensuring that programming reflects the linguistic and cultural diversity of Swaziland.[71] The Commission is empowered to set acceptable standards for programming, inquire into complaints against a licensee and ensure that broadcasting services are impartial and do not incite crime or racial hatred leading to disorder or offending public feeling.[72] The Commission "shall promote pluralism in the media by giving priority of consideration to applicants who are able to satisfy the Commission that their broadcasting services shall be subject to no editorial control other than an independent editorial control exercised from within the broadcasting of the prospective licensee".[73]

Licensees are required to follow the Code of Conduct, which includes ensuring professionalism and the right of reply to a person whose character, goodwill or reputation has been adversely affected by a broadcast.[74] The Commission may revoke a licence if the licensee failed to comply with the Code of Conduct or "it is in the public interest to do so".[75] What constitutes "public interest" is however not defined in the Act.

Programmes which relate to controversial or political matters, must be broadcast impartially.[76] The licensee must also always ensure respect for human dignity and human rights and contribute to the tolerance of different opinions and beliefs.[77] A licensee must further ensure that its programmes "do not offend against good taste, morality or decency or are likely to encourage or incite crime or lead to disorder, or are repugnant, offensive to public feeling, or broadcast in bad faith".[78] This provision is overly broad and it is hard to delineate what would constitute "good taste" or "decency".

69 Swaziland Broadcasting Bill 2016 s 3.
70 Swaziland Communications Commission Act 2013 s 4.
71 Swaziland Broadcasting Bill 2016 s 4(b) and (e).
72 Swaziland Broadcasting Bill 2016 s 5.
73 Swaziland Broadcasting Bill 2016 s 18(2).
74 Swaziland Broadcasting Bill 2016 s 20.
75 Swaziland Broadcasting Bill 2016 s 21(3).
76 Swaziland Broadcasting Bill 2016 s 26(1)(c).
77 Swaziland Broadcasting Bill 2016 s 27(a) and (b).
78 Swaziland Broadcasting Bill 2016 s 26(1)(a).

The Bill further provides for the establishment of the Swaziland Broadcasting Corporation. It specifically requires that the Corporation shall "put across the various points of view on controversial matters".[79] This is important given the public perception of bias towards the State by the media. The editorial policy of the Corporation requires that the Corporation shall:[80]

a) "Reflect, without bias, a range of opinions, philosophical, religious, cultural, traditional, scientific and artistic trends;
b) Contribute to the development of free and informed opinion;
c) Respect human dignity, human rights and freedoms as enshrined in the Constitution of Eswatini;
d) Advance and further international understanding of the sense of peace and social justice of the public;
e) Contribute to the realisation of equal treatment and gender balance; and
f) Promote moral values and not broadcast programmes which contain, promote or perpetuate hate speech, messages or any prejudices against any person or group of persons."

There is some ambiguity in the above policy. Also noticeable is the failure to refer to the expression of political opinion. Whilst this can perhaps be read into section 36(b), it would be important to mention this explicitly as the public and private media in Eswatini has been reluctant to air political views given the country's history of banning political parties. For example, the Trade Union Congress of Swaziland (TUCOSWA) was banned from making announcements to its constituency on national radio or television or in relation to any other information of public interest.[81] Of concern is that the Bill empowers the Minister to at any time issue a notice directing that the licensee refrains from including specific matter in their programmes.[82] Similar provisions are contained in the Broadcasting Guidelines which was approved by Parliament in 2018.

The Broadcasting Bill provides for the establishment of the Swaziland Broadcasting Corporation Board. The Bill provides that "a person shall not be qualified to be appointed to the Board unless that person is committed to fairness, freedom of expression, openness and accountability".[83]

The Refugees Act No. 15 of 2017

The new Refugees Act defines refugees as persons with a well-founded fear or being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, who are unable to seek the protection of their own country; or persons who are compelled to leave their country due to conflict or war.[84] These definitions correspond with international law. The Act further adds as a refugee "a person belonging to a class of persons determined by the Minister to be a refugee".[85]

The Act is progressive in prohibiting a person who committed a crime against peace, a war crime

[79] Swaziland Broadcasting Bill 2016 s 34(2)(e).
[80] Swaziland Broadcasting Bill 2016 s 36.
[81] Sifiso Nhlabatsi, 'TUCOSWA Wants SBIS, STVA to Give Trade Unions Air Time' The Swazi Observer (1 August 2017).
[82] Swaziland Broadcasting Bill 2016 s 57(3).
[83] Swaziland Broadcasting Bill 2016 s 40(1).
[84] Refugees Act 2017 s 4(1) and (b).
[85] Refugees Act 2017 s 4(c).

or crime against humanity from claiming refugee status.[86] The Act also envisages that a refugee could at some stage acquire Swazi nationality and cease to be a refugee.[87] The Act further also grants refugee status to the dependents of a refugee, "in accordance with principles of family unity" and places a positive obligation on the government to facilitate entry into the country of the family members of the refugee.[88]

The Act provides for refugee settlements and places an obligation on a settlement officer to ensure that women, children and refugees with special needs are protected from abuse, including sexual abuse.[89] A major limitation in the Act is that it does not explicitly provide for the right to work of refugees.

B. Cases

Maseko and Others v Prime Minister of Swaziland and Others [2016] SZHC 180

Over the past decade, political activists have been arrested in Eswatini under charges of contravening the Suppression of Terrorism Act No. 3 of 2008 (STA) and the Sedition and Subversive Activities Act No. 46 of 1938 (Sedition Act). A number of these activists have challenged their arrests on the basis that certain provisions in these laws are unconstitutional.

Background

During 2013 and 2014, several members of the People's United Democratic Movement (PUDEMO) and the Swaziland Youth Congress (SWAYOCO) were arrested, detained, and charged under the Suppression of Terrorism Act (STA) and/or the Sedition Act after engaging in various forms of non-violent political activity. Both these organisations had been designated terrorist organisations in 2008.

a) The first set of arrests, flowing from a planned SWAYOCO rally that was stopped by police on 19 April 2013, resulted in Mfanawenkhosi Mntshali, Derrick Nkambule and Maxwell Dlamini being charged with two counts of violating the Sedition Act.[90]

b) The second set of arrests, relating to the wearing of T-shirts indicating support for PUDEMO on 23 April 2014, saw Mlungisi Makhanya and five others being charged under the Suppression of Terrorism Act. They were granted bail on 5 May 2014.[91]

c) The third set of arrests concerned events that took place on 1 May 2014, when Maxwell Dlamini and Mario Masuku attended the May Day celebrations at the Salesian School sportsgrounds in Manzini. The celebrations were attended by thousands of workers to commemorate the international workers' day. Mario Masuku spoke at the event and Maxwell Dlamini participated in the singing of songs and chanting of slogans. They were both charged with contravening the Suppression of Terrorism Act and the Sedition Act. They were eventually released on bail after spending 454 days in jail.[92]

86 Refugees Act 2017 s 2(a).
87 Refugees Act 2017 s 3(c) and 20(2).
88 Refugees Act s 10.
89 Refugees Act 2017 s 15(3).
90 *Maxwell Dlamini v Director of Public Prosecutions,* Case No. 1526/13 and *Mfanawenkhosi Mntshali and Another v Director of Public Prosecutions,* Case No. 180/13.
91 *Mlungisi Makhanya and Others v King* [2014] SZHC 100.
92 *Maxwell Mancoba Dlamini and Another v Rex* [2014] SZSC 9.

In all three cases, the accused challenged the constitutionality of the provisions under which they were charged.

a) In *Maxwell Dlamini and Others v Prime Minister of Swaziland and Others*, filed under case number 782/14, the applicants sought an order declaring sections 3(1), 4(a) and 4(e) of the Sedition Act inconsistent with various provisions of the Constitution, and accordingly invalid;

b) In *Mario Masuku and Another v Prime Minister of Swaziland and Others*, filed under case number 1703/2014, the applicants sought an order declaring sections of the STA and Sedition Act inconsistent with various provisions of the Constitution, and accordingly invalid; and

c) And in *Mlungisi Makhanya v Prime Minister of Swaziland and Others,* filed under case number 181/2014, the applicant sought an order declaring sections of the STA inconsistent with various provisions of the Constitution, and accordingly invalid.

These cases were consolidated with a case brought by Thulani Maseko on 18 June 2009. In a judgment handed down on 16 September 2016, a majority of the three-judge bench of the High Court upheld the challenges, declaring various provisions of the statutes unconstitutional, and accordingly invalid.[93]

The case was taken on appeal. On 23 October 2017 the case was struck off the roll, with the Supreme Court ordering that it was not to be reinstated without the leave of that Court. In a judgment dated 5 March 2018, the Supreme Court reluctantly agreed to reinstate the appeal.[94]

High Court Judgment

At the hearing in the High Court, there was no contention by the State that the relevant provisions in the Sedition and Subversive Activities Act of 1938 did not infringe the applicants' constitutional rights. Instead, the respondents argued that the rights to freedom of expression and association were not absolute and the restrictions put on the applicants' rights by the Act were legitimate and thus lawful and permissible.[95] The test as laid out by the High Court was whether "the limitations were proportional to the mischief sought to be regulated" and if "there is a rational connection between such limitations and objectives to which such restrictions or limitations relate". The Court explained that the legitimate objectives of such limitations could only be for the purposes of "defence, public safety, public order, public morality or public health, or the other interests enumerated under section 24(3) or 25(3) of the Constitution". Notably, the Court stated that it had "not been told of any mischief" done by the applicants. In its reasoning, the Court found that "the respondents failed to satisfy that the restrictions and limitations imposed on the applicants' freedom of speech or expression are either reasonable or justifiable".[96]

Regarding provisions of the Suppression of Terrorism Act, the High Court found that despite PUDEMO being a specified entity under the Suppression of Terrorism Act, the applicants were arrested purely for belonging to this group and for wearing its t-shirts and chanting its slogans, which interfered with their rights to freedom of association and freedom of expression. It also held that, the government had not provided a legitimate justification for interfering with these rights. The Court said that sections 28 and 29(4) of the Suppression of Terrorism Act could be used to

[93] *Maseko and Others v Prime Minister, Swaziland and Others* [2016] SZHC 180.
[94] *Prime Minister and Others v Maseko and Others* [2018] SZSC 1.
[95] *Maseko and Others v Prime Minister of Swaziland and Others* [2016] SZHC 180, paras 17 and 18.
[96] *Maseko and Others v Prime Minister of Swaziland and Others* [2016] SZHC 180, paras 21 and 22.

target individuals without allowing them to defend themselves and found that "it is against the rules of natural justice or procedural fairness or administrative justice that a person can be condemned before he has been given the opportunity to be heard on the issue under consideration".[97]

In the end, the Court declared sections 3(1), 4(a)(e) and 5 of the Sedition and Subversive Activities Act and paragraph (1) of section 2, paragraph 2(f)(g)(i)(ii)(iii)(i), paragraph (b), section 11(1)(a) and (b), and 11(2), as well as sections (28) and 29(4) of the Suppression of Terrorism Act inconsistent with sections 23, 24 and 25 of the Constitution.[98] Whilst an appeal is pending before the Supreme Court, the provisions of the Suppression of Terrorism Act and Sedition Act which were declared unconstitutional by the High Court, remain intact.

Mbongiseni Shabangu and Others v Elections and Boundaries Commission and Others [2018] SZHC 170

The elections which took place on 21 September 2018 were preceded by a 26-day campaign period. It is in respect of this campaign period that an application for an interim interdict was brought in the High Court by the Swazi Democratic Party (SWADEPA), its General-Secretary (Mr. Shabangu) and an executive member of its Women's League (Ms. Dlamini). After their case was dismissed in the High Court on 20 July 2018, the applicants filed an appeal in the Supreme Court. Their case was summarily dismissed in the Supreme Court without the Court hearing arguments on the appeal.

The application was about the rights to freedom of expression and association during the election campaign period. The applicants sought an interdict to prevent the respondents from interfering with:

- The rights of candidates for election to the House of Assembly to express their political and/or other views or policies;
- The rights of candidates to associate publicly with their chosen political parties; and
- The rights of candidates to receive sponsorship and support from political parties, and the rights of political parties to provide sponsorship and support to their members.

Section 79 of the Constitution provides that the Tinkhundla-based system of government emphasises individual merit as a basis for election to public office. This section has been interpreted by the government and the Elections and Boundaries Commission to exclude political parties from the electoral process.

In contrast, the applicants submitted that the reference to 'individual merit' in section 79 means no more than a requirement that each candidate for election be considered based on what he or she brings to the table. They submitted that the case was necessary to ensure that registered voters will be able to exercise their right to vote knowing all relevant information about the candidates running for public office.

The respondents' case was primarily focused on narrow, technical issues, largely avoiding the important substantive issues.

[97] *Maseko and Others v Prime Minister of Swaziland and Others* [2016] SZHC 180, paras 28, 32, 34 and 36.
[98] As above, para 42.

For example, they argued that the applicants had no right to raise the merits of the case before the Supreme Court, as the case was dismissed on technical grounds in the High Court. It should be noted, however, that the High Court dismissed the entire application. The Supreme Court agreed with the respondents.

The respondents also argued that the High Court was correct in dismissing the application on the basis that the relief sought did not pertain to the first applicant. Mr Shabangu, the first applicant, joined the case both in his individual capacity as a registered voter and as a person who is eligible to stand for elections, and in his representative capacity, on behalf of the members of SWADEPA who are registered voters and/or candidates.

Linked to this, the respondents claimed that the applicants cannot seek relief on behalf of all "registered voters who choose to run as candidates for election", and that the relief sought must pertain to the individual applicants. But section 35 of the Constitution specifically provides that "where a person alleges that any of the foregoing provisions of this Chapter has been, is being, or is likely to be, contravened in relation to that person *or a group of which that person is a member* then, without prejudice to any other action with respect to the same matter which is lawfully available, that person may apply to the High Court for redress."

The respondents also claimed that a similar issue had already been determined by the Supreme Court in the 2009 *Sithole* case.[99] In that case, the Supreme Court held that the Constitution does not prevent a member of a political party from seeking election as an independent candidate, and once elected, joining up with others who think similarly to operate as a unit. What the previous judgment did not address was the nature and extent of permissible political party participation in any candidate's election campaign.

The applicants sought very simple relief which was in line with electoral legislation and did not require anything from government. Both the High Court and the Supreme Court decided not to hear arguments from either side and instead raised matters on its own accord from the bench. These matters were of a procedural nature and avoided dealing with the merits of the case. This runs contrary to jurisprudence in constitutional matters where courts are normally enjoined to hear matters where rights violations are alleged even if the procedural grounds for bringing such matter might be flawed in some respect.

[99] *Sithole and Others v Government of the Kingdom of Swaziland and Others* (Case No. 50/2008) (21 May 2009).

C. What Still Needs to Be Done?

Press Freedom

A study by Media Institute of Southern Africa (MISA-Eswatini) found that there are still thirty-eight (38) laws and practices that infringe on the right to freedom of expression in the country. For example, the Books and Newspapers Act No. 20 of 1963, which requires a person, organisation or company to apply for a license from the Ministry of Information and Technology to publish, is still in force.[100]

The legal and political environment has resulted in a constrained media environment in the country. The common law offence of criminal defamation is still in existence, whilst the offence of contempt of court has been used to suppress freedom of expression. For example, in 2014, Bheki Makhubu, editor in charge of the Nation newspaper spent fifteen (15) months in prison for exposing misconduct in the judiciary.[101] His imprisonment has contributed to self-censorship in the media. In 2015 the Supreme Court ruled that he was wrongfully convicted for contempt of court and released him and his co-accused Thulani Maseko.[102] In that case the Supreme Court noted:

> *"It remains for me to observe that what happened in this case was a travesty of justice. Whatever issues that arose with regard to the need to balance freedom of expression or of the press with the protection of fair hearing and authority of the courts; those issues were not properly handled. The importance of freedom of expression in promoting democracy and good governance cannot be over emphasised. Equally important is the need to strengthen and promote the independence and accountability of the judiciary."*[103]

After the arrests of Thulani Maseko and Bheki Makhubu, the African Commission on Human and Peoples' Rights issued a resolution calling on the State to protect the rights to freedom of expression, association and assembly and to prevent harassment of human rights defenders and media practitioners.[104]

The common law offence of publishing defamatory matter (criminal defamation) has only one recognised defence – that the publication was the truth and for the public benefit.[105] This offence ought to be repealed on the basis that it is a disproportionate limitation of the right to freedom of expression, in that has a chilling effect on expression, there is an existing civil remedy, and because of the severe impact of imprisonment.[106] It is an offence to display an image of the King in a disparaging manner[107] or to offend the dignity of the queen-mother. The latter crime can result in 12 years' imprisonment.[108]

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100 Books and Newspapers Act 1963 s 5.
101 https://www.mediadefence.org/case-study/what-happened-next-bheki-makhubu-swaziland.
102 *Thulani Maseko and Others v Rex* [2015] SZSC 03.
103 *Thulani Maseko and Others v Rex* [2015] SZSC 03, para 14.
104 ACHPR, 'Resolution on Freedom of Expression in the Kingdom of Swaziland' (Resolution 286), Adopted at the 16th Extraordinary Session of the African Commission held from 20-29 July 2014 in Kigali, Rwanda, www.achpr.org/sessions/16th-eo/resolutions/286/.
105 Criminal Procedure and Evidence Code 1938 s 156.
106 See for example the judgments of other courts in the region declaring the offence unconstitutional: *Peta v Minister of Law and Others* [2018] LSHC 3, *Okuta and Another v Attorney General and Others* [2017] eKLR, *Konate v Burkina Faso* [2014] African Court, *Mandahire and Another v Attorney General* [2014] ZWCC 2.
107 Cinematograph Act No. 31 of 1920 s 6.
108 Protection of the Person of the Ndlovukazi Act No. 23 of 1967 s 2.

