



Swaziland

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B. Normative and institutional framework of the State

The Constitution of the Kingdom of Swaziland has been supreme law since 2005. Its enactment followed more than three decades of *de facto* emergency rule under the King's Proclamation of 12 April 1973. Emerging from a prolonged and contested process, the Constitution has an enforceable Bill of Rights and a set of Directive Principles, which make reference to social and economic rights. During the drafting of the Constitution Amnesty International raised concerns that the proposed provisions allowed wide scope for the government to excessively restrict the rights and freedoms it guarantees.¹ This concern still stands and is referred to in further detail below.

Although civil society organizations remain concerned about the processes which led to the adoption of the new Constitution, as well as its lack of clarity and limitations in certain critical areas, they have used its provisions to mount legal challenges to persistent infringements of human rights. With a few exceptions, however, the rulings by the High Court and the Supreme Court of Appeal on constitutional issues have not substantially advanced the protection of the rights at risk.

National human rights institutions provided for under the Constitution are weak. Members of the new Human Rights and Public Administration Commission, who were appointed in 2009, began work without an enabling statutory law, so preventing the Commission from effectively discharging its mandate and obligations.

Of further concern is the slow pace of bringing into line subordinate law with constitutional law and Swaziland's obligations through its accession to a number of international and regional human rights treaties.² Swaziland has a poor record of reporting on the implementation of its international human rights treaty obligations.

Discrimination against women

The Constitution guarantees women the right to equal treatment with men, a right that "shall include equal opportunities in political, economic and social activities" (Section 28 (1)). However other provisions of the Constitution appear to fall short of international human rights standards. For example, Section 15(1) that prohibits discrimination on various grounds does not include marital status.³ Women's right to equality in the cultural sphere is also inadequately protected by the provision guaranteeing that "a woman shall not be compelled to undergo or uphold any custom to which she is in

¹ <http://www.amnesty.org/en/library/info/AFR55/004/2004/en> at pages 70-91

² These include the ratification of the African Charter on Human and Peoples' Rights and their accession in 2004 to the UN Convention on the Elimination of All Forms of Discrimination against Women, the International Covenant on Civil and Political Rights and the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment.

³ Nor does it include the ground of sexual orientation.

conscience opposed”(Section 28(3)). This formulation places an undue burden on the individual woman, whereas international human rights law stipulates that it is the responsibility of the state to prohibit and condemn all forms of harmful practices which negatively affect women. Furthermore, girls and young women are not sufficiently protected under the law from forced or early marriages.

As a consequence of the slow pace of law reform, women remain unprotected by the law and continue to face forms of discrimination permitted by domestic law. The delays cannot be blamed on a lack of resources since the government has been provided with various forms of practical support for this process as it pertains to women’s rights by the EU and UN agencies. While a number of new bills had already been drafted by 2009, by early 2011 only one, the Sexual Offences and Domestic Violence bill, had been tabled in Parliament. In May 2010 the Supreme Court ordered that an unconstitutional provision of the 1968 Deeds Registry Act must be amended by Parliament within a year. The provision (Section 16(3)) prohibited most women married under civil law from legally registering immovable property in their own name. By early 2011 the law was still on the statute books unchanged.

Statutory and case law in Swaziland reduce most married women to the status of legal minors. Women married under civil law provisions (the 1964 Marriages Act) are subject to the ‘marital power’ of their husbands. They cannot independently administer property, sign contracts or conduct legal proceedings. The only exception involves an ante-nuptial contract, and few women seem to be aware of this option. Women in Swaziland may alternatively marry under customary law under the country’s dual legal system. For them the husband’s ‘marital power’ extends even further and its limits are unclear. The Marriages Act also discriminates between boys and girls, providing a lower minimum age of marriage for girls (16) than boys (18). Under customary law, marriage is permissible for girls as young as 13.

Until the Sexual Offences and Domestic Violence draft law is passed, women experiencing gender-based violence have few remedies available to them under the law. Under common law, rape is defined narrowly and marital rape is not criminalized in either statute or common law. The Girls and Women’s Protection Act of 1920 specifically excludes marital rape from its range of offences.

