

# TOO LATE, TOO LITTLE

THE FAILURE OF LAW REFORM FOR  
WOMEN IN SWAZILAND

**AMNESTY**  
INTERNATIONAL



## WOMEN'S ORGANIZATIONS IN SWAZILAND ARE BATTLING TO REFORM LAWS THAT TREAT WOMEN AS SECOND-CLASS CITIZENS. THE GOVERNMENT HAS FAILED TO CHANGE THESE LAWS, DESPITE REPEATEDLY PROMISING TO DO SO. THE RESULT IS THAT WOMEN IN SWAZILAND ARE NOT PROTECTED BY THE LAW AND FACE DISCRIMINATION THAT IS PERMITTED BY LAW.

Women and girls have no legal protection from rape by their husbands. In the country with the highest prevalence of HIV in the world, there are no laws criminalizing domestic violence, forced marriages or early marriages. Most married women are denied equal status as legal adults and cannot administer property, sign contracts or conduct legal proceedings without their husband's consent. Denied the right to own land, many widows are forced from their homes.

In a breakthrough in the fight for equality, Swaziland agreed in 2004 to be bound by the UN Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) – the key international treaty on women's human rights. The Constitution of the Kingdom of Swaziland was enacted in the following year. For the first time, national law guaranteed to women the right to equal treatment with men and some protection from being “compelled to undergo or uphold any custom to which [they are] in conscience opposed”. However, the laws that govern the daily lives of Swazi men and women have not been brought into line with CEDAW or the Constitution and leave Swaziland in flagrant violation of its international commitments to women's rights.

### BROKEN PROMISES

*“[T]he Respondents [Minister of Justice and Constitutional Affairs and others] have had sufficient time since the coming into effect of the Constitution to embark on aggressive legal reforms especially those relating to women who have been marginalised over the years in many areas of the law.”*

Justice Q.M. Mabuza, ruling in the High Court in a case related to women's rights to own property, February 2010, case number 383/2009

More than half a decade after ratifying CEDAW and adopting a new Constitution, official steps to reform the laws affecting women's rights have achieved very little. The Sexual Offences and Domestic Violence bill was only introduced in Parliament for full debate on 28 October 2010. This is despite the active lobbying by women's rights activists and other interested parties, including Amnesty International, since 2005.

Civil society organizations have attended meetings to discuss other draft bills but the law reform process appears to have stalled. In March 2009, the then Minister of Justice, in a meeting with Amnesty International, referred to an ambitious legislative programme to protect and promote women's rights and stated that several other bills would be tabled in parliament by the

end of that year. As of November 2010 this had still not happened.

The delay in the law reform process cannot be blamed on lack of resources. The European Commission, the Commonwealth Secretariat and UN agencies have all supported the reform process by providing legislative drafters, research assistance and funding. The rapid passing of anti-trafficking legislation in 2009, under external pressure, highlights what can be achieved with sufficient political will.

### SWAZI GROUPS DEMAND ACTION

In early 2008, Swaziland's gender consortium – a group of non-governmental organizations working on gender issues – publicly told the Prime Minister that the government had failed to deliver on its promises to end gender disparities. The consortium drafted 16 demands to end gender-based violence in the country. These included the incorporation of CEDAW into national law, enactment of the law on Sexual Offences and Domestic Violence, and finalization of the review of the Marriages Act, Deeds Registry Act and other discriminatory laws. None of these demands have yet been met.



## WOMEN BEAR THE BRUNT

While Swaziland is classified as a middle income country, two thirds of its population live on less than US\$1 a day and life expectancy is among the lowest in the world – different reports put the figure at between 31 and 46 years. Swaziland also has the highest HIV prevalence rate in the world. As a result of discrimination and their low social status, women in Swaziland face high levels of gender-based violence and are disproportionately affected by poverty, unemployment and the HIV epidemic.

*The Lancet* medical journal published data in 2009 from interviews with girls and women aged 13 to 24, which revealed that almost one third of them had experienced at least one incident of sexual violence before they reached 18. Husbands and boyfriends were reported to be the perpetrator in more than one quarter of these sexual assaults.

According to official statistics from 2006/7, 31 per cent of women in Swaziland aged 15 to 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. Women's ability to negotiate safe sex is reduced by fear and by being economically dependent on male partners. In 2004, according to a UN agency, Swazi women earned an estimated 71 per cent less than men.

**In the country with the highest HIV prevalence in the world, support groups play a vital role for women in rural areas. Lubombo, Swaziland.**

## NATIONAL LEGAL CONTEXT

Swaziland's Constitution recognizes the validity of both formal written laws and common law in the state-administered judicial system. In addition it also recognizes uncodified customary law, which is administered by "national courts" and Chiefs. Chiefs are appointed by the King who is also Head of State.

Section 2 of the Constitution affirms that the Constitution is supreme law and that any law or section of a law which is inconsistent with it is deemed null and void.