In December 2017, an independent business newspaper, Swaziland Shopping, was shut down for not following the Books and Newspapers Act.[109] Even local artists and comedians have at times been prevented from expressing themselves when their acts were deemed culturally offensive.

The Proscribed Publications Act No. 17 of 1968 remains in place. The Act allows the Minister, by notice in the gazette, to declare any publication or intended publication to be proscribed "if the publication is prejudicial or potentially prejudicial to the interests of defence, public safety, public order, public morality or public health".[110]

A comprehensive study listing all the laws that violate the rights of freedom of expression and related human rights is highly recommended. The study should complement the MISA research and propose recommendations to address the challenges. The findings should be tabled with the authorities for legislative reform and policy formulation.

Freedom of Expression and Association

In *Sithole and Others v Government of the Kingdom of Swaziland and Others,* the Supreme Court held that "the right to freedom of association contained in section 25(1) of the Constitution necessarily include[s] the right to form and join political parties."[111] This was supposed to be a watershed decision, showing clearly that the new Constitution has overruled the 1973 Proclamation's prohibition of political parties. However, subsequent arrests of activists and the use of the Suppression of Terrorism Act against political parties, created a default assumption that the prohibition of political parties remains in place. For this reason, it would be important for the government to explicitly repeal the 1973 Proclamation, and its 1987 affirmation, and to allow political parties to support candidates during the elections.[112]

The Swazi Administration Act No. 79 of 1950 sets out the duties of chiefs, and empowers them to prevent crime, summons persons to appear before them, and issue orders.[113] The Act creates a number of offences including failure to obey an order of the chief.[114] The Act allows a chief to prohibit "any act or conduct which might cause a riot or disturbance of the peace".[115] This provision has been used to curtail freedom of expression, assembly and association. For example, a 70-year old Khwapheni resident was arrested and charged in a Magistrate's Court for contravening section 13 of the Swazi Administration Act by failing to notify the Prince who oversees the Khwapheni Royal Kraal about an alleged community meeting.[116] The Act ought to be read in line with the Constitution and accordingly a chief may not exercise any of these broadly-framed powers in a manner that does not respect and protect the rights of people, including members of political parties, to engage in constitutionally-protected activities.

Unfortunately recent legislation continues to discourage freedom of opinion, expression and association. The Public Service Act No. 5 of 2018 was assented to in February 2018, but its date of commencement has not yet been proclaimed. The Act contains a number of provisions which unreasonably limit the right to freedom of expression and the right to freedom of association.

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109 Lungelo Nkambule 'Government Closes Down Illegal Tabloid Paper' Swazi Observer (15 December 2017).
110 Proscribed Publications Act 1968 s 3.
111 *Sithole and Others v Government of the Kingdom of Swaziland and Others* (Case No. 50/2008) (21 May 2009), para 12.
112 Proclamation by His Majesty King Sobhuza II, No. 1 of 1973, and King's Proclamation (Amendment) Decree, No. 1 of 1987.
113 Swazi Administration Act 1950 s 8-10.
114 Swazi Administration Act 1950 s 13(2). A similar provision was declared unconstitutional in Ghana for infringing on the right to freedom of movement. *Adjei-Ampofo v Attorney-General and President of the National House of Chiefs* [2003-2004] SCGLR 411.
115 Swazi Administration Act 1950 s 10(2).
116 Eugene Dube 'Khwapheni Resident Arrested for Defying Prince Logcogco' Times of Swaziland (24 March 2014).

Section 8 of the Act limits the ability of public officers to express themselves. The provision is overly broad to the extent that it prohibits a public officer from publishing in any manner "anything which may be reasonably regarded as of a political or administrative nature", and prohibits a public officer from being interviewed on "any matter affecting or relating to public policy, security or strategic interests or resources of Swaziland". The section limits citizens' ability to access government information and hold government accountable. The section further inhibits public officers from becoming whistle-blowers.

Section 49 of the Public Service Act includes under types of misconduct by a public officer "to express any view critical of or contrary to Government policy." Section 51(1) further provides that "a public officer shall not hold office with a political formation or organisation". The Public Officer's Code of Conduct, annexed to the Act, provides that the public officer acts in a politically neutral manner in the execution of his or her duties, whilst sections 51(2) and (3) also prohibit the misuse of office for any purpose. These latter sections are sufficient to curb abuse and there is no need to go beyond this and prevent someone from having a political affiliation outside of their work.

Access to Information

Freedom of expression is entrenched in the Constitution and is inclusive of the freedom to receive ideas and information without interference and the freedom to communicate ideas and information without interference.[117] Thus, although there is no stand-alone right to access to information in the Constitution, it is incorporated within the right to freedom of expression. Some laws, however, potentially hinder the right to access to information.

Section 4 of the Official Secrets Act No. 30 of 1968 prohibits any person who possesses or has been entrusted, "by any person holding office under the Government", with any code, password, sketch, plan, model, article, note, document or information, from communicating it to any unauthorized person, retaining it, failing to take proper care of it or using it "in any manner or for any purpose prejudicial to the safety or interests of the Kingdom of Eswatini".[118] Reference is made to the terms safety or interests of the Kingdom of Eswatini which are very broad. It would be very helpful if the law defined these terms clearly to avoid abuse of the law where the information disclosed does not place the State at risk.

In 2007, the government released a draft Freedom of Information and Protection of Privacy Bill. This Bill received some criticism and has not been passed. A new Access to Information Bill has been mooted.

Section 5 of the Public Service Act of 2018 introduces a Code of Conduct and Public Service Charter.[119] Article 23 of the Public Service Charter provides for some access to information: "The disclosure of official information is subject to the general principle that information should be made available on request, unless compelling reasons exist why it should not. However, specific procedures for dealing with the release of information shall also be laid down by departments. Official information should be released only in accordance with those procedures and by employees authorised to deal with requests for information. In all other circumstances, information is to be used by employees only for official purposes and treated as confidential to the department." These provisions are insufficient to ensure that the public can exercise their right to access to information, and specific legislation is required.

[117] Constitution s 24(2).
[118] Official Secrets Act 1968 s 4.
[119] Second and Third Schedules in the Act.

Extrajudicial Killings

Section 15(4) of the Constitution provides that a person shall not be regarded as having been unlawfully deprived of life if the death results from use of force to such extent that is reasonably justifiable and proportionate in the circumstances of the case – "(a) for the defence of any person from violence or for the defence of property; (b) in order to effect a lawful arrest or to prevent the escape of a person lawfully detained; (c) for the purpose of suppressing a riot, insurrection or mutiny; or (d) in order to prevent the commission by that person of a serious criminal offence". These provisions are concerning because they are overly broad and they allow impunity for extra-judicial killings.

Corporal Punishment and Conditions in Prisons

The provisions allowing corporal punishment in the Criminal Procedure and Evidence Act No. 67 of 1938 should be repealed. Section 306 of the Act provides for the sentence of whipping against a male person over the age of 18 years. Section 307 of the Act allows "moderate correction of whipping not exceeding 15 cuts with a light cane" where the male is younger than 18 years of age. Section 308 of the Act provides that whipping is not an appropriate sentence in the case of a woman or in the case of a man over the age of 40 years.

The Criminal Procedure and Evidence Act No. 67 of 1938 contains provisions which are not uniformly applied in prisons. For example, section 93 of the Act provides that "the friends and legal advisers of an accused person shall have access to him" in prison. The Act further contains provisions which are contrary to international human rights standards. Section 165(3) of the Criminal Procedure and Evidence Act No. 67 of 1938 still allows for the detention of a person at "his Majesty's Pleasure" where an accused person raised the insanity defence during trial and was ordered by the court to be kept in custody as a "criminal lunatic". [120]

The Correctional Services Act No. 13 of 2017 ought to be supplemented to ensure that nutrition and detention standards comply with regional and international human rights standards. The Act has not properly integrated the provisions around children in conflict with the law, which are in the Children's Protection and Welfare Act No. 6 of 2012. The Act further classifies classes of offenders in a vague and arbitrary manner, including referring to 'ethnic offenders', 'drug offenders' and 'aged offenders'.[121]

[120] See also Correctional Services Act 2017 s 72(4).
[121] Correctional Services Act 2017 s 93.

5.2 Economic, Social and Cultural Rights – Recommendations from UN Human Rights Mechanisms

This section assesses how Eswatini laws governing economic, social and cultural rights address recommendations issued by the three UN human rights monitoring mechanisms discussed. The right to education is discussed under the section relating to children. Many recommendations highlighted the need to ensure these services reach urban and rural communities on an equal basis.[122]

Right to Health

The right to health, particularly access to treatment and non-discrimination for persons living with HIV, was raised as major concern in recommendations of UN human rights monitoring mechanisms. Some of the recommendations stemming from the 2016 UPR review process focused on the prevalence of HIV in the country and highlighted the need to strengthen efforts to reduce transmission and future infections through response strategies including prevention and treatment programmes.[123] Ghana urged Eswatini to "take steps to address discrimination against persons living with HIV".[124] In its 2017 Concluding Observations, the HRC recommended that Eswatini intensifies efforts to combat the discrimination and stigmatisation of persons living with HIV, including amending its domestic legislation.[125] The CEDAW Committee's Concluding Observations called on Eswatini to continue providing free antiretroviral treatment and increase preventive strategies with a particular focus of ensuring that everyone has access to HIV treatment, especially pregnant mothers.[126]

Regarding children, the Committee on the Rights of the Child in 2006 raised concerns around access to clean water, sanitation facilities, and insufficient child nutrition.[127]

Rights of Persons with Disabilities

The challenges affecting the enjoyment of human rights by persons with albinism were raised in the recommendations issued by the UN human rights monitoring mechanisms. During the UPR process, many recommending States urged Eswatini to take measures to protect persons with albinism, particularly women and children, from being killed and murdered for ritual purposes.[128] As part of these measures, the country was asked to consider establishing a national registry of persons with albinism and to investigate and effectively prosecute perpetrators who commit crimes against them.[129] The 2017 Concluding Observations of the HRC on Eswatini recommended that the country takes "steps to ensure that persons with albinism are protected, in law and in practice, against all forms of violence and discrimination".[130] The 2014 CEDAW Committee Concluding Observations made similar recommendations.[131]

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122 Human Rights Council 'Report of the Working Group on the Universal Periodic Review- Swaziland' UN Doc A/HRC/33/14 (13 July 2016) Rec 107,63 (Malaysia), Rec 107,64 (Spain).

123 Human Rights Council 'Report of the Working Group on the Universal Periodic Review- Swaziland' UN Doc A/HRC/33/14 (13 July 2016) Rec 107,66 (Angola), Rec 107,68 (Libya), Rec 107,69 (Turkey), Rec 107,70 (Uganda), Rec 107,72 (Ukraine), Rec 107,73 (Ethiopia).

124 This recommendation was accepted by Eswatini. See generally, Human Rights Council 'Report of the Working Group on the Universal Periodic Review- Swaziland' UN Doc A/HRC/33/14 (13 July 2016) Rec 107,67 (Ghana). See also UPR Info '2RP: Responses to Recommendations and Voluntary Pledges- Swaziland', https://www.upr-info.org/sites/default/files/document/swaziland/session_25_-_avril_2016/recommendations_and_pledges_swaziland_2016.pdf, pg. 5.

125 Human Rights Committee 'Concluding Observations on Swaziland in Absence of a Report' UN Doc CCPR/C/SWZ/CO/1 (2017), para 20.

126 Committee on the Elimination of All Forms of Discrimination Against Women 'Concluding Observations on Swaziland' UN Doc CEDAW/C/SWZ/CO/1-2 (2014), para 35.

127 Committee on the Rights of the Child, Concluding Observations: Swaziland, CRC/C/SWZ/CO/1, 16 October 2006, para 51-52.

128 Human Rights Council 'Report of the Working Group on the Universal Periodic Review- Swaziland' UN Doc A/HRC/33/14 (13 July 2016) Rec 109.40 (Uruguay), Rec 109.41 (Argentina), Rec 109.42 (Senegal), Rec 109.43 (Sierra Leone), Rec 109.44 (Slovenia).

129 Human Rights Council 'Report of the Working Group on the Universal Periodic Review- Swaziland' UN Doc A/HRC/33/14 (13 July 2016) Rec 109.40 (Uruguay), Rec 109.43 (Sierra Leone), Rec 109.44 (Slovenia).

130 Human Rights Committee 'Concluding Observations on Swaziland in Absence of a Report' UN Doc CCPR/C/SWZ/CO/1 (2017), para 22.

131 Committee on the Elimination of All Forms of Discrimination Against Women 'Concluding Observations on Swaziland' UN Doc CEDAW/C/SWZ/CO/1-2 (2014), para 23.

A. Actions to Improve Human Rights

The recommendations made by the UN human rights monitoring mechanisms studied were based on practices that caused real or potential violations of human rights in Eswatini. Many of the recommendations urged legal reforms.

The Persons with Disabilities Act No. 16 of 2018

In July 2015, the country published a National Disability Plan of Action for 2015-2020, following the adoption of the National Policy on Disability in 2013. The Plan of Action is in line with the Convention on the Rights of Persons with Disabilities (CRPD), which the country ratified in 2012.

The new Persons with Disabilities Act became operational on 1 August 2018. The Act includes important new definitions which show a shift in thinking around persons with disabilities,[132] including "universal design"[133], "independent living"[134], "reasonable accommodation"[135], and "rehabilitation"[136]. The Act is not a full domestication of the CRPD, and fails to articulate legal capacity rights. The Act does not mention the CRPD. The Act's provisions recognising rights to healthcare[137] and education[138] on an equal basis with others are an important development.

Consumer Credit Act No. 7 of 2016

The Consumer Credit Act has as its objective to regulate consumer credit and protect consumer credit rights. The Act makes it an offence to run a credit provision business without a licence.[139] The Act regulates the costs of credit and prohibits certain charges.[140] Once a credit agreement is determined to be reckless (including where the consumer did not appreciate the risks and obligations of the agreement, and where the agreement would make the consumer over-indebted), a court may suspend or set aside the credit agreement.[141] Consumers may also apply to debt counsellors to be declared over-indebted, and arrange for a plan of debt re-arrangement.[142] The Act prohibits a credit provider from harassing a person at home or work to apply for credit or pay a credit agreement.[143]

[132] The Act defines "persons with disabilities" as "those who have long term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others."
[133] "Universal design" refers to the "design of products, environments, programmes and services to be usable by all people, to the greatest extent possible, without the need for adaptation or specialised design and shall include assistive devices for particular groups of persons with disabilities where this is needed."
[134] "Independent living" refers to "a philosophy which postulate that persons with disabilities have the right to control their lives by making informed choices that enable them to actively participate in all aspects of society."
[135] "Reasonable accommodation" refers of "necessary and appropriate modifications and adjustments not imposing a disproportionate or undue burden, where needed in a particular case, to ensure to persons with disabilities the enjoyment or exercise of the quality of life and wellbeing on an equal basis with persons without disabilities."
[136] "Rehabilitation" refers to "a process aimed at enabling persons with disabilities to attain and maintain their full physical, mental, social and vocational ability and full inclusion and participation in all aspects of life."
[137] Persons with Disabilities Act 2018 s 33.
[138] Persons with Disabilities Act 2018 s 34.
[139] Consumer Credit Act 2016 s 5.
[140] Consumer Credit Act 2016 s 38-44.
[141] Consumer Credit Act 2016 s 81-91.
[142] Consumer Credit Act 2016 s 92-95.
[143] Consumer Credit Act 2016 s 105.

B. Cases

Whilst Eswatini acceded to the ICESCR at the same time as acceding to the ICCPR, the Bill of Rights focuses on political and civil rights, with economic and social issues contained in the section pertaining to children's rights and in the Directive Principles for State Policy. In the past this made it difficult to litigate on socio-economic rights. However, recently, cases have been brought to the courts with some positive outcomes. These cases are discussed under the section dealing with women's rights.

C. What Still Needs to Be Done?

Some of the steps needed to promote socio-economic and cultural rights, in particular the rights to health and access to land, are listed below.