Restrictions on fundamental freedoms

The Constitution guarantees the rights to freedom of thought, conscience and religion, of expression and opinion, and of peaceful assembly and association (Sections 23-25). These crucial civil and political rights lie at the heart of decades of conflict over forms of governance in Swaziland. The relevant provisions are, however, undermined by extensive limitation clauses that permit the state to restrict the enjoyment of these rights. Political participation is further restricted by Section 79 of the Constitution which allows participation as candidates in elections only on the basis of “individual merit”, effectively precluding individuals from participating under the banner of a political party.⁴

The enjoyment of fundamental human rights is further affected by draconian security legislation such as the Sedition and Subversive Activities Act⁵ and the 2008 Suppression of Terrorism Act (STA). For example, the provisions of the former Act are vague and can be interpreted in such a manner as to severely curtail the enjoyment of freedom of expression, among other rights, and allow for punishments of up to twenty years’ imprisonment without the option of a fine.

⁴ In May 2009, the Supreme Court ruled that there was no conflict between the right of Swazi citizens to form and join political parties under Section 25 of the Constitution, and Section 79. A dissenting ruling was issued by Justice Thomas Masuku, who argued that Section 79 did nullify the substantive right protected under Section 25.

⁵ Act No 46 of 1938 as amended.

Likewise, provisions in the STA are sweeping and imprecise while the penalties for breaches are severe. The definition of a “terrorist act” in Section 2 of the STA is not limited to the threatened or actual use of violence or to acts committed in pursuit of an underlying political or ideological goal. Many key provisions of the STA rely on this definition, so its breadth and vagueness also renders these other provisions excessively broad in their effects. The STA gives the government wide discretion to declare an organization a “terrorist group”. The Act also limits the role of the courts in reviewing such decisions, and effectively requires the organization to persuade the court that the government’s decision was “not reasonable”. Being designated a “terrorist group” in this way carries grave consequences. Membership of the group becomes a criminal offence, as does giving “support” to the group, the scope of which is undefined.⁶

Limitations on protections of the right to life and physical integrity

Under Section 15(4) of the Constitution, lethal force can potentially be used in a range of circumstances, including to defend property, make a lawful arrest or prevent the escape of a lawfully detained person, suppress a riot, or prevent the commission of a serious criminal offence. In so far as these situations do not put the lives of law enforcement officials or others at risk, these grounds are inconsistent with international human rights standards on the use of force and firearms by law enforcement officials, and are open to abuse.

Subordinate law also threatens the enjoyment of the right to life. For instance the 1953 Game Act gives game-rangers or any person acting on their instructions the right to use firearms “in self defence or if he has reason to believe that his life, or that of any of his colleagues, is threatened or in danger”. This would appear to permit the use of lethal force in situations where there may be no threat to life. A separate clause also appears to offer immunity from prosecution to those purporting to have used firearms in self-defence without any test of reasonableness under this Act.

The use of torture or “inhuman or degrading treatment or punishment” is prohibited under Section 18(2) of the Constitution, and this right to freedom from torture is made non-derogable during declared states of emergency (Section 38(e)). These guarantees are weakened, however, by the failure of the Constitution to incorporate crucial safeguards intended to prevent torture and other forms of ill-treatment. In addition, the government has not taken steps to domesticate the country’s obligations under the UN Convention against Torture, including by developing legislation which specifically defines and criminalizes torture and includes effective measures to prevent and punish acts of torture. Certain subordinate laws such as the STA also increase the risk of torture, by, for instance, providing for detention without trial and not obliging the authorities to produce the detainee in court at any stage.

C. Promotion and protection of human rights on the ground

Discrimination against women

As a result of gender-based discrimination and their low social status, women in Swaziland face high levels of violence and are disproportionately affected by poverty, unemployment and the HIV epidemic.⁷ According to official statistics from 2006/7, 31 per cent of women in Swaziland aged 15 to

⁶ See Suppression of Terrorism Act Undermines Human Rights in Swaziland, Amnesty International and the Human Rights Institute of the International Bar Association (<http://www.amnesty.org/en/library/info/AFR55/001/2009/en>)

⁷ The Lancet medical journal published data in 2009, which revealed that almost one third of girls and women aged 13 to 24 years had experienced some form of sexual violence before they reached 18.

49 are HIV positive, compared to 20 per cent of men. For women aged 25 to 29, the HIV prevalence rate is 49 per cent. Gender-based discrimination, including violence, increases women's risk of HIV infection by reducing their ability to negotiate safe sex with their male partners.

Repression of fundamental freedoms

Political activists continue to be subjected to arrests and trials under security legislation, as well as common law charges such as treason, with some of these matters never brought to conclusion. Sixteen young men charged with treason and released on bail in 2006, for instance, have still not been brought to trial. A human rights lawyer, who was charged in 2009 under the Sedition and Subversive Activities Act for something he was alleged to have said at a public gathering, still has these charges pending against him.