Right to Health

The government seeks to attain Universal Health Coverage – where every person will have access to equitable, affordable and quality health care, irrespective of age, gender, and socio-economic status.[144] The World Health Organisation, in its assessment of Eswatini's ability to achieve Universal Health Coverage, noted important areas to improve, including: declining national immunisation coverage; an inadequate workforce and retention of skilled staff; urban bias in provision of services; gaps in the implementation of the Essential Health Care Package; insufficient government spending on health, and weak health financing monitoring.[145] The national health budget for the 2019/2020 financial year, is estimated to be E2.2bn, which fails to meet the 15% budget allocation threshold for health as required by the Abuja Declaration on HIV, Tuberculosis and Other Related Infectious Diseases.[146]

Frequent medicine shortages are reported. For example, in October 2017, the Ministry of Health's Chief Pharmacist noted distribution challenges which resulted in a shortage of medicines in hospitals including antiretroviral treatment to prevent mother-to-child transmission of HIV. Medicine shortages have reportedly been due to a range of factors, including constraints in the health budget, failure to pay suppliers, breakdown in communication between health facilities and the Central Medical Stores.[147]

Eswatini still has the highest HIV prevalence in the world.[148] HIV prevalence is estimated at 27.4% of the adult population.[149] It is estimated that 85% of people living with HIV are on antiretroviral treatment.[150] Although increased access to publicly funded antiretroviral treatment helped, the stigma attached to the HIV pandemic remains high and serves as a barrier to HIV treatment and testing. Knowledge about HIV prevention among young people also remains low.[151] Moreover, the widespread effects of HIV need to be addressed with adequate budgetary allocations to assist those affected.

[144] Budget Speech, 2019, presented to parliament by the Minister of Finance on 27 February 2019, pg. 25.
[145] World Health Organisation 'Swaziland: Universal Health Coverage - Leaving No One Behind in the Kingdom of Eswatini' (13 February 2019), https://allafrica.com/stories/201902130537.html.
[146] Budget Speech, 2019, presented to parliament by the Minister of Finance on 27 February 2019, pg. 25. Abuja Declaration on HIV/AIDS, Tuberculosis and Other Related Infectious Diseases, adopted at African Summit on HIV/AIDS, Tuberculosis and Other Related Infectious Diseases, Abuja, Nigeria, 24-27 April 2001, OAU/SPS/ABUJA/3, www.un.org/ga/aids/pdf/abuja_declaration.pdf.
[147] Reported in Sunday Observer (22 October 2017) and referred to in 'Shortage of HIV Drugs for Babies' Swazi Media Commentary (24 October 2017), https://swazimedia.blogspot.com/2017/10/shortage-of-hiv-drugs-for-babies.html.
[148] https://www.worldatlas.com/articles/countries-with-the-highest-rates-of-hiv-aids.html.
[149] UNAIDS Country Factsheets: Eswatini, 2017. Men aged 15-49 years have an estimated HIV prevalence rate of 19,3%, whilst women are estimated to have a prevalence rate of 35,%.
[150] UNAIDS Country Factsheets: Eswatini, 2017.
[151] UNAIDS Country Factsheets: Eswatini, 2017. Knowledge about HIV prevention among young people aged 15-24 is estimated at 49,53%, based on MICS data of 2014.

The country has experienced a growing number of cases of cervical cancer and other ailments linked to the high rates of HIV prevalence.[152] The country's National Health Policy noted that cervical cancer accounts for 43.1% of all cancer among women.[153] However, treatment including chemotherapy and radiotherapy are not available, and hysterectomies for cervical cancer can only be performed in a handful of public hospitals.[154] This reiterates the need to make treatment available in private and public hospitals.[155]

The provision of mental health care services are of particular concern. The Persons with Disabilities Act No. 16 of 2018 does not appear to repeal the Mental Health Order No. 20 of 1978, which defines a "mental illness" as "any disorder or disability of the mind, and includes any mental disease, any arrested or incomplete development of the mind, and any psychopathic disorder" and "mentally ill person" as "a person who by reasons of some mental illness is incapable of managing himself or his affairs, or who requires care, supervision and control for his own protection or for the protection of others".

The Mental Health Order has positive provisions which are not implemented – the Order allows for Board visits to inspect institutions,[156] and prohibits any staff member in an institution from ill-treating or neglecting patients.[157] Problematically, the Mental Health Order does not allow for the institution of civil proceedings against any person unless it is proved that the person acted in bad faith or without reasonable care, and further requires any action to be launched within 6 months from the date of the action complained of, or from the date of release from the institution.[158] All mental health laws should be reviewed to ensure that they are in line with the principles and provisions of the Convention on the Rights of Persons with Disabilities.

Land Rights

The land in Eswatini is divided into two categories: Swazi Nation land and land which is owned by freehold or concession, including tenure farms and commercial land. Swazi Nation land is further divided into land under customary tenure and land which is leased by private companies controlled by the royal family.[159]

In terms of the 1973 Proclamation by His Majesty King Sobhuza II,[160] "all land and rights in and to land previously vested in the government shall now vest in the King".[161] In terms of the Vesting of Land in the King Order No. 45 of 1973, the government retained the authority to lease land vesting in the King, but the government could not sell or exchange land vesting in the King without written authority from the King, unless such land was located in urban areas and the sale was

[152] James Howlett 'Swaziland to Use IAEA Recommendations to Address its Growing Cancer Burden', International Atomic Energy Agency (2017) https://www.iaea.org/newscenter/news/swaziland-to-use-iaea-recommendations-to-address-its-growing-cancer-burden.
[153] Kingdom of Eswatini, Ministry of Health and Social Welfare, 'Swaziland National Health Policy' pg. 8.
[154] Howlett J 'Swaziland to Use IAEA Recommendations to Address its Growing Cancer Burden', International Atomic Energy Agency (2017) https://www.iaea.org/newscenter/news/swaziland-to-use-iaea-recommendations-to-address-its-growing-cancer-burden. See also Malambo N 'It Would have been Better if I had Never Known: Why Swazi Women Avoid Cancer Screening' International Development Research Centre (2017) https://www.idrc.ca/en/resources/perspectives/it-would-have-been-better-if-i-had-never-known-why-swazi-women-avoid-cancer.
[155] Southern Africa Litigation Centre 'Tackling Cervical Cancer Services for Women in Southern Africa' (October 2012), www.southernafricalitigationcenre.org/2012/11/24/salc-research-report-tackling-cervical-cancer-improving-access-to-cervical-cancer-services-in-southern-africa/.
[156] Mental Health Order 1978 s 9.
[157] Mental Health Order 1978 s 16.
[158] Mental Health Order 1978 s 21.
[159] Vandome C et al 'Swaziland: Southern Africa's Forgotten Crisis' Chatham House (2013), pg. 23.
[160] Extraordinary Government Gazette, 17 April 1973.
[161] King's Proclamation (12 April 1973), decree 6(a).

linked to development of the land.[162] The new Constitution continued this arrangement. Section 211 of the Constitution provides:

a) "From the date of the commencement of this Constitution, all land (including any existing concession) in Swaziland, save privately held title-deed land, shall continue to vest in iNgwenyama in trust for the Swazi Nation as it vested on the 12th April 1973.

b) Save as may be required by the exigencies of any particular situation, a citizen of Swaziland, without regard to gender, shall have equal access to the land for normal domestic purposes.

c) A person shall not be deprived of land without the due process of the law and where a person is deprived, that person shall be entitled to prompt and adequate compensation for any improvement on that land or loss consequent upon that deprivation unless otherwise provided by law.

d) Subject to subsection (5), all agreements the effect of which is to vest ownership in land in Swaziland in a non-citizen or a company the majority of whose share-holders are not citizens shall be of no force and effect unless that agreement was made prior to the commencement of this Constitution.

e) A provision of this chapter may not be used to undermine or frustrate an existing or new legitimate business undertaking of which land is a significant factor or based."

Despite section 211(2) of the Constitution emphasising gender equality, Swazi law and custom limits the right to land for cultivation and residence to the male head of a household. The land is allocated to Swazi people through local chiefs and is based on a patronage system.

Further, despite the requirements in section 211(3) of the Constitution requiring due process and compensation, there continues to be evictions without compensation and alternative accommodation being provided. In a recent development, sixty-one (61) people (including children) were forcibly evicted from their homes at a farming area in Embatjeni to give way to a privately owned development.[163] The settlements in which the families lived for fifty-seven (57) years were demolished in the presence of representatives of the company that allegedly owns the property, the Sheriff of the High Court of Eswatini and armed police officers.164 Reportedly, the people affected were not given adequate notice before the eviction took place and they were not provided with alternative housing.[165]

Lack of transparency in the allocation of title deed land and concessions have meant that communities who lived on the land for many years believing that it is Swazi Nation land, can be evicted if such land is subsequently allocated through title deed to others. Many of the large-scale evictions that have taken place are accordingly at the instance of agricultural and other companies.[166]

The Farm Dwellers Control Act No. 12 of 1982 makes provision for when the Tribunal may order the

[162] Vesting of Land in the King Order No. 45 of 1973, s 5.

[163] See statement issued by Amnesty International 'Swaziland: housing demolitions leave dozens homeless', published 10 April 2018, available at https://www.amnesty.org/en/latest/news/2018/04/swaziland-housing-demolitions-leave-dozens-homeless/, (accessed 26 April 2018).

[164] Statement by Amnesty International Swaziland, 'Urgent Action: Dozens left homeless after forced eviction', published on12 April 2018, available at https://www.amnesty.org/download/Documents/AFR5582082018ENGLISH.pdf, (accessed 26 April 2018).

[165] As above.

[166] The nature and impact of such recent evictions in Malkerns and Nokwane are detailed in a recent report by Amnesty International entitled '"They Don't See Us as People": Security of Tenure and Forced Evictions in Eswatini' (August 2018).

recovery of possession of land occupied by a farm dweller.167 The Tribunal is not empowered to make such order without reasonable accommodation or compensation for the farm dweller.168 The Act further provides that a person may not be evicted between September of one year and May of the next year, to ensure that crops are not lost.169 Subsistence farmers who live on title deed land are only protected under the Farm Dwellers Act if they have a formal agreement with the owner of the land.

The Vagrancy Act No. 39 of 1963 has further been used against people who are homeless. The Act defines a vagrant as a person who:

a) "Having neither lawful employment nor lawful means of subsistence which provide him regularly with the necessities for his maintenance; or
b) Having no fixed abode and not giving a satisfactory account of himself; or
c) Wandering abroad and placing himself in a public place, to beg or gather alms, or procuring or encouraging a child or children to do so; or
d) Living or lodging in a place of area which the Minister has declared by notice in the Gazette to be unfit for living in."

The Act allows the police to arrest without a warrant any person who appears to be a vagrant.[170] The court can then order such person to be detained in a place of detention or to leave the area, leave the country, or order the person to return home.[171] The Manzini, Matsapa and Mbabane prisons have been declared places of detention under the Act.[172] The Act continues to be enforced and has led to the detention of homeless persons in prison, despite not having committed a criminal offence.[173]

167 Farm Dwellers Control Act s 10(1).
168 Farm Dwellers Control Act s 10(1).
169 Farm Dwellers Control Act s 10(2).
170 Vagrancy Act 1963 s 3.
171 Vagrancy Act 1963 s 4.
172 Declaration of Places of Detention, 6 October 1967.
173 Sibusiso Shange 'Vagrancy Act Outdated – Lawyer' Times of Swaziland (21 January 2019), http://www.times.co.sz/news/121960-vagrancy-act-outdated-%E2%80%93-lawyer.html.

5.3 Women and LGBTI Rights - Recommendations from UN Human Rights Mechanisms

The protection of women's human rights and the rights of lesbian, gay, bi-sexual, transgender and intersex (LGBTI) persons were also cited as concerns by UN human rights mechanisms. Some of the areas of greatest concern include violence against women, women's sexual reproductive health and rights, and access to education, employment and political participation.

Many monitoring bodies highlighted gaps in the implementation of strategies and legislation consistent with obligations under CEDAW. Some recommending States asked Eswatini to amend domestic laws and usher in pending bills to align national laws with CEDAW. They also recommended that Eswatini empowers women and develops strategies to prevent discrimination against women.[174] Moreover, during the UPR and the CEDAW review processes, many recommendations were made for Eswatini to accede to the Optional Protocol to CEDAW,[175] which the country accepted.[176] The CEDAW Committee expressed concern that aspects of both customary and statutory law were not in line with CEDAW and called upon Eswatini "to establish a law review commission, which should conduct a gender analysis of all laws in the State party with a view to harmonising them with the Convention".[177]

Discrimination against Women

Other issues raised in the recommendations of the human rights monitoring mechanisms were related to women's access to education, property and employment opportunities, and inequality between men and women. The UPR highlighted that inequalities between men and women are perpetuated due to certain customary norms and practices prevalent in the society.[178] The UPR process culminated with recommendations for Eswatini to review domestic laws and customary norms causing such inequalities. Emphasis was placed on the need for the country to review laws on marriage, inheritance and property rights and to combat discriminatory customary practices.[179]

[174] Human Rights Council 'Report of the Working Group on the Universal Periodic Review- Swaziland' UN Doc A/HRC/33/14 (13 July 2016) Rec 109, 30 (France), Rec 109,49 (Latvia), Rec 107,21 (Mexico), Rec 107,23 (Pakistan), Rec 107,24 (Senegal), Rec 107,24 (Panama), Rec 107,26 (Uganda), Rec 107,27 (Honduras), Rec 107,28 (Indonesia), Rec 107,29 (Uganda), Rec 107,30 (United Kingdom of Great Britain and Northern Ireland), Rec 107,31 (Ukraine).

[175] Committee on the Elimination of All Forms of Discrimination Against Women 'Concluding Observations on Swaziland' UN Doc CEDAW/C/SWZ/CO/1-2 (2014), para 11.

[176] Human Rights Council 'Report of the Working Group on the Universal Periodic Review- Swaziland' UN Doc A/HRC/33/14 (13 July 2016) Rec 109,9 (Turkey), Rec 109,10 (Togo), Rec 109,11 (Philippines), Rec 109,12 (South Africa).

[177] Committee on the Elimination of All Forms of Discrimination Against Women 'Concluding Observations on Swaziland' UN Doc CEDAW/C/SWZ/CO/1-2 (2014), para 10, 11.

[178] Human Rights Committee 'Concluding Observations on Swaziland in Absence of a Report' UN Doc CCPR/C/SWZ/CO/1 (2017), para 24.

[179] Eswatini was also urged to ensure proper administration of estates, and increase awareness-raising measures in rural areas, including among men and traditional leaders. See Human Rights Committee 'Concluding Observations on Swaziland in Absence of a Report' UN Doc CCPR/C/SWZ/CO/1 (2017), para 25.

Specifically, during the UPR process, Botswana recommended the alignment of national laws in accordance with the principles outlined in CEDAW to address women's rights, including laws relating to land acquisition, equality and citizenship of children.[180] The CEDAW Committee categorically called for removal of the 'doctrine of marital power' which takes away married women's legal capacity to administer and own property and prevents them from suing without consent of the husband.[181]

The Committee on the Rights of the Child in 2006 recommended that Eswatini abolishes "the prohibition of land ownership by women, particularly widowed mothers and orphans".[182] The CEDAW Committee also urged the State to eliminate all cultural barriers that restrict women's access to land, especially in rural areas.[183]

The CEDAW Committee noted that Eswatini has amended the Deeds Registry Act No. 37 of 1968 in 2012 in line with the ruling of the Supreme Court in *Attorney General v Aphane.*[184] It recommended that the country widely disseminates the amendment.[185]

The CEDAW Committee called upon Eswatini to "pay special attention to the needs of older women, women with disabilities and widows to ensure that they enjoy equal access to health care, training, employment and other rights".[186]

Cultural Practices

The Kingdom of Eswatini is widely known for its rich customs and traditions. The country has a dual legal system where common law operates alongside customary norms to regulate the daily lives of the people. Some customs, however, negate women's rights, such as those which limit women's ability to own land or inherit from their relatives. During the 2016 UPR process, Haiti urged Eswatini to "take … measures to put an end to cultural practices against children with disabilities, women, and all persons living with HIV".[187]

CEDAW in its Concluding Observations raised concerns about "the persistence of adverse cultural practices and traditions and patriarchal attitudes and deep-rooted stereotypes regarding the roles and responsibilities of women and men in the family and in society, especially those portraying women as caregivers".[188] The CEDAW Committee raised specific concerns around the practices of child marriages, abduction of girls and polygamy. The Committee urged Eswatini to take legal measures to prohibit and eliminate child and/or forced marriage and abolish polygamy.[189]

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[180] Human Rights Council 'Report of the Working Group on the Universal Periodic Review- Swaziland' UN Doc A/HRC/33/14 (13 July 2016) Rec 109,31 (Botswana).
[181] Committee on the Elimination of All Forms of Discrimination Against Women 'Concluding Observations on Swaziland' UN Doc CEDAW/C/SWZ/CO/1-2 (2014), para 40.
[182] Committee on the Rights of the Child, Concluding Observations: Swaziland, CRC/C/SWZ/CO/1, 16 October 2006, para 58.
[183] Committee on the Elimination of All Forms of Discrimination Against Women 'Concluding Observations on Swaziland' UN Doc CEDAW/C/SWZ/CO/1-2 (2014), para 37.
[184] *Attorney General v Doo Aphane* [2010] SZSC 32.
[185] Amendment Act No. 2 of 2012. Committee on the Elimination of All Forms of Discrimination Against Women 'Concluding Observations on Swaziland' UN Doc CEDAW/C/SWZ/CO/1-2 (2014), para 8, 9.
[186] Committee on the Elimination of All Forms of Discrimination Against Women 'Concluding Observations on Swaziland' UN Doc CEDAW/C/SWZ/CO/1-2 (2014), para 39.
[187] Human Rights Council 'Report of the Working Group on the Universal Periodic Review- Swaziland' UN Doc A/HRC/33/14 (13 July 2016) Rec 109.29 (Haiti).
[188] Committee on the Elimination of All Forms of Discrimination Against Women 'Concluding Observations on Swaziland' UN Doc CEDAW/C/SWZ/CO/1-2 (2014), para 18.
[189] Committee on the Elimination of All Forms of Discrimination Against Women 'Concluding Observations on Swaziland' UN Doc CEDAW/C/SWZ/CO/1-2 (2014), para 19.

Sexual Violence and Domestic Violence

Many States that participated in the UPR process of Eswatini recommended that the country should act to counter violence, and particularly to address the problem of sexual violence committed against women and children. In concrete terms, recommendations were made for Eswatini to pass into law the Sexual Offences and Domestic Violence Bill (SODV Bill) that had been pending for a long time. It was recently passed into law in July 2018.[190]

The CEDAW Committee emphasised that to address domestic violence, the SODV Bill should prohibit marital rape and sexual harassment.[191] It also encouraged the country to establish a national coordination mechanism against gender-based violence.[192]

The HRC called upon Eswatini to amend and/or adopt legislation to address domestic and sexual violence; train police officers, public prosecutors and members of the judiciary on domestic and sexual violence and techniques for evidence gathering in cases involving domestic violence and abuse. The HRC also requested that the country implements awareness raising programmes and campaigns on the impact of domestic violence and the options available to victims: encourage reporting and investigating of domestic violence cases; and prosecute offenders and punish them appropriately. A call was made for the country to provide support services and remedies for victims, including the provision of psychological services, accommodation or shelter for them.[193]

Discrimination against LGBTI Persons

Discrimination and violence based on sexual orientation and gender identity was also noted. During the UPR process, Slovenia made an appeal to Eswatini to decriminalise same-sex relations. The appeal was rejected by Eswatini.[194] The HRC requested that the country amends its laws to expressly prohibit discrimination based on sexual orientation and gender identity, and to make efforts to address harmful stereotypes towards LGBTI persons. The Committee also urged the country to train judges, police officers, prosecutors and other relevant officers to equip them with skills needed to identify discrimination, implement laws that protect members of the LGBTI community and ensure that violent crimes committed against them are considered hate crimes, and investigated and punished appropriately. Calls were also made for Eswatini to criminalise male rape and to repeal the crime of sodomy.[195]

[190] Human Rights Council 'Report of the Working Group on the Universal Periodic Review- Swaziland' UN Doc A/HRC/33/14 (13 July 2016) Rec 109,49 (Latvia), Rec 109,50 (Algeria), Rec 107,32 (Cote d'Ivoire), Rec 107,35 (Egypt), Rec 107,36 (Germany), Rec 107,37 (Panama), Rec 107,38 (Norway), Rec 107,39 (Togo), Rec 107,40 (United States of America), Rec 107,41 (Namibia), Rec 107,42 (Botswana), Rec 107,43 (Turkey), Rec 107,44 (Italy), Rec 107,45 (Uruguay) and Rec 107,46 (Brazil).

[191] Committee on the Elimination of All Forms of Discrimination Against Women 'Concluding Observations on Swaziland' UN Doc CEDAW/C/SWZ/CO/1-2 (2014), para 21.

[192] Committee on the Elimination of All Forms of Discrimination Against Women 'Concluding Observations on Swaziland' UN Doc CEDAW/C/SWZ/CO/1-2 (2014), para 21.

[193] Human Rights Committee 'Concluding Observations on Swaziland in Absence of a Report' UN Doc CCPR/C/SWZ/CO/1 (2017), para 27.

[194] Human Rights Council 'Report of the Working Group on the Universal Periodic Review- Swaziland' UN Doc A/HRC/33/14 (13 July 2016) Rec 110,13; UPR Info '2RP: Responses to Recommendations and Voluntary Pledges- Swaziland' https://www.upr-info.org/sites/default/files/document/swaziland/session_25_-_avril_2016/recommendations_and_pledges_swaziland_2016.pdf, pg. 13.

[195] Human Rights Committee 'Concluding Observations on Swaziland in Absence of a Report' UN Doc CCPR/C/SWZ/CO/1 (2017), para 19.

Reproductive Health

The protection of women's reproductive health and rights also featured in the recommendations issued by the human rights mechanisms under examination. During the UPR, Egypt urged Eswatini to make efforts to reduce the rate of maternal and infant mortality.[196] This subject was raised by the HRC, and linked the high rate of maternal mortality to unsafe abortions.[197] Some of the concerns raised by the HRC included the strict requirements in the law, doctors' refusal to perform abortions on moral grounds and the difficulties of obtaining court orders allowing doctors to perform safe abortion procedures.[198] The CEDAW Committee, also expressed these concerns and urged the Kingdom of Eswatini to take steps to reduce the incidence of maternal mortality through providing safe abortion and post-abortion care services and other services needed.[199]

The HRC was also concerned about the high rates of teenage pregnancy in the country. It recommended that Eswatini resolves these problems by providing options for safe and accessible abortions, ensuring that everyone has access to reproductive health services, especially in rural areas where such services are hardly available, and improving access to contraceptives.[200]

The Committee on the Rights of the Child in 2006 highlighted the need to "undertake a comprehensive study to assess the nature and extent of adolescent health problems, and with the participation of adolescents, use it as a basis to formulate adolescent health policies and programmes with a particular focus on the prevention of early pregnancies and sexually transmitted infections, especially through reproductive health education".[201]

Forced Labour

Some of the recommendations made by the human rights monitoring mechanisms noted the need to address forced labour and human trafficking. Although section 17(2) of the Constitution of Eswatini prohibits forced labour, the practice remains problematic in the country. During the UPR process, Honduras recommended that Eswatini takes the necessary steps to combat and eradicate forced labour.[202] The Concluding Observations issued by the CEDAW Committee called upon Eswatini to tackle the root causes of trafficking and help to rehabilitate victims by providing them with support services such as shelters, medical and psychological assistance. It also urged the country to provide legal advice and assist victims with income generating opportunities; collect data by developing a study on the trafficking of women and girls; increase awareness to promote reporting of trafficking and early detection of victims; and increase efforts to ensure bilateral, regional and international cooperation in addressing and preventing trafficking.[203]

[196] Human Rights Council 'Report of the Working Group on the Universal Periodic Review- Swaziland' UN Doc A/HRC/33/14 (13 July 2016) Rec 107,74 (Egypt).
[197] Human Rights Committee 'Concluding Observations on Swaziland in Absence of a Report' UN Doc CCPR/C/SWZ/CO/1 (2017), para 28.
[198] As above.
[199] Committee on the Elimination of All Forms of Discrimination Against Women 'Concluding Observations on Swaziland' UN Doc CEDAW/C/SWZ/CO/1-2 (2014), para 35.
[200] Human Rights Committee 'Concluding Observations on Swaziland in Absence of a Report' UN Doc CCPR/C/SWZ/CO/1 (2017), paras 28 and 29.
[201] Committee on the Rights of the Child, Concluding Observations: Swaziland, CRC/C/SWZ/CO/1, 16 October 2006, para 55-56.
[202] Human Rights Council 'Report of the Working Group on the Universal Periodic Review- Swaziland' UN Doc A/HRC/33/14 (13 July 2016) Rec 109,59 (Honduras).
[203] Committee on the Elimination of All Forms of Discrimination Against Women 'Concluding Observations on Swaziland' UN Doc CEDAW/C/SWZ/CO/1-2 (2014), para 25.

Equal Access to Employment and Services

Both the UPR and the Concluding Observations of the CEDAW Committee called upon Eswatini to ensure women's equal participation in public and private sectors, including in decision-making positions.[204] In this regard, the CEDAW Committee categorically mentioned the need for special measures to ensure the participation of women in education and employment, as well as the need for measures to achieve substantive equality of women with men. Insofar as barriers faced by rural women are concerned, the CEDAW Committee urged the country to eradicate cultural obstacles that impede women's ability to access land, assist women to be more involved in the decision-making process regarding rural projects and to expand programmes to provide low-interest microfinance and microcredit loans to empower women allowing them to become entrepreneurs.[205]

In 2014, the CEDAW Committee raised concerns about the challenges affecting women in the workplace, including sexual harassment, low wages and the high concentration of women in the informal sectors of the economy.[206] For example, organisations such as the Coalition of Informal Economy Associations of Swaziland (CIEAS) have highlighted the current vulnerability of women street vendors in Eswatini and treatment of domestic workers. There is no legislative framework that responds specifically to domestic workers' rights and Eswatini needs to establish clear directives on how the Conciliation, Mediation and Arbitration Commission (CMAC) should respond to reported cases.

The CEDAW Committee called upon Eswatini to increase the participation of women in parliament by using temporary special measures, including the full implementation of the set quota of 30% representation of women in parliament as provided under section 86 of the Constitution.[207]

[204] Human Rights Committee 'Concluding Observations on Swaziland in Absence of a Report' UN Doc CCPR/C/SWZ/CO/1 (2017), para 25.
[205] Committee on the Elimination of All Forms of Discrimination Against Women 'Concluding Observations on Swaziland' UN Doc CEDAW/C/SWZ/CO/1-2 (2014), paras 17, 36 and 37.
[206] Committee on the Elimination of All Forms of Discrimination Against Women 'Concluding Observations on Swaziland' UN Doc CEDAW/C/SWZ/CO/1-2 (2014), para 32-33.
[207] Committee on the Elimination of All Forms of Discrimination Against Women 'Concluding Observations on Swaziland' UN Doc CEDAW/C/SWZ/CO/1-2 (2014), para 16, 17.

A. Actions to Improve Human Rights

The Kingdom of Eswatini has not been keen to promote the rights of LGBTI persons and the country rejected UPR recommendations calling for decriminalisation of same-sex sexual acts. Certain rights for women have seen more success. The discussion below refers to various legal reforms aimed at improving women's rights in Eswatini.

Since Eswatini has a dual legal system, it remains imperative that the traditions and customs which infringe on women's rights are also addressed. This would be in line with section 252(3) of the Constitution, which provides that customs which are inconsistent with the Constitution or repugnant to natural justice, morality or general principles of humanity, are not recognised.

The Sexual Offences and Domestic Violence Act No. 15 of 2018

The Sexual Offences and Domestic Violence Act No. 15 of 2018 (the SODV Act) provides the necessary normative framework to curb sexual offences and domestic violence.

The SODV Act expands the definition of rape to include the rape of men and boys and broadens the definition of sexual penetration.[208]

Under the Act, an unlawful sexual act is a sexual act which is either committed in coercive circumstances; under false pretences or by fraudulent means; in respect of a person who is incapable in law of appreciating the nature of the sexual act; with duress; with psychological oppression; or by causing fear of violence.[209]

Section 151 of the SODV Act prohibits marital rape by providing that marital relationships or other types of relationships, previous or existing, shall not serve as defence to any criminal offence under the law.[210]

The SODV Act departs from the current laws of Eswatini in that it introduces the crimes of unlawful stalking, abduction and sexual harassment.[211] What is of concern is that "acceptable courting" is removed from the ambit of the offence of unlawful stalking, without defining what would constitute "acceptable courting".[212] The offence of abduction relates to the taking of a child out of the control of the child's custodian with the intent of performing a sexual act; for the purpose of harmful rituals or sacrifices; or for any other unlawful purpose.[213]

The SODV Act provides reporting standards and makes provision for the treatment of victims of sexual offences.[214] Thus, under the Act, a person who witnessed or received information or those who have reasonable grounds to believe that an offence has occurred under the Act are tasked with the duty to report.[215] Police officers and prosecutors are obliged to refer victims, and particularly women and children, to support services and inform them about the availability of post-exposure prophylaxis (PEP) to reduce the chance of contracting HIV.[216] Guidelines are

[208] SODV Act 2018 s 3.
[209] SODV Act 2018 s 3 (3). Subsections 4, 5 and 6 further elaborate on instances which could constitute coercive circumstances, false presentences or fraudulent means; and circumstances where a person is incapable in law of appreciating the nature of the sexual act.
[210] SODV Act 2018 s 151.
[211] SODV Act 2018 s 10-12, 42 and 48 respectively.
[212] SODV Act 2018 s 10(3)(c).
[213] SODV Act 2018 s 42(1).
[214] SODV Act 2018 s 70-73.
[215] SODV Act 2018 s 70.
[216] SODV Act 2018 s 72.

provided for medical professionals to treat victims while minimising the effects of trauma.[217] The Act also recognises barriers to early reporting by victims of sexual offences thus shifting the position where late reporting could be used as evidence against the complainant.[218]

The section on principles in cases of sexual offences indicates an important break from the way rape survivors' evidence have been treated in Eswatini and other Southern African countries. The SODV Act states that in cases of sexual offences, the court *shall* be guided by the following principles:[219]

a) "Consent cannot be inferred by reason of any words or conduct of a victim where force, threat of force, coercion or taking advantage of a coercive environment undermined the ability of the victim to give voluntary and genuine consent;

b) Consent cannot be inferred by reason of any words or conduct of a victim where the victim is incapable of giving voluntary and genuine consent;

c) Consent cannot be inferred by reason of the silence of, or lack of resistance by a victim to the alleged sexual offence;

d) Credibility, character, antecedents or predisposition to sexual availability of a victim or witness cannot be inferred by reason of the sexual nature of the prior or subsequent conduct of a victim or witness."

In South Africa, the Constitutional Court has declared invalid provisions which criminalised consensual sexual behaviour between adolescents.[220] Eswatini's SODV Act addresses this by providing that in the case of offences relating to having a sexual relationship with a child, consent can be a defence if it is proved beyond reasonable doubt that both the victim and the accused were under the age of 18 years at the time of the alleged offence, and both the victim and the accused gave their full and free consent to all of the sexual acts alleged.[221] Prosecution may further not be instituted without the written consent of the Director of Public Prosecutions, where the victim was under the age of 18 years at the time of the offence, there was an age difference of no more than 5 years between the victim and the accused, and both the victim and the accused gave their full and free consent.[222]

The Act provides protection orders for victims of domestic violence, as well as a range of alternative remedies which can be employed to protect victims and their family members. Unlike similar legislation elsewhere, the SODV Act has a wide definition of domestic violence and domestic relationships and makes domestic violence a criminal offence.[223] Provision is made for the establishment of Domestic Violence Courts. These are special courts tasked with dealing with cases of domestic violence.[224] The Act addresses many of the problems encountered with domestic violence legislation in other jurisdictions. For example, the Act attributes specific duties to police officers and magistrates. The Act further prohibits an officer from refusing to institute a prosecution or from withdrawing a charge without authorisation from the Director of Public Prosecutions.[225]

[217] SODV Act 2018 s 74-76.
[218] SODV Act 2018 s 50(b).
[219] SODV Act 2018 s 51.
[220] *Teddy Bear Clinic for Abused Children and Another v Minister of Justice and Constitutional Development and Another* [2013] ZACC 25.
[221] SODV Act 2018 s 153(2).
[222] SODV Act 2018 s 153(3).
[223] SODV Act 2018 s 77(1).
[224] SODV Act 2018 s 126(1).
[225] SODV Act 2018 s 121.

Section 13 of the SODV Act criminalises commercial sexual exploitation. This section applies to pimps and other persons who make money from the sexual acts performed between the buyer and another person. The Act further continues the previous position which criminalised procurement and brothel-keeping.[226]

The SODV Act criminalises the acts of benefiting from prostitution and living from the earnings of prostitution.[227] Both these offences apply to someone like a pimp, with the difference between the offences being whether the benefit the person receives is ad hoc or whether the person makes a living from this arrangement. From the wording of both these offences, it is clear that the offences only apply to a person who makes money off someone else's sex work. It accordingly does not apply to sex workers, the dependants of sex workers or children.

The SODV Act does not criminalise sex workers or the act of selling sex for reward. The SODV Act instead criminalises activities which exploit sex workers. Importantly, other provisions in the SODV Act relating to the treatment of victims of sexual offences by police, prosecutors, magistrates and health care workers, apply to sex workers as well. Any person who is a victim of a sexual offence or domestic violence should be treated with respect and without judgment.

The SODV Act provides that "as soon as practicable" after the coming into force of the Act, persons who have duties to perform under the Act are to attend training on:[228]

a) "Domestic violence and in particular covering the types of violence and the cycle of violence;
b) Societal attitudes towards violence and sexual assault and how they can impact on decision makers;
c) Working with survivors of domestic violence and sexual assault including child victims; interviewing children;
d) The role of court intermediaries; or
e) Any other incidental training."

What is encouraging is that the Act specifies that the above training should not be limited to persons in the Domestic Violence, Child Protection and Sexual Offences Unit. In many other countries where training has been limited to these units, survivors of domestic violence and sexual assault still receive discriminatory treatment from officers who attend to incidents or are at the charge office of a police station. In fact, without such training, the Act would be of little assistance to survivors of gender-based violence. Given current financial constraints within the country, international agencies and donors are urged to provide financial and technical support for such training.