In 2008 the sweeping provisions of the STA were used to criminalize membership of two long-standing political organizations. The STA has also been used to conduct arrests and initiate prosecutions against members of these organizations, irrespective of whether the alleged offences could have been investigated and prosecuted under ordinary criminal law. In September 2009 the president of one of these organizations, Mario Masuku, was acquitted of a charge of providing "support to the commission of a terrorist act", due to lack of evidence against him. He was charged again under the STA in 2010 after speaking at the funeral of another political activist.

The indiscriminate and intimidating effect of the STA was also evident in a large-scale crackdown in June and July 2010. Armed police in the course of investigating a spate of petrol bombings conducted raids and prolonged searches at the homes of dozens of high profile human rights defenders, trade unionists and political activists. In the few instances in which warrants were produced, the searches had been authorized under provisions of the STA. Some individuals were taken to police stations and interrogated about their activities, and several reported being subjected to torture.

Legal gatherings and marches have frequently been disrupted, including in September 2010 when police broke up a peaceful civil society meeting in Manzini and unlawfully arrested more than 50 people.

Violations of the right to life and physical integrity

Over a number of years Amnesty International has raised with the government of Swaziland its concern that law enforcement officials use excessive force against peaceful demonstrators, use lethal force without justification against criminal suspects, and use torture and other forms of ill-treatment against arrested and detained persons.

In January 2010 the then Chairperson of Swaziland's Human Rights and Public Administration Commission, Rev David Matse, publicly expressed concern that police and soldiers appeared to be using a "shoot-to-kill policy" which violated the right to life as set out in the Constitution. In cases where Amnesty International sought corroboration, the information clearly indicated that the victims were not posing a threat to life when they were fatally shot.

The most persistent forms of ill-treatment of people taken into police custody are severe beatings and suffocation torture, with abuses occurring in both informal settings and at police stations. The usual targets are criminal suspects and government opponents. The lack of political will to denounce, prevent and punish perpetrators of torture was underscored by the public and widely reported comments made by Prime Minister Sibusiso Dlamini on 8 September 2010 that torture should be considered as a form

of punishment in certain circumstances. There was no clear repudiation subsequently by his office of these reported comments.

There is no effective, independent and impartial body for the oversight and investigation of alleged human rights violations by the security forces. This absence has been a key contributing factor to the persistence of such violations. Civil damages suits against the authorities has to date been the only effective, if very slow, legal remedy available to victims, if they have access to legal assistance.

A report of an official inquiry into torture allegations made by defendants in the 2006 treason trial has never been made public by the office of the Prime Minister. To Amnesty International's knowledge, only two coroner's inquests have been carried out in the past decade into suspicious deaths in custody, with unsatisfactory outcomes. A third coroner's inquest was ordered by the Prime Minister in the wake of the death in custody of political activist Siphon Jele on 4 May 2010. At the time, Amnesty International welcomed the quick decision. The Coroner's report was presented to the Prime Minister on 4 March 2011.

D. Recommendations for action by the State under review

Amnesty International calls on the government:

Discrimination against women

- To ensure the urgent repeal of legislation that discriminates against women and enact new laws which comply with the commitments to gender equality voluntarily accepted by Swaziland through its accession to the Convention on the Elimination of Discrimination Against Women;
- To commit publicly to a time-frame within which the repeal or reform of existing discriminatory laws and the enactment of new laws to protect the rights of women will be accomplished.

Restrictions on fundamental freedoms

- To remove all restrictions in law and practice which prevent full participation in political life as guaranteed under the International Covenant on Civil and Political Rights and other international standards.
- To repeal or immediately amend the Suppression of Terrorism Act of 2008 and other pieces of security legislation to bring them in line with international human rights standards.

Violations of the right to life and physical integrity

- To institute an urgent review of law, regulation and procedures relating to the use of force and firearms by law enforcement officials and those acting in the private sector under delegated powers.
- To enact legislation which specifically defines and criminalizes torture and includes effective measures to prevent and punish any violations of the right not to be subjected to torture.
- To seek advice and implement a process leading to the establishment of an effective, independent and impartial body to oversee and investigate alleged human rights violations by the security forces.

National Human Rights Institutions

- To ensure the speedy enactment of publically-considered enabling legislation to equip the Human Rights and Public Administration Commission with clear powers and adequate resources to ensure that it is able to work in an accessible, effective, independent and impartial manner.