Acknowledging that domestic violence and sexual assault cases tend to be neglected, the Act specifically states that the police and courts must give these cases priority.[229]

[226] SODV Act 2018 s 15 and s 18
[227] SODV Act 2018 s 16 and s 17.
[228] SODV Act 2018 s 191.
[229] SODV Act 2018 s 192.

The Marriages Bill of 2017

If passed into law, the Marriages Bill will govern marriage relations in Eswatini. The fact that the Marriages Bill applies to civil and customary marriages[230] raises hope that it could help address some of the challenges affecting the enjoyment of human rights by women.

Of particular significance, the Marriages Bill establishes the age of marriage at 21 years and allows people to get married at 18 years provided they obtain written consent of parents or legal guardians.[231] This is in line with section 43 of the Sexual Offences and Domestic Violence Act No. 15 of 2018 which provides that a person shall not marry a child in contravention of the Marriages Act No. 47 of 1964 or any Act succeeding the Marriages Act (a child is defined as a person under the age of 18 years). Section 37(1) of the SODV Act also criminalises maintaining a sexual relationship with a child.

Under the Marriages Bill a widow can marry a relative of the deceased husband if she expresses her free consent.[232] While this helps to addresses customary practices requiring Eswatini women to marry a relative of the deceased husband, it fails to deal with financial and cultural pressures that are placed on widows to enter such levirate marriages. Furthermore, the Bill does not prohibit polygamy. However, seeing the need to protect women in polygamous marriages, the Bill bans applications for another marriage if it is not proven that the husband "is capable of giving the same treatment to all the wives".[233]

The Marriages Bill prohibits marital rape which is currently permissible under Swazi law and custom. Section 43 bans sexual intercourse with a spouse without consent and punishes perpetrators with up to one year imprisonment or a fine of two thousand Emalangeni.[234] Courts are allowed to sanction perpetrators with a penalty of up to three thousand (3 000) Emalangeni, and they may classify marital rape as a civil wrong giving rise to a civil remedy such as suspension of conjugal rights or attracting compensation, as may be determined by the court.[235] The SODV Act does not permit marriage as a defence to a charge of rape.[236] Under the SODV Act, marital rape can also fall within the definition of domestic violence (which includes sexual abuse of a civil or customary spouse) and can result in a penalty of up to 15 years' imprisonment.

The Marriages Bill has been outstanding for a long time. The Committee on the Rights of the Child, when considering Eswatini's report in 2006, recommended that the country "expedite the preparation, adoption and enactment of the Marriages Bill" to prevent the practice of early marriages and set an equal age of marriage.[237]

[230] Marriages Bill 2017 s 5.
[231] Marriages Bill 2017 s 8.
[232] Marriages Bill 2017 s 10.
[233] Marriages Bill 2017 s 14 and 25.
[234] Marriages Bill 2017 s 43 (a).
[235] Marriages Bill 2017 s 43 (a), (b).
[236] SODV Act 2018 s 151: "Any relationship, previous or existing, shall not provide a defence to any offence under this Act."
[237] Committee on the Rights of the Child, Concluding Observations: Swaziland, CRC/C/SWZ/CO/1, 16 October 2006, para 24.

The Matrimonial Property Bill of 2017

The Matrimonial Property Bill aims to regulate the property rights of spouses.[238] It introduces changes to the current law attributing the husband sole responsibility to administer matrimonial property. Written consent is required of both spouses before transactions are made over matrimonial property, and such consent is also required for the matrimonial home to be mortgaged or leased.[239] Thus, in section 8, spouses married in community of property have joint capacity to acquire, administer, hold, control, use and dispose of property whether movable or immovable. They also have joint capacity to enter into a contract and sue and be sued in their own name.[240] A spouse can institute or defend legal proceedings without the consent of the other spouse if the legal proceedings are in respect of that spouse's separate property, or for the recovery of damages not related to patrimonial loss, and in respect of a matter relating to the profession, trade or business of the other spouse."[241] The Matrimonial Property Bill would better protect women's right to property and should be passed by Eswatini.

Regulation of Wages (Domestic Employees) Order, 2016

The Employment Act No. 5 of 1980 makes specific provision for domestic employees, stating specifically that they may not work for more than 8 hours a day, are entitled to breaks and adequate rest periods, and payment for overtime work.[242] The Regulation of Wages (Domestic Employees) Order builds on this and provides for hours of work, overtime, paid public holidays, sick leave, maternity leave, compassionate leave, uniforms and protective clothing, and a basic minimum wage. [243]

Other subsidiary legislation issued under the Wages Act No. 16 of 1964, which has the potential to benefit female employees include: Regulation of Wages (Textile and Apparel Industry) Order, 2016; Regulation of Wages (Pre-Schools and Day-Care Centres Industry) Order, 2016; Regulation of Wages (Retail, Hairdressing, Wholesale and Distributive Trades Industry) Order, 2016; Regulation of Wages (Hotel, Accommodation, Catering and Fast Foods Trades) Order, 2016; Regulation of Wages (Manufacturing and Processing Industry) Order, 2016; Regulation of Wages (Support Employees in Schools and Educational Institutions) Order, 2017; and Regulation of Wages (Manufacture and Sale of Handicraft Industry) Order, 2018.

238 Matrimonial Property Bill 2017 'Memorandum of Reasons and Objections'.
239 Matrimonial Property Bill 2017 s 5.
240 Matrimonial Property Bill 2017 s 8.
241 Matrimonial Property Bill 2017 s 20.
242 Employment Act 1980 s 108.
243 Legal Notice No. 186 of 2016.

B. Cases

Attorney General v Master of the High Court [2014] SZSC 10

In 2014, the Supreme Court delivered judgment in the case of Attorney General v Titselo Dzadze Ndzimandze and Others [2014] SZSC 78, confirming a decision of the High Court that section 2(3) of the Intestate Succession Act No. 3 of 1953 is inconsistent with section 34 of the Constitution. Section 2(3) of the Intestate Succession Act provides that where spouses were married in community of property, a surviving spouse would be entitled to a child's share of the deceased estate.

In 2016 the Supreme Court reviewed and set aside its previous decision. The Supreme Court held that the Intestate Succession Act did not apply since the spouses were married under customary law, and that section 68 of the Administration of Estates Act No. 28 of 1902 excludes the administration of deceased estates where the spouses were married by customary marriage. Emphasising the country's dual legal system, the Supreme Court criticised its previous decision for being insensitive by applying common law in a case of Swazi law and custom.

Section 34(1) of the Constitution provides:

(1) "A surviving spouse is entitled to a reasonable provision of the estate of the other spouse whether the other spouse died having made a valid will or not and whether the spouses were married by civil or customary rites.

(2) Parliament shall, as soon as practicable after the commencement of this Constitution, enact legislation regulating the property rights of spouses including common law husband and wife."

The Supreme Court noted that the provision does not define what constitutes "reasonable provision out of the estate of the other" and that it does not subject customary marriages to the administration of the Master of the High Court. The Court further noted:

"The Constitution was signed into law on the 26th July 2005; hence the delay in enacting this legislation has been inordinately long. However, that is not a justification for the courts to usurp the function of Parliament. The least that courts could do in the circumstances is to remind Parliament of its Constitutional obligation as mandated by section 34(2) of the Constitution, and, to set time limits within which Parliament should comply with its Constitutional mandate."

The Supreme Court accordingly ordered that the Minister of Justice and Parliament was directed to expedite the enactment of legislation regulating the property rights of spouses within a period of 12 months.

Sihlongonyane v Sihlongonyane [2013] SZHC 207

Mrs. Sihlongonyane sought control over her marital property and the removal of certain persons from the matrimonial home. Her husband argued that the common law doctrine of marital power gave him full control over their joint property and prevented Mrs. Sihlongonyane from suing or being sued by him. Mrs. Sihlongonyane alleged that the doctrine was inconsistent with sections 20 and 28 of the Constitution which set out the right to equality before the law and the

rights of women, respectively.[244] The High Court found the doctrine of marital power arbitrarily subordinates the wife to the power of her husband and is therefore unfair and serves no useful or rational purpose.[245] The High Court said that:

> *"[m]arital power is unfair discrimination based on sex or gender inasmuch as it adversely affects women who have contracted a specific type of marriage but does not affect the men in that marriage in the same way."*[246]

Finding in favour of the applicant, the Court rejected arguments by Mr. Sihlongonyane that a married woman needed to seek leave from the court for her to sue without her husband. The Court found that process discriminatory in a context where married men do not have to apply for leave.[247]

Attorney General v Doo Aphane [2010] SZSC 32

In *Attorney General v Aphane,* the Supreme Court affirmed the High Court's decision declaring section 16(3) of the Deeds Registry Act unconstitutional. The provision prohibited women married in community of property from registering immovable property in their name. The applicant was married in community of property and she and her husband sought to jointly purchase property but were denied the opportunity to do so. The Supreme Court held that section 16(3) of the Deeds Registry Act violated her rights to equality before the law and her rights as a woman.[248] The Supreme Court ordered the parliament, within 12 months of the judgment, to pass legislation to correct the invalidity in section 16(3) and that pending such amendment, the Registrar is authorised to register immovable property, bonds and other real rights in the joint names of husbands and wives married to each other in community of property.

Section 16(3) of the Deeds Registry Act was since amended by Act No. 2 of 2012 and currently reads:

> *"Where immovable property or other real right that is not excluded from the community is transferred to or registered in the name of a spouse married in community of property neither spouse may, alone deal with the immovable property or other real right unless that spouse has the written consent of the other spouse or has been authorised by an order of the court to so deal with the immovable property or other real right."*

R v Shabangu [2007] SZHC 47

The case concerned the rape of a thirteen (13) year old girl.[249] The victim was scared to inform her sister about the rape and waited for other family members who had been away to return home. She waited for a few months before reporting the crime to the police.[250]

Due to the delayed reporting, the High Court had to decide whether the victim's testimony was fabricated or not, and if it could be used as evidence to support the case. In its reasoning the Court concluded that it was convinced that the evidence could be used to support the case provided there were safeguards to reduce the risk of wrongful conviction.[251] It was inclined to

[244] *Sihlongonyane v Sihlongonyane* [2013] SZHC 207 (July 2013), para 12.
[245] *Sihlongonyane v Sihlongonyane* [2013] SZHC 207 (July 2013), para 24.
[246] *Sihlongonyane v Sihlongonyane* [2013] SZHC 207 (July 2013), para 24.
[247] *Sihlongonyane v Sihlongonyane* [2013] SZHC 207 (July 2013), para 25.
[248] Constitution s 20 and s 28.
[249] *R v Shabangu* [2007] SZHC 47, para 1.
[250] *R v Shabangu* [2007] SZHC 47, paras 1-11.
[251] *R v Shabangu* [2007] SZHC 47, para 23.

follow the decision of Olivier JA in *S v Jackson*[252] which stated that:

> *"The notion that women are habitually inclined to lie about being raped is of ancient origin... Few things may be more difficult and humiliating for a woman than to cry rape: she is often, within certain communities, considered to have lost her credibility; she may be seen as unchaste and unworthy of respect; her community may turn their back on her; she has to undergo the most harrowing cross-examination in court, where the intimate details of the crime are traversed* ad nauseam*; she (but not the accused) may be required to reveal her previous sexual history; she may disqualify herself in the marriage market, and many husbands turn their backs on a 'soiled' wife (...)the burden is on the State to prove the guilt of an accused beyond reasonable doubt - no more no less. The evidence in a particular case may call for a cautionary approach, but that is a far cry from the application of a general cautionary rule."253*

The High Court held that "the cautionary rule, as hitherto applied in our courts, is outmoded, arbitrary, discriminatory of women and empirically false and should no longer be part of our law".[254] This position was subsequently endorsed in the SODV Act which abolished the cautionary rule in relation to the evidence of the complainant of a sexual offence or a child.[255]

Mkhabela v The King [2017] SZHC 184

The case highlighted the need to address the issue of male rape and remove the gender-based definition of rape under common law. Mkhabela allegedly inserted his penis into the victim's anus without his consent and forced him to comply at knife point.[256] The prosecution brought a charge of indecent assault for this offence as male rape is not included in the common law definition of rape. The High Court made progressive comments about the common law definition of rape highlighting the need to expand it to include non-consensual acts committed by men against other men. In concrete terms, the Court said that:

> *"It is regrettable that such an occurrence continues to be treated as indecent assault in our jurisdiction, despite that it has all the elements of rape, but for the fact of same gender. At a time when homosexuality just falls short of being fashionable, one would expect the common law to grow with the times, in a manner that affords the male gender equal protection against sexual violation. This growth does not have to come from legislation. The courts have inherent authority to develop the law in keeping with changing times and circumstances, in a manner that responds to new challenges and experiences..."*

Furthermore, the Court said that "[w]hat happened to the complainant in this case goes far beyond the original scope of indecent assault".[257] This issue was subsequently addressed in the SODV Act of 2018 which provides for a gender-neutral definition of rape.[258]

252 1998 (1) SACR 470 (A) at 474G-477D.
253 *R v Shabangu* [2007] SZHC 47, para 25.
254 *R v Shabangu* [2007] SZHC 47, para 26.
255 SODV Act 2018 s 49.
256 *Mkhabela v The King* 2017 SZHC 184, para 21.1.
257 *Mkhabela v The King* 2017 SZHC 184, para 21.3
258 SODV Act 2018 s 3.

C. What Still Needs to Be Done?

Discrimination against Women

The government is urged to finalise the Marriages Bill and Matrimonial Property Bill. As has been recognised by the courts, the current laws are not in line with the extensive provisions in the Constitution on women's rights. Whilst laws are being reformed, the orders of the courts striking down unconstitutional provisions should be followed. Law reform processes relating to the Administration of Estates Bill, Marriages Bill and draft Land Policy have all stalled for more than a decade.

The Marriage Act No. 74 of 1964 currently discriminates based on race. Section 24 of the Act provides that:

> *"The consequences flowing from a marriage in terms of this Act shall be in accordance with the common law as varied from time to time by any law, unless both parties to the marriage are Africans in which case, subject to the terms of section 25, the marital power of the husband and the proprietary rights of the spouses shall be governed by Swazi law and custom."*

Section 25(1) of the Act further provides that:

> *"If both parties to the marriage are Africans, the consequences flowing from the marriage shall be governed by the law and custom applicable to them unless prior to the solemnisation of the marriage the parties agree that the consequences flowing from the marriage shall be governed by common law."*

Marital power refers to the right of the husband to rule over and defend the person of his wife and denies a married woman the right to contract, to administer property and to sue or be sued in court. This common law marital power has been restricted in the *Sihlongonyane* case. The Court held that marital power constitutes unfair discrimination and that its decision applies to "all married women subject to the martial powers of their husbands".[259] Since the facts of the case did not apply to marriages out of community of property, there is still a need to invalidate the common law marital power in its totality. This should be explicitly addressed in the Marriages Bill.

To give effect to the rights enshrined in the Constitution, the customary practice of male primogeniture should be explicitly abolished since it is contrary to sections 18, 20, 28, 29(7)(b) and 34(1) of the Constitution, it is repugnant and offends against natural justice and the principles of humanity.[260]

Discrimination against LGBTI Persons

Eswatini has not taken any concrete legislative step to enhance the enjoyment of human rights by members of the LGBTI community in the country. Authorities have only made sporadic pronouncements on the issue. Thus, on some occasions the Minister of Justice told the international community that the country will no longer prosecute same-sex sexual acts between

[259] *Sihlongonyane v Sihlongonyane* [2013] SZHC 144, para 33.
[260] Constitution s 252.

consenting adults in Eswatini. This position was confirmed by the Attorney General[261] who gave hope that the country would repeal its sodomy offence under common law. However, the Minister of Justice and Constitutional Affairs, Edgar Hillary, in response to questions of the Human Rights Committee, noted that although the "State did not prosecute consensual relations among men," "criminalisation of sodomy was a common law offence and the State did not have an intention to decriminalise it".[262]

Since unlawful sexual acts under the new SODV Act are those relating to the absence of consent or consent in coercive circumstances, criminalisation of consensual sodomy is ripe for formal repeal. The new SODV Act makes the offence of rape gender neutral and has broadened it to cases of anal penetration. Accordingly, there is no reason to maintain the sodomy offence under common law for cases of male rape or cases of consensual sexual acts.

Unfortunately, the new SODV Act missed an opportunity to explicitly decriminalise the common law offence of sodomy. This failure now places the LGBTI community at risk of being placed on the National Register for Sexual Offenders provided for under the Act if they are convicted of the common law offence of sodomy. The provisions in the SODV Act relating to who can be placed on the National Register for Sexual Offenders are overly broad and ought to be reviewed.

The extended National Multi-Sectoral HIV and AIDS Framework (2014-2018) includes men who have sex with men in the list of key populations, but does not address lesbian, bisexual, transgender or intersex individuals. Much more can be done on a policy level to reduce discrimination faced by LGBTI persons.

In June 2018, many people attended Eswatini's first Gay Pride in Mbabane.[263] This was an important milestone and illustrated the significance of the new Public Order Act.

Sexual Offences and Domestic Violence

The enactment of a law on sexual offences and domestic violence is a positive development, but must be complemented with other initiatives. These include implementation of education programmes for local police officers, magistrates, prosecutors, lawyers and other relevant stakeholders to ensure that the law is used effectively. Prosecution of crimes committed under the Act is also essential to uphold the rights afforded to women and LGBTI communities.

Sexual Harassment in the Workplace

A recent study by the Swaziland Economic Policy Analysis and Research Centre (SERPAC) showed that 16.2% of employees in the private sector experienced sexual harassment, and 17.6% in the NGO sector.[264] According to the study about 15.5% of employees in the private sector witnessed colleagues experiencing sexual harassment, and another 12.3% witnessed harassment in the NGO sector.[265] The study also revealed that there were many incidents where sexual harassment

[261] Civil society report on the implementation of the International Covenant on Civil and Political Rights, submitted to the 120th session of the Human Rights Committee, in July 2017, http://www.southernafricalitigationcentre.org/wp-content/uploads/2017/11/Swaziland-CSO-reply-to-list-of-issues_ICCPR-review-report.pdf, pg. 12.
[262] OHCHR, 'Human Rights Committee Discusses Implementation of Civil and Political Rights in Swaziland' (10 July 2017).
[263] 'Eswatini Gay Pride Waves its Rainbow Flag for the First Time' AFP (30 June 2018).
[264] Swaziland Economic and Policy Analysis Research Centre 'Sexual Harassment in the Workplace in Swaziland: A Focus on the Private Sector and Non-Governmental Organisations', http://www.separc.co.sz/wp-content/uploads/2018/04/Sexual-Harassment-Report.pdf, pg. v.
[265] Swaziland Economic and Policy Analysis Research Centre 'Sexual Harassment in the Workplace in Swaziland: A Focus on the Private Sector and Non-Governmental Organisations', http://www.separc.co.sz/wp-content/uploads/2018/04/Sexual-Harassment-Report.pdf, pg. v.

was not reported.[266] According to the study, a large factor behind the low rates of reporting is that employees are unaware of the structures and procedures to follow and most victims only have circumstantial evidence to support their claim, making it very difficult to prove when there are no witnesses.[267] The study also revealed that many employees have little knowledge about sexual harassment.[268] The study recommended law reform and the establishment of an independent institution to manage cases and reports of sexual harassment.[269] The research report reiterated the need for Eswatini to take legislative steps to address sexual harassment in the workplace. Subsequently, section 48 of the SODV Act specifically criminalised sexual harassment with a fine or 10 years' imprisonment as sentence.

Challenges Faced by Women in the Workplace

The CEDAW Committee expressed concerns that a large majority of women remained concentrated in low-paying jobs and in the informal economy. The enactment of a law or policy addressing challenges faced by women in the informal sector will help improve their socio-economic position in society.

The Employment Act No. 5 of 1980 contains some positive provisions which require wider publication. The Act prohibits discrimination and termination of employment on grounds of "race, colour, religion, marital status, sex, national origin, tribal or clan extraction, political affiliation or social status."[270]

The Employment Act's provisions on maternity leave require improvement. Whilst a woman is allowed at least 12 weeks' maternity leave and a nursing break at work, only two weeks are full pay and there is no additional obligation on employers.[271] The Act prohibits dismissal on the ground of pregnancy.[272]

[266] As above, pg. vi.
[267] Idem.
[268] About 50 percent of employees recognised verbal comments or physical abuse as elements of sexual harassment, less than 30 percent showed any understanding about how such actions can lead to a hostile work environment and few recognised more subtle displays of sexual harassment such as displaying indecent photos in the workplace. The study found "that if the sexual harassment behaviour is not directly invasive to the person's body, or verbally derogating to the person, employees tend to ignore, pardon or entirely dismiss all other behaviours as not qualifying as sexual harassment. Swaziland Economic and Policy Analysis Research Centre 'Sexual Harassment in the Workplace in Swaziland: A Focus on the Private Sector and Non-Governmental Organisations', http://www.separc.co.sz/wp-content/uploads/2018/04/Sexual-Harassment-Report.pdf, pg. 46.
[269] Swaziland Economic and Policy Analysis Research Centre 'Sexual Harassment in the Workplace in Swaziland: A Focus on the Private Sector and Non-Governmental Organisations', http://www.separc.co.sz/wp-content/uploads/2018/04/Sexual-Harassment-Report.pdf, pg. 49.
[270] Employment Act 1980 s 29, s 35.
[271] Employment Act 1980 s 102, s 103, s 107.
[272] Employment Act 1980 s 105.

5.4 Children's Rights – Recommendations from UN Human Rights Mechanisms

All human rights monitoring mechanisms discussed formulated recommendations to support the implementation of children's rights in Eswatini. Most of the recommendations related to early or forced marriages, the child justice system, the administration of discipline for children and statelessness of children.

Child Marriages

Many recommending States participating in the UPR process urged Eswatini to implement legislation to ban early and forced marriages, and to take measures to protect girls from this negative practice.[273] Similarly, the Human Rights Committee recommended addressing bride inheritance.[274] On its part, the CEDAW Committee called for the elimination of early or forced marriages in the country.[275] Responding to the call under the UPR process, Eswatini agreed to ban child marriages and highlighted that it had started drafting the Marriages Bill to raise the age of marriage to 21 years.[276]

Children in Conflict with the Law

Eswatini was urged to establish a functioning child justice system serving the whole country and to raise the age of criminal responsibility to comply with acceptable international standards".[277] In addition to recommendations under the UPR process, the Human Rights Committee urged Eswatini to establish a child court system and to take measures to ensure that children in conflict with the law are not held in the same facilities as adults.[278] Similar recommendations were made in 2006 by the Committee on the Rights of the Child, including the urgent abolition of corporal punishment in the child justice system.[279]

Education

When Eswatini ratified the Convention on the Rights of the Child, it made the following Declaration:

> *"The Convention on the Rights of the Child being a point of departure to guarantee child rights; taking into consideration the progressive character of the implementation of certain social, economic and cultural rights; as recognised in article 4 of the Convention, the Government of the Kingdom of Swaziland would undertake the implementation of the right to free primary education to the maximum extent of available resources and expects to obtain the co-operation of the international Community for its full satisfaction as soon as possible."*

Many UPR and CEDAW recommendations also focused on implementation of the right to education. During the UPR review, Nigeria acknowledged Eswatini's efforts to advance this right by implementing the free primary education programme. However, noting the challenges in

[273] Human Rights Council 'Report of the Working Group on the Universal Periodic Review- Swaziland' UN Doc A/HRC/33/14 (13 July 2016) Rec 109,51 (Australia), Rec 109,52 (Chad), Rec 109,53 (Ghana), Rec 109,54 (Panama), Rec 109,55 (Maldives), Rec 109,56 (Sierra Leone), Rec 109,57 (Spain).
[274] Human Rights Committee 'Concluding Observations on Swaziland in Absence of a Report' UN Doc CCPR/C/SWZ/CO/1 (2017), para 25 (c).
[275] Committee on the Elimination of All Forms of Discrimination Against Women 'Concluding Observations on Swaziland' UN Doc CEDAW/C/SWZ/CO/1-2 (2014), para 19 (c).
[276] Human Rights Council 'Report of the Working Group on the Universal Periodic Review Swaziland- Addendum' UN Doc A/HRC/33/14/Add.1 (21 September 2016), para 21.
[277] Human Rights Council 'Report of the Working Group on the Universal Periodic Review- Swaziland' UN Doc A/HRC/33/14 (13 July 2016) Rec 107, 54.
[278] Human Rights Committee 'Concluding Observations on Swaziland in Absence of a Report' UN Doc CCPR/C/SWZ/CO/1 (2017), para 46, 47.
[279] Committee on the Rights of the Child, Concluding Observations: Swaziland, CRC/C/SWZ/CO/1, 16 October 2006, para 68.

achieving full realisation of the right to education, Nigeria urged Eswatini to implement measures to overcome the various limitations of the programme, and particularly, to address the social factors that limit enrolment of children in primary schools and address the shortage of qualified teachers affecting the system negatively.[280] Again, Eswatini accepted these recommendations. The CEDAW Committee formulated similar recommendations touching on the need to address factors limiting the enjoyment of the right to education by girls.[281]

Corporal Punishment

Section 29(2) of the Constitution provides that "a child shall not be subjected to abuse or torture or other cruel, inhumane or degrading treatment or punishment, subject to lawful and moderate chastisement for purposes of correction."

The subject of administration of discipline for children was also assessed by the UN human rights monitoring mechanisms. During the UPR process, Montenegro recommended that Eswatini prohibits corporal punishment in all settings. This recommendation was accepted. However, Eswatini responded that corporal punishment is banned in the country's educational facilities, but it is still allowed within the home environment.[282] The Human Rights Committee urged the country to take practical measures to stop corporal punishment including prohibiting it in legislation.[283] It should be noted that the Committee on the Rights of the Child has already in 2006 recommended that the State party should as a priority explicitly prohibit corporal punishment in all settings, including the family, schools, the penal system and alternative care settings.[284] It referred to the Committee's General Comment No. 8 on the right of the child to protection from corporal punishment.

Statelessness

Statelessness and the transmission of nationality from Swazi mothers to their children is yet another contentious topic raised in the recommendations issued by human rights monitoring mechanisms. It has been raised as an issue in 2006 already by the Committee on the Rights of the Child.[285] States participating in the UPR process urged Eswatini to take steps to amend domestic laws to allow women to transfer nationality to their children even if the father is foreign born.[286] This recommendation was reiterated in the Concluding Observations of the Human Rights Committee which asked Eswatini to address discrimination between men and women in the area of transfer of citizenship.[287] The CEDAW Committee also raised concerns about the possibility of children becoming stateless under the current laws.[288]

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[280] Human Rights Council 'Report of the Working Group on the Universal Periodic Review- Swaziland' UN Doc A/HRC/33/14 (13 July 2016) Rec 107,82 (Nigeria), See also Rec 107,80 (Congo) and Rec 107,81 (Ethiopia).

[281] Under the CEDAW review, focus was placed on addressing girls' access to schools and it recommended that Eswatini removes indirect costs of primary education such as school uniforms that might pose a barrier to access to education; implement programmes to ensure that girls do not experience violence and sexual violence in schools and ensure that such perpetrators are investigated and punished; encourage girls to undertake studies in non-traditional fields of study such as sciences; promote re-entry of girls into school after pregnancy; push age-appropriate sexual and reproductive health education into the curriculum; and prohibit corporal punishment. Committee on the Elimination of All Forms of Discrimination Against Women 'Concluding Observations on Swaziland' UN Doc CEDAW/C/SWZ/CO/1-2 (2014), para 32.

[282] Human Rights Council 'Report of the Working Group on the Universal Periodic Review Swaziland- Addendum' UN Doc A/HRC/33/14/Add.1 (21 September 2016), para 22-24.

[283] Human Rights Committee 'Concluding Observations on Swaziland in Absence of a Report' UN Doc CCPR/C/SWZ/CO/1 (2017), para 51.

[284] Committee on the Rights of the Child, Concluding Observations: Swaziland, CRC/C/SWZ/CO/1, 16 October 2006, para 36-37.

[285] Committee on the Rights of the Child, Concluding Observations: Swaziland, CRC/C/SWZ/CO/1, 16 October 2006, para 32-33.

[286] Human Rights Council 'Report of the Working Group on the Universal Periodic Review- Swaziland' UN Doc A/HRC/33/14 (13 July 2016) Rec 109,28 (Ghana), Rec 109,31 (Botswana), Rec 109,32 (Australia), Rec 109,33 (Republic of Korea), Rep 109,34 (Djibouti), Rec 109,35 (Sierra Leone), Rec 109,36 (Honduras).

[287] Human Rights Committee 'Concluding Observations on Swaziland in Absence of a Report' UN Doc CCPR/C/SWZ/CO/1 (2017), para 25 (a).

[288] The CEDAW Committee recommended that the country implements programmes to ensure that children born to Swazi women married to non-Swazi men are not rendered stateless and have equal access to education, health care and other basic services. Committee on the Elimination of All Forms of Discrimination Against Women 'Concluding Observations on Swaziland' UN Doc CEDAW/C/SWZ/CO/1-2 (2014), para 28, 29.

A. Actions to Improve Human Rights

There are many processes seeking to enhance the enjoyment of human rights by children in Eswatini. Providing a detailed analysis of these processes is beyond the scope of this report which assesses the extent to which Eswatini's legislation is aligned to the recommendations stemming from UN human rights mechanisms. Consequently, emphasis is placed on discussing major legislative steps to improve the situation.

The Children's Protection and Welfare Act No. 6 of 2012

Eswatini enacted the Children's Protection and Welfare Act No. 6 of 2012 (Children's Act). The enactment of the Children's Act represents a great step towards the domestication of the ratified UN Convention on the Rights of the Child.[289] The law sets out a range of rights for children. Some of these include the right to education, the right to social activity, the right of opinion, the right to protection from exploitative labour and the right to protection from harmful and degrading treatment, which includes any cultural practices which dehumanises the child or is injurious of the child's well-being.[290] The Act allows a child to refuse to be compelled to undergo or uphold any custom or practices that could negatively affect the child.[291] The Act makes provision for Children's Courts.[292]

Whilst there are provisions on the right to legal representation for children, such representation is not provided for free nor is it State funded. The court is obliged to appoint an attorney *pro bono* if the child will be remanded in detention or is likely to face a residential sentence.[293] Another concern is the inclusion of the term "justifiable" when defining suitable means to administer discipline for children in section 14.[294] Importantly, the Act encourages restorative justice, diversion, family group conferences and victim-offender mediation in cases where a child is in conflict with the law.[295] The Act further states that "no sentence of corporal punishment or any form of punishment that is cruel, inhumane or degrading may be imposed on a child" and "corporal punishment and public humiliation shall not be elements of diversion".[296] This brings the country in line with international standards on child justice.

The Act provides that a child "shall not be discriminated against on the grounds of gender, race, age, religion, disability, health status, custom, ethnic origin, rural or urban background, birth, socio-economic status, refugee status or other status".[297] The Act specifically seeks to ensure that children with disabilities do not face discrimination in the exercise of their rights, the provision of services and access to education.[298]

A child can consent to medical treatment if the child is at least 12 years of age, of sufficient maturity, and has mental capacity to understand the risks and benefits of the treatment.[299] In addition, no person may refuse to provide reproductive health information to a child, or refuse to sell any reproductive health protective devices, or refuse to provide a child with such devices

[289] The Kingdom of Eswatini ratified the United Nations Convention on the Rights of the Child (CRC) on 26 August 1995.
[290] Children's Protection and Welfare Act 2012 s 14(1).
[291] Children's Protection and Welfare Act 2012 s 15.
[292] Children's Protection and Welfare Act 2012 s 132.
[293] Children's Protection and Welfare Act 2012 s 146 and 147.
[294] Children's Protection and Welfare Act 2012 s 14(2).
[295] Children's Protection and Welfare Act 2012 Part XIV.
[296] Children's Protection and Welfare Act 2012 s 161(2), 126(5).
[297] Children's Protection and Welfare Act 2012 s 4.
[298] Children's Protection and Welfare Act 2012 s 9, 11.
[299] Children's Protection and Welfare Act 2012 s 239(2).

where they are distributed free of charge.[300] A child who obtains reproductive health products and services is entitled to confidentiality.[301]

The Children's Act provides that a child has the right from birth to acquire nationality.[302] A child is entitled to provision out of the estate of a parent, whether the child is born in or out wedlock or orphaned.[303]

The implementing regulations that will allow this Act to be fully operational has not yet been issued.

The Sexual Offences and Domestic Violence Act No. 15 of 2018

Part V of the SODV Act is specifically dedicated to sexual offences committed against children. It deals with indecent treatment of children, maintaining a sexual relationship with a child, sexual grooming of children, as well as, promoting the sexual grooming of children. Other aspects covered include: the use of electronic communication to procure children; compelling or causing children to witness sexual offences, sexual acts and/or self-masturbation; abduction and marrying of a child or placing a child in a situation akin to marriage.[304]

Part XXIX of the SODV Act relates to children as witnesses and puts in place protective measures to support children during trial.[305]

The Free Primary Education Act No. 1 of 2010

The Act provides that "every Swazi child enrolled at a public primary school is entitled to free education at the public primary school beginning with grade 1 up to and including grade 7".[306] It further states that "a Swazi child enrolled at a public primary school shall not be dismissed or excluded from school on the ground only that the Government has not paid the fees due".[307] In terms of the Act, the government shall pay to each public primary school money based on the number of pupils enrolled at the public primary school for that term and entitled to free primary education.[308] Where a learner fails a grade more than twice, the government will no longer pay that child's school fees.[309] Support staff, which include non-teaching staff, are not deemed public officers under the Act and their costs are paid from the money provided for school fees by the government.[310] The Act provides that where a School Committee intends to ask parents for top-up school fees, above the fees to be paid to the school by the government, written approval must be obtained from the Minister.[311] The Act provides for the progressive implementation of the right to free primary education, starting with grades 1 and 2 in 2010.[312]

[300] Children's Protection and Welfare Act 2012 s 244(1).
[301] Children's Protection and Welfare Act 2012 s 244(3).
[302] Children's Protection and Welfare Act 2012 s 5.
[303] Children's Protection and Welfare Act 2012 s 17.
[304] SODV Act 2018 s 36-43.
[305] SODV Act 2018 s 161-170.
[306] Free Primary Education Act 2010 s 3(1).
[307] Free Primary Education Act 2010 s 3(2).
[308] Free Primary Education Act 2010 s 8(2).
[309] Free Primary Education Act 2010 s 8(3).
[310] Free Primary Education Act 2010 s 8(4)-(5).
[311] Free Primary Education Act 2010 s 12.
[312] Free Primary Education Act 2010 s 14.

Prohibition of Corporal Punishment in Schools

The Education Act No. 9 of 1981 retains the subsidiary Education Rules of 1977 which permits corporal punishment of boys and girls.[313] The Ministry of Education and Training's Swaziland Education and Training Sector Policy of 2011 advocates for positive discipline, but does not mention corporal punishment. Following several newspaper reports on corporal punishment in schools, including the death of a pupil, the Minister of Education, Phineas Magagula, in October 2015, announced that teachers who hit pupils should be reported to the ministry and will face disciplinary action.[314] It is not clear whether this was a formal directive from the department and provisions on corporal punishment in the Education Rules remain intact.

B. Cases

Swaziland National Ex-mine Workers Association v Minister of Education and Others [2010] SZSC 35

The appellant had filed a case in the High Court in 2009 for an interim order asking the respondents to show cause why they should not be ordered to make free education in public schools available for every child; and why they should not make available their education policy on the implementation of this constitutional requirement. Section 29(6) of the Constitution provides that "every Swazi child shall within 3 years of the commencement of the Constitution have the right to free education in public schools at least up to the end of the primary school, beginning with the first year".

The High Court held that the constitutional obligation to provide free primary education includes tuition at no cost, provision of textbooks and where possible, exercise books and stationary and is a right of every Swazi child attending public primary school.[315] The same applicant brought a further application in the High Court arguing that the High Court's first order was merely declaratory and did not compel anybody to do anything, leaving it to the respondents to decide when to provide free primary education.[316] The High Court held that to hold the government accountable for reneging and abdicating its constitutional obligation to provide free primary education, the applicant has to prove on a balance of probabilities that the resources for doing so are available at the disposal of government but the government does not want to utilise them. The applicant did not prove that resources were indeed available and the Court dismissed the application.[317]

In the Supreme Court, the appellant argued that the High Court ought not to have placed the onus on the appellant to prove that resources are available to implement free primary education in schools. The Supreme Court dismissed the appeal noting that the explicit provision on free primary education in the Constitution was more of an aspirational right.

[313] Education Rules 1977 s 11.
[314] Joseph Zulu 'Ministry to Punish Teachers for Corporal Punishment' Times of Swaziland (9 October 2015); Eddie Abner 'Ministry to Ban Corporal Punishment in Schools' Swazi Observer (23 September 2015).
[315] *Swaziland National Ex-Miners Workers Association and Another v Minister of Education and Others* [2009] SZHC 104 (March 2009).
[316] *Swaziland National Ex-Miners Workers Association v Minister of Education and Others* [2010] SZHC 258 (January 2010).
[317] *Swaziland National Ex-Miners Workers Association v Minister of Education and Others* [2010] SZHC 258 (January 2010), para 48.

Alice Fikile and 45 Others v Swaziland National Provident Fund and Others [2011] SZSC 30

The appellants brought an application in the High Court interdicting the respondents from evicting them from the first respondent's farm and demolishing their homesteads. The application was based on sections 18 and 29 of the Constitution on the basis that the evictions would be a threat to the education of the appellants' children and were inhumane and degrading. The Supreme Court held that the appellants had failed to establish a *prima facie* right for interim relief. It further held that the children's rights under sections 18 and 29 of the Constitution are subject to respect for the rights of others, including the rights of the registered owner of the farm. It dismissed the appeal with costs.

Masinga v Director of Public Prosecutions and Others [2011] SZHC 58

In the *Masinga* case, the High Court considered the constitutionality of provisions in the Criminal Procedure and Evidence Act which had the effect of providing for mandatory sentences for children convicted of an offence. In that case, the applicant was 15 years at the time of the commission of the offence of rape and was sentenced to the mandatory sentence of 9 years. The Court relied on various South African cases, the CRC and a judgment by Masuku J which considered the appropriateness of mandatory sentences in the case of children in *Rex v Mndzebele*.[318] The Court concluded:

> *"More to the foregoing is that it is the judicial consensus that a child, by reason of the frailties of his physical, emotional and psychological circumstances, is exempt from mandatory sentences. Jurisprudence proposes that imprisonment must be a last resort for the child. This position of jurisprudence is in accord with the tail end of our section 29(2) [of the Constitution], which advocates that any punishment imposed on a child should be subject to lawful and moderate chastisement for purposes of correction."*

The Court held that sections 185bis(1), 313 (1) and 313(2) of the Criminal Procedure and Evidence Act, "in so far as they compel the imposition of a minimum mandatory custodial sentence upon all Third Schedule offences, including the child, are inhumane, cruel and destitute of natural kindness". The Court held that these sections are inconsistent with the interest of the child preserved by sections 29(2) and 19(2) read together with sections 18(2) and 38(e) of the Constitution and are unconstitutional to the extent of such inconsistency. The declaration of invalidity was not made with retrospective effect for fear that such declaration "spells dire consequences for the nation" and would "open the flood gates", which would have an impact on the country's economic situation and the administration of justice. The declaration of invalidity was accordingly suspended until the passing of the Children's Protection and Welfare Bill. Section 156 of the Children's Protection and Welfare Act No. 6 of 2012 provides that when imposing a sentence, a Court must be satisfied that it is a measure of last resort and for the shortest possible period. The Act allows for the imposition of a sentence of imprisonment of up to 5 years in the case of a child over 16 years of age, which sentence may be postponed or suspended.

[318] Criminal Trial No. 213/2007, unreported.

C. What Still Needs to Be Done?

Corporal Punishment

The call to prohibit corporal punishment in all settings was repeatedly made in recommendations of various human rights monitoring mechanisms.

It will be helpful to amend section 14(2) of the Children's Protection and Welfare Act No. 6 of 2012 which deals with the administration of discipline for children. Although sections 14(1) and (2) could be read to discourage corporal punishment in any setting, it is important that this is stated explicitly. No justification should be allowed under section 14 for parents, guardians, teachers or other persons to administer discipline with violence against children.

It is recommended that provisions in other subsidiary legislation such as the Education Rules, which refer to corporal punishment, be removed. Cases are still often reported of grave abuses of school children by teachers, and substantial training would be required to ensure teachers are equipped to use positive discipline.[319]

Child Justice

As per the case law discussed above, it would be important to amend section 185bis(1) of the Criminal Procedure and Evidence Act to explicitly state that the mandatory sentence for rape does not apply in the case of a child offender. Similarly, sections 313(1) and (2) of the Criminal Procedure and Evidence Act which allow postponed or suspended sentences except in the cases of murder, robbery and rape, should be amended to reflect that the Children's Protection and Welfare Act recommends that children only be sentenced as last resort.

Statelessness

The various recommendations issued by the human rights monitoring mechanisms highlighted the need for Eswatini to take concrete legislative steps to prevent children from becoming stateless. This includes amending section 43 of the Constitution which states that a child born in Eswatini is a citizen if at the time of birth his or her father was a citizen. Urgent efforts should also be made to improve birth registration.

Education

The courts have interpreted the right to free primary education as a right that is subject to progressive realisation. This is in line with the State's own roadmap to achieve free primary education, which anticipated gradually moving towards free primary education, starting with free education for grades 1 and 2 in 2010.[320] Despite this, some schools had been charging parents' top-up fees to cover their running costs, contrary to instructions from the King.[321] In the State's response to the Human Rights Committee, the government noted that it has successfully rolled out free primary education in all State schools.[322] However, at the time of this statement the European Union had been supplementing school fees. In September 2017, the government issued a circular allowing

[319] 'Govt Sued because of Violent Teachers' Swazi Observer (11 October 2017).
[320] IRIN 'Free Primary Education, at Last' (29 January 2010), https://reliefweb.int/report/swaziland-free-primary-education-last.
[321] Mantoe Phakathi 'The Struggle to Keep Swaziland's Primary Schools Free' (18 February 2013) www.ipsnews.net/2013.02/the-struggle-to-keep-pimary-schools-free.
[322] OHCHR, 'Human Rights Committee Discusses Implementation of Civil and Political Rights in Swaziland' (10 July 2017).

the Ministry of Education and Training to charge learners additional top-up fees.

Many challenges have been raised in relation to the implementation of the right to education, including lack of qualified teachers in primary schools and the problem of early marriage affecting girls negatively. Eswatini's education policy also stipulates that pregnant girls can stay in school. In practice, girls are often expelled once the school becomes aware of the pregnancy. From a policy perspective, it would be helpful to regulate the concrete steps to be taken when girls fall pregnant while attending school. Shortages experienced in school-feeding programmes also contribute to school drop-outs.[323]

The Primary School Net Enrolment rate is estimated at 95%, but the Secondary School Net Enrolment rate is only 46,3%.[324] Approximately 16% of the National Budget for 2019/2020 is earmarked for education.[325]

[323] IRIN 'The Cost of Hunger in Swaziland' (1 August 2018), www.irinnews.org/news/2013/08/01.
[324] Budget Speech, 2019, presented to parliament by the Minister of Finance on 27 February 2019, pg. 24.
[325] Budget Speech, 2019, presented to parliament by the Minister of Finance on 27 February 2019, pg. 24.

6. FACTORS AFFECTING THE ALIGNMENT OF ESWATINI'S LAWS WITH UN RECOMMENDATIONS

A myriad of socio-economic and political factors impact on the alignment of domestic laws with recommendations issued by human rights monitoring mechanisms. Some of these factors, such as political interests and economic capacity, bear more weight than others in establishing *de facto* the position of the government in relation to these recommendations. In Eswatini, the duality of the legal system, the independence of the judiciary and other aspects, influence the extent to which actions are taken to bring the laws of the country into compliance with recommendations issued by the human rights monitoring mechanisms.

6.1 Duality of the Law, Political Will and Customary Values

Eswatini subscribes to a dual legal system where customary norms exist alongside positive law. In part, the customary norms have been used to explain disregard for human rights standards under the banner that certain Swazi customs do not correlate with enforceable human rights standards. This assertion has been used by government to avoid legislative action needed to align domestic laws with recommendations made by human rights monitoring mechanisms. The few examples below attempt to explain this further.

Section 252(2) of the Constitution states that:

> *"Subject to the provisions of this Constitution, the principles of Swazi customary law (Swazi law and custom) are hereby recognised, adopted and shall be applied and enforced as part of the law of Swaziland."*

However, section 252(3) states that:

> *"The provisions of subsection (2) do not apply in respect of any custom that is, and to the extent that it is,* ***inconsistent with a provision of this Constitution*** *or a statute, or* ***repugnant to natural justice or morality or general principles of humanity.****"*

These two provisions represent the clash between the rights enshrined in the Constitution and customary laws. The Constitution is reiterated as the supreme law of Eswatini in section 252(3) and thus appears to overrule customary law and custom where that law is repugnant to the rights in the Constitution. However, traditional law and custom can be perceived by the common

law courts as operating outside of their jurisdiction and there is still some doubt about whether traditional matters can be successfully challenged in the common law courts.[326]

The reluctance of the courts to intervene in traditional matters was clearly demonstrated in the decision of the Supreme Court in *Commissioner of Police and the Attorney General v Mkhondvo Aaron Maseko*. The case concerned an order by the King for the removal of the respondent's cattle and a key issue before the Court was whether the matter fell within the jurisdiction of the common law courts or the traditional legal system. The Supreme Court found "that the Constitution is informed by very strong traditional values" and that "it is wrong, if not downright insensitive for any court in this country to apply Roman-Dutch law in a case which cries out for Swazi law and custom."[327] It appears that there is a distinct lack of political will by government to change laws to meet its obligations under international law where those changes are likely to interfere with customary law and traditional values.

According to an interview conducted by the Georgetown Journal of International Law, a principal magistrate admitted that "the biggest problem we're facing at this point in time is that we, Swazis, on the ground we have not seen the will, the political will or desire to really reform the laws that would not be in step with the Constitution."[328]

The 2013 elections were marred by incidents of women being discriminated against when attempting to exercise their political right to run for election. Jennifer du Pont-Shiba made an application before the courts to set aside the initial primary election results because of interference in the results which represented a violation of her constitutional rights. According to her application, and corroborated by numerous witnesses, Chief Maguduvela summoned the residents of his chiefdom to a meeting where he discouraged them from voting for Ms Du Pont-Shiba because of her status as a recent widow, which according to custom and tradition made her ineligible for parliament.[329]

Similarly, Mana Mavimbela was unable to have her name included in the list of nominees for the primary elections because she wore a pair of pants which was considered unacceptable dress-code by the returning officer. She made an application to the court claiming violations of her rights under sections 20 and 28 of the Constitution. The Elections and Boundaries Commission eventually conceded and added her name to the list of nominees.[330]

In a positive step, the Election of Women Members to the House of Assembly Act No. 9 of 2018 was enacted to give effect to the constitutional provisions which seek to increase women's participation in the House of Assembly. The difficulty is that the law only puts in place a mechanism for adding women to parliament but does not in practice improve the environment necessary for more women to decide to participate in the elections. For the 2018 elections, only 13.2% of candidates for the Secondary Elections were women.[331]

[326] Dlamini-Ndwandwe N 'Customary laws and practices relating to land property and the right to equality in Swaziland's Constitution' 331.
[327] *Commissioner of Police and Another v Maseko* [2011] SZSC 15, paras 2, 12.
[328] http://www.law.georgetown.edu/academics/law-journals/gjil/upload/2-inheritancereport.pdf.
[329] Mbongiseni Ndzimandze 'Jennifer du Pont Wins Round One' Times of Swaziland (13 September 2013); Mduduzi Magagula 'Don't Vote for Widow – Chief' Times of Swaziland (18 August 2013).
[330] Thomas Masuku, (2013) 'Women and Justice in Swaziland: Has the Promise of the Constitution Been Fulfilled' in Perspectives – Political Analysis and Commentary from Africa, Issue No. 3, pg. 24.
[331] Sibongile Sukati 'Full List of Candidates Out' Times of Swaziland (29 August 2018).

6.2 Challenges to Judicial Independence

The judiciary in Eswatini has come under scrutiny for its lack of independence. In 2017, the Human Rights Committee expressed concern about reports of political interference in the judiciary by the executive arm of government. The Committee recommend that Eswatini takes measures such as implementing specific constitutional guarantees to protect judges and prosecutors from any form of political interference or pressure.[332] The judicial crisis of 2015 which saw Chief Justice Michael Ramodibedi formally charged with misconduct highlighted clear issues within the judiciary of Eswatini. For years before charges were laid, Chief Justice Ramodibedi was criticised for his lack of independence, including in 2011 when the Law Society of Eswatini filed a complaint before the African Commission raising concerns about interference with the judiciary.[333]

Beyond the actions by the former Chief Justice above, there are allegations that the judicial system in Eswatini is especially susceptible to interference from the King and the executive. It is said that the Crown exclusively controls judicial appointments and is known to appoint judges who are likely to serve the interests of the King.[334] Some commentators have said that there is a clear lack of transparency and consultation in the appointment process.[335]

The system of allocation of cases has also undermined judicial independence in a context where the practice is for the Chief Justice to take full control of the process eroding the powers of the Registrar known to be responsible for case allocation.[336]

The lack of judicial independence as perceived by the public resulted in low levels of public confidence in the judicial system which is now perceived as a tool to protect the interests of Crown and the executive. It is submitted that this situation erodes the functions of the judiciary as seen by the wider public as an effective or accessible instrument to obtain justice and reinforces the notion that the court is incapable of enforcing the Constitution and the law, particularly in cases concerning the actions of the executive.[337] In such a context where the judiciary has been rendered ineffective, it becomes difficult to use it as a tool to press government to meet its commitments under international norms as expressed in recommendations issued by human rights monitoring mechanisms.

Section 35(1) of the Constitution contemplates that a natural person can apply to the High Court for redress in one or more of three possible capacities:

1. In his or her personal capacity, alleging that one of his or her rights "has been, is being, or is likely to be, contravened";
2. In a representative capacity, alleging that one of a detained person's rights "has been, is being, or is likely to be, contravened"; and
3. In his or her capacity as a member of a group, representing the members of that group, alleging that one of their rights – as members of that group – "has been, is being, or is likely to be, contravened".

A juristic person can apply to the High Court on behalf of its members for redress in circumstances where one of their rights – as members of that group – "has been, is being, or is likely to be, contravened".

Despite these provisions, parties who approach the courts to enforce constitutional rights often fail to get past the hurdle of legal standing. This approach by the courts impacts on access to justice.

[332] Human Rights Committee 'Concluding Observations on Swaziland in Absence of a Report' UN Doc CCPR/C/SWZ/CO/1 (2017), paras 38 and 39.
[333] International Commission of Jurists 'Justice Locked Out: Swaziland's Rule of Law Crisis' (2016) pg. 8, 10, and 13.
[334] As above, pg. 22.
[335] International Commission of Jurists 'Justice Locked Out: Swaziland's Rule of Law Crisis' (2016) pg. 22.
[336] As above, pg. 28.
[337] As above, pg. 33.

7. SOME KEY HUMAN RIGHTS ACTORS

7.1 Civil Society

Many stakeholders, including the government play a significant role in shaping the landscape for human rights in Eswatini. Whilst criticism has been raised against the government, it continues to play a vital role enacting legislation, adopting policies, implementing strategies and programmes seeking to improve the lives of many vulnerable people in the country.

As main umbrella body, the Coordinating Assembly of Non-Government Organisations (CANGO), established in 1983, works to build capacity and strengthen partnerships for positive social change in the country.

The engagement of UN human rights mechanisms by civil society in Eswatini in the 2016-2018 cycles involved several organisations clustered according to their work on human rights, with the support of COSPE.

The **Civil and Political Rights Cluster** includes: the **Council of Swaziland Churches**, whose main mandate is promoting and defending human rights under the Justice and Peace Department; the **Swaziland Multimedia Community Network** (SMCN) whose mandate is to lobby for freedom of expression in relation to broadcasting at community level; the **Swaziland Coalition of Concerned Civic Organisations** (SCCCO), established in 2003 to work collectively towards the attainment of a just society through the promotion of respect for human rights, democracy and good governance; the **Catholic Commission for Justice and Peace** (CCJP), a department under the Diocese of Manzini, which facilitates the involvement of the Catholic Church congregation in the promotion of justice and peace activities; the **Swaziland Concerned Church Leaders** (SCCL), formed in 2008 with members from all church bodies (Council of Swaziland Churches, Swaziland League of Independent Churches, Swaziland Conference of Churches) as well as non-affiliated Churches, whose mandate is to coordinate efforts on critical social, political and economic issues; the **Swaziland United Democratic Front**, a coalition of pro-democracy interests including political parties, unions and churches formed in 2008; the **Political Assembly**, consisting of the declared political parties, namely People's United Democratic Movement (PUDEMO), Ngwane National Liberatory Congress (NNLC) and Swazi Democracy Party (SWADEPA), to foster freedom of association and expression in the country.

The **Socio-Economic Rights Cluster** includes: the **Foundation for Socio-Economic Justice** (FSEJ), a federation of organisations born out of the organic struggles of rural poor, workers and young activists in 2004; the **Swaziland National Association of Teachers** (SNAT) founded in

1928, which strives to improve the professional and socio-economic status of teachers, enhance collective bargaining for teachers and encourage maximum participation and dynamic provision of quality education to learners; the **Arterial Network Swaziland**, an arts civil society organisation registered in 2010, whose vision is to promote a vibrant, dynamic and sustainable arts sector as means to contribute to democracy, human rights and eradication of poverty; the **Trade Union Congress of Swaziland** (TUCOSWA), formed in 2012 with the mandate to defend and promote the interests of the workers and labour sectors; the **Coalition of Informal Economy Associations of Swaziland** (CIEAS), founded in 2006 by marginalised community-based organisations striving to earn a living, which works to bring together all informal traders in the country to support each other in economic and political development and to build alliances towards changing the country's policies to be inclusive and pro-poor.

The **Women and LGBTI Rights Cluster** includes: **Women and Law in Southern Africa** (WLSA-Swaziland) which seeks to contribute to the social, economic, political and legal advancement of women and girls in Swaziland;[338] the **Swaziland Rural Women Assembly** (SRWA), formed in 2011, to support rural women to freely participate and contribute in all the social, economic, religious, political, cultural and educational spheres in the country; **Swaziland Action Group Against Abuse** (SWAGAA), a non-governmental organisation that has been working for over 20 years to eradicate gender-based violence (GBV), sexual abuse and human trafficking; the **Swaziland Domestic Workers Union**, registered in 2016 to promote an environment of decent and safe work regulations and the respect of rights of domestic workers; **Voice of Voices** (VOOV), newly registered to provide health services and support to marginalised women, especially sex workers, and to advocate for their rights; the **Rock of Hope**, which since 2012 addresses human rights issues for the marginalised people and is dedicated to the building of healthy and empowered minority groups in the country, especially supporting the LGBTI community; **Gcama Mfati Women Network**, established in 2016 by women from Manzini and Lubombo regions, to promote the rights of women at community and national level.

The **Youth and Children's Rights Cluster** consists of: **Luvatsi** (Swaziland Youth Empowerment Organization) formed in 2006 to create an enabling environment for youth participation and empowerment; the **Swaziland National Union of Students**, whose mandate is to organise students to play a meaningful role towards the total transformation of education; **SOS Children's Villages Swaziland**, member of the SOS International Federation, which is committed to the welfare of children and youth, to strengthen families and communities as a preventive measure in the fight against abandonment and social neglect; **Phumelela Swaziland,** established in 2016 to empower youth at risk through knowledge, compassion and opportunities: the **Swaziland Youth Network Vision** whose vision is to integrate and unify youth bodies to participate and influence government decision-making structures locally and globally; the **Family Life Association** (FLAS) opened in 1979 to promote sexual and reproductive health for youths aged 10 to 24 years.

[338] WLSA-Swaziland often joins as an *amicus curiae* or co-applicant in cases concerning women's rights and the interpretation of the Constitution and the Bill of Rights.

7.2 Judiciary

Despite concerns raised about judicial independence and impartiality due to political interference, courts continue to play a significant role in promoting human rights. The role of courts is evident in instances where they stood strong in defence of rights where laws and practices do not conform to human rights standards.

7.3 The Human Rights Commission

The Human Rights Commission was established under sections 163 to 171 of the Constitution and tasked with the mandate to investigate complaints of violations of fundamental rights and freedoms contained in the Constitution, as well as functions to investigate complaints of corruption and abuse of power by public officials.[339] Of significance, the Commission was created to function as an independent entity free from external control of public of private entities.[340]

Section 169 of the Constitution provides that the Commission shall not, when investigating a matter connected with the decision of a Minister, inquire into the policy of government in accordance with which the decision was made. The Commission may further not investigate any matter relating to the exercise of any royal prerogative by the Crown.[341]

In the past, the Commission faced severe constraints in discharging its functions. Established in 2009, it lacked adequate resources (financial and human) to carry out its mandate and until 2015 it did not have a functioning secretariat. These challenges compromised significantly the extent to which the Commission could carry out its mandate.[342] Presently, however, five officers work at the Commission including an Executive Secretary, a legal advisor and three human rights researchers. The draft Bill on the Human Rights Commission has not yet been finalised.

7.4 The International Community

As in other countries, development partners play a great role contributing towards economic growth and respect for human rights in Eswatini. The list of international stakeholders that play a role in shaping the human rights landscape of Eswatini comprises of diplomatic representations from various countries, the World Bank, and UN delegations and specialised agencies. Certain prominent multilateral corporations, intergovernmental agencies and international non-governmental organisations also play a significant role in the country. [343]

The EU, diplomatic representations and the UN agencies provide technical support and financial assistance to government and stakeholders working on human rights.

[339] The Constitution the Commission shall consist of a Commissioner and at least two Deputy Commissioners to be appointed by the King on the advice of the Judicial Service Commission. See Constitution of Eswatini s 163(2) and (3).
[340] Constitution s 166.
[341] Constitution s 155(3)(c).
[342] Report of the Human Rights Commission 2016 pg. 28.
[343] World Food Programme 'WTP Swaziland Country Brief' (November 2017) http://documents.wfp.org/stellent/groups/public/documents/ep/wfp272254.pdf?_ga=2.187200877.499232248.1522837100-1777035913.1522837100.

The European Instrument for Democracy and Human Rights (EIDHR) has the following priorities in Eswatini:

- Support advocacy and awareness initiatives for the full realisation of basic democratic principles, rights and freedoms as enshrined in the 2005 Constitution and other international treaties and protocols;
- Support the country's initiatives aimed at ensuring gender equality, the empowerment of women and the promotion of children's rights;
- Assist the country's initiatives to strengthen the judiciary, rule of law, access to justice for the poor and governance, and framework conditions to accelerate sustainable and inclusive growth and reduce poverty.

In May 2014 the EU adopted a rights-based approach encompassing all human rights. The EU supports civil society actions aimed at promoting and protecting human defenders, and protecting and promoting the political, social, economic and cultural rights of groups vulnerable to discrimination, such as women, children, immigrants, people living with albinism and persons with disabilities.[344]

Other role-players are international civil society organisations operating in the country, such as Amnesty International Southern Africa, Civicus, International Commission for Jurists (ICJ), Lawyers for Human Rights, Southern Africa Litigation Centre, Centre for Civil and Political Rights (CCPR) and many others that have consistently carried out local and international advocacy, capacity strengthening and litigation aimed at improving the situation of human rights in the Kingdom of Eswatini.[345]

COSPE has been supporting civil society in the country, under the EU co-funded project *Fostering communication and cooperation amongst non-state actors for the benefit of Swazi civil society (2014-2016)*, in partnership with CANGO and Punto Sud.[346] The process has led to the creation of four different civil society clusters (Civil and Political Rights, Economic, Social, Cultural Rights, Women's and Lesbian, Gay, Bisexual, Transgender and Intersex (LGBTI) Rights, Children's and Youth Rights) involving 25 civil society organisations that have developed a national and regional advocacy action plan for the implementation of UN recommendations on human rights, including the drafting of the Civil Society Universal Periodic Review Report for the 2016 country review session that has been presented to the Human Rights Committee at the UPR-info session. The number of active organisations has been enlarged up to 35 in the current EU co-funded project *Rights4All: Promotion and protection of fundamental Rights and democracy in Swaziland* (2018-2020), carried out by SALC, COSPE and FSEJ, to engage the UN human rights mechanisms namely the UPR, CEDAW and ICCPR.[347]

[344] EIDHR 'Supporting Civil Society Organisations Actions to Promote Human Rights, Good Governance and Gender Equality in Eswatini: Guidelines for Grant Applicants' (June 2018).
[345] See more details about the work of these institution on their respective websites at Amnesty International (AI) - https://www.amnesty.org/; Human Rights Watch (HRW) - https://www.hrw.org/; International Commission for Jurists (ICJ) - https://www.icj.org/; and Southern Africa Litigation Centre (SALC) - http://www.southernafricalitigationcentre.org/.
[346] FED/2012/307-510.
[347] EIDHR/2017/155320/14.

8. RECOMMENDATIONS

8.1 Recommendations Specific to the Government

In addition to recommendations made in the body of this research report, the key recommendations include the following:

In Respect of Civil and Political Rights:

Democratic Governance

- Ratify the African Charter on Democracy, Elections and Governance;
- Amend the Constitution to allow a multi-party democracy and to increase oversight mechanisms within government;
- Formally repeal the King's Proclamation of 1973 and subsequent Decrees which inhibit political party activities;
- Amend the Swazi Administration Act of 1950 to revise the broad powers attributed to chiefs to the extent that such powers impact on the rights to expression, assembly and association;
- Repeal section 51(1) of the Public Service Act of 2018, to the extent that it prevents a public officer from holding office in a political organisation;
- Finalise the Human Rights Commission Bill and ensure that the Commission has adequate resources.

Freedom of Expression, Association and Assembly

- Review all laws which impact on freedom of expression and press freedom, including the Proscribed Publications Act of 1968, the Books and Newspapers Act of 1963, the Cinematograph Act of 1920, the Protection of the Person of the Ndlovukazi Act of 1967, and the Public Service Act of 2018;
- Abolish the common law offence of criminal defamation;
- Ensure that the Media Complaints Commission has an adequate budget;
- Finalise the Broadcasting Bill and remove vague provisions relating to decency, morality and good taste;
- Review the Suppression of Terrorism Act (as amended) to include provisions allowing organisations to challenge an order listing them as terrorist before such order is finalised, and to narrow provisions which infringe on freedom of expression and assembly;
- Repeal the Sedition and Subversive Activities Act of 1938;

- Ensure all police officers and the judiciary are trained on the Public Order Act of 2017;
- Repeal section 15(3)(h) of the Public Order Act of 2017 which prohibits a person participating in a gathering from inciting hatred or contempt against the culture and traditional heritage of the Swazi Nation.

Access to Information

- Adopt the Access to Information Bill after public consultation;
- Amend the Official Secrets Act of 1968 to remove provisions punishing public office holders from making information publicly, to the extent that it hampers the enjoyment of the right to access to information;
- Ratify the African Union Convention on Cyber Security and Personal Data Protection and enact legislation relating to data protection and protection of whistle-blowers.

Death Penalty

- Ratify the Second Optional Protocol to the ICCPR relating to the death penalty;
- Repeal section 297 of the Criminal Procedure and Evidence Act of 1938 relating to the death penalty.

Extra-judicial Killings

- Ratify the Convention for the Protection of All Persons from Enforced Disappearances;
- Repeal section 15(4) of the Constitution relating to extra-judicial killings.

Corporal Punishment and Conditions in Detention

- Ratify the Optional Protocol to the Convention Against Torture and Other Cruel, Inhuman and Degrading Treatment;
- Repeal sections 306 and 307 of the Criminal Procedure and Evidence Act of 1938 relating to corporal punishment;
- Ensure officers are trained on the prohibition on torture and cruel, inhuman and degrading treatment, as contained in the Correctional Services Act of 2017 and the Police Service Act of 2018;
- In terms of the Correctional Services Act of 2017, the Minister should appoint and resource an independent body to inspect prisons;
- Repeal section 165(3) of the Criminal Procedure and Evidence Act of 1938 which allows for detention at his Majesty's pleasure of a person found to be a 'criminal lunatic'.

Access to Justice

- Adopt legislation regulating access to legal aid in Eswatini.

In Respect of Economic, Social and Cultural Rights:

Health

- Ensure access to health care services without discrimination against persons based on health status, disability; gender identity or sexual orientation;

- Increase the health budget and improve health finance management to prevent shortages in health service provision and in medicines;
- Provide access to treatment for cervical cancer.

Land

- Amend the laws governing the land tenure system to confer security of land ownership and protect communities from unlawful evictions;
- Repeal the Vagrancy Act of 1963.

Disability

- Ratify the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Persons with Disabilities;
- Review existing mental health and disability laws to ensure their compliance with the Convention on the Rights of Persons with Disabilities;
- Train public officers on the Persons with Disabilities Act of 2018;
- Develop measures to protect persons with albinism.

In Respect of the Rights of Women and LGBTI Persons:

International Law

- Ratify the Optional Protocol to the Convention on the Elimination of all Forms of Discrimination against Women;
- Review domestic laws affecting the enjoyment of human rights by women, to identify the gaps and embark on a process of reform to align domestic laws with CEDAW;
- Address all customary norms and traditional practices inconsistent with CEDAW and the Constitution.

Gender-based Violence

- Establish a national coordination mechanism on gender-based violence;
- Ensure the SODV Act is properly budgeted for and implemented;
- Ensure all public officers are trained on the SODV Act in terms of the requirements in section 191 of the Act;
- Address sexual harassment in workplace and create awareness of the criminalisation of sexual harassment under the SODV Act;
- Review the provisions in the SODV Act on the National Register for Sex Offenders, with a view to narrowing its ambit.

Rights of LGBTI Persons

- Decriminalise the common law offence of sodomy;
- Take measures to reduce discrimination against LGBTI persons and ensure the punishment of the perpetrators or discrimination.

Gender Equality

- Expedite the passing of the Marriages Bill and Matrimonial Property Bill and ensure that they have adequate provisions to ensure gender equality, prohibit child marriages, and ensure reasonable provision for a surviving spouse;
- Remove the doctrine of marital power as it applies to marriages out of community of property;
- Abolish the customary practice of male primogeniture and other practices which unfairly discriminate against women and widows.

Equal Access to Employment and Services

- Amend all labour legislation to include provisions prohibiting discrimination against persons based on health status, disability; gender identity or sexual orientation;
- Review the provisions in the Employment Act of 1980 on maternity leave;
- Ensure enforcement of the regulations pertaining to minimum wages and workplace rights for domestic workers and other sectors of employment, and create measures to improve the situation of street vendors.

In Respect of Youth and Children:

- Ensure the implementing regulations of the Children's Protection and Welfare Act of 2012 are adopted.

Child Marriages

- Explicitly prohibit early, forced or child marriages in legislation.

Corporal Punishment

- Amend section 14(2) of the Children's Act to explicitly prohibit corporal punishment in all settings;
- Amend the Education Rules to remove reference to corporal punishment.

Child Justice

- Amend sections 185bis(1) and 313 of the Criminal Procedure and Evidence Act of 1938 to reflect that children may only be sentenced to imprisonment as last resort.

Statelessness

- Amend section 43 of the Constitution and applicable legislation governing the right to citizenship to include provisions granting nationality to all children born in Eswatini, and particularly, for children born to Swazi mothers regardless of the nationality of the father.
- Improve birth registration processes to ensure that all children are registered.

Education

- Improve access to education, including for pregnant learners.

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