While the Constitution contains some important advances for the protection of human rights, some of its provisions appear to fall short of international human rights

standards. For example, a provision that allows a woman to opt out of "any custom to which she is in conscience opposed", places an undue burden on the individual woman when it is actually the responsibility of the state to prohibit and condemn all forms of harmful practices which negatively affect the human rights of women. The women's rights organization, Women in Law in Southern Africa, stated in 2003 that "societal attitudes... [as well as the] sanction and ostracism of a woman who refuses to uphold a certain custom... may also militate against women being able to exercise and enjoy [their constitutional] rights". These factors as well as poverty may also prevent women from being able to challenge discriminatory laws and practices in court.

**Women take to the streets of Manzini, Swaziland, to protest against violence against women. The demonstration was organized by a coalition of non-governmental organizations, July 2008. Women's groups in Swaziland are campaigning for legal reform to protect women's rights and women's lives.**

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## UNPROTECTED FROM RAPE AND ABUSE

*"Several women have come to me seeking to prosecute their husbands for rape but because no common law or statute recognizes marital rape as a crime, all I could do was refer them [to an NGO] for counselling."*

Legal practitioner in Swaziland, in an affidavit collected as part of a constitutional challenge on marital rape, December 2006. The case failed to reach court because the applicants could not afford to pursue it.

Where a state fails to criminalize acts of violence against women, and bring perpetrators to justice, the state gives its tacit encouragement to perpetrators to continue their crimes and denies women equal protection of the law. It also reinforces prejudices that violence against women is normal and acceptable, rather than a crime.

Swaziland has not criminalized marital rape under statutory law and common law also appears not to provide legal redress for women raped by their husbands. The Girls' and Women's Protection Act, concerned with sexual abuse of girls under 16, specifically excludes marital rape from its range of offences. Yet girls as young as 13 may be married under customary law and forced marriages continue to be reported.

Under the common law, rape is defined narrowly as the non-consensual penetration of the vagina by a penis. Other forms of sexual violence, such as non-consensual anal or oral penetration, can only be lesser offences, such as indecent assault.

The Girls' and Women's Protection Act, which dates back to 1920, allows the accused to claim that the victim appeared to be 16 or appeared to be "a prostitute" as grounds for a defence. This provision could not only lead to impunity, but also supports attitudes that sex workers are not worthy of the protection of the law.

Some higher courts have understood the gravity of the crime of rape and have tried to address some of the other legacies of the existing law. For example, in a recent case (*Sandile v the King*) the Appeal Court ruled that the presumption that a rape complainant's evidence should be treated with caution was "arbitrary, discriminatory of women...and should no longer be part of our law". However, without a clear legal framework that incorporates international standards, and the provision of comprehensive training to all those involved in the administration of justice, women's access to justice will continue to be undermined by prejudice.

## VIOLENT HOMES

There is no law criminalizing domestic violence in Swaziland. A man accused of domestic violence can only be charged with a common law offence such as assault or attempted murder. This also means that remedies, such as restraining orders to prohibit specific abuses, are not available under the law. The police are often unaware of their duties to protect women from gender-based violence.

Evidence of how far violence against women has come to be seen as normal is shown by a 2006/7 official survey. Approximately four in 10 women and four in 10 men believe that a husband is justified in beating his wife in some circumstances.

Judges are not immune from prejudice. In the High Court case, *Rex v Goodman Mngometulu* in August 2010, the presiding judge, when sentencing a man convicted of murdering his wife, described the murder as "a shocking fairy tale of a man who nurtured, nourished and cherished and invested his hope and his resources into a woman for a future paradise...[who then] betrayed him by her infidelity". The accused was sentenced to seven years' imprisonment, backdated to the time of his arrest.



ENOUGH IS ENOUGH STOP THE KILLING!!

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POLICE



A nurse addresses a women's question and answer group, in Kubuta, Swaziland as part of a community-wide event involving drama, community performances and information exchange.

## FORCED MARRIAGE

*"A woman's right to choose a spouse and enter freely into marriage is central to her life and to her dignity and equality as a human being."*

UN Committee on the Elimination of Discrimination against Women, General Recommendation 21

Two types of marriage are recognized in Swaziland: civil-rites marriages, governed by the Marriages Act of 1964, and marriage under Swazi law and custom. The Marriages Act 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. While polygamy is not recognized in civil law, customary law allows men to take an unlimited number of wives.

There is no law criminalizing forced marriages, including early marriages, which continue to be reported. Although the Constitution states that marriage "shall be entered into only with the free and full consent of intending spouses", it does not explicitly protect girls unable to give informed consent. At least one High Court decision has highlighted that consent is important in examining the validity of a customary marriage.

## MARITAL POWER

*"During marriage, the spouses should have equal rights and responsibilities in the family. This equality extends to all matters arising from their relationship, such as choice of residence, running of the household, education of the children and administration of assets"*

UN Human Rights Committee, General Comment 19

Women married in most civil-rites marriages or under Swazi law and custom are subject to the "marital power" of their husbands – she has no equality within the relationship.

In civil-rites marriages, almost all women require their husband's consent and assistance to administer property, sign contracts or conduct legal proceedings. The only exception is if, before the marriage, the couple explicitly agree in a prenuptial contract to equality and establish separate ownership of all assets and debts (establish a marriage "outside of community of property"). Few women know that this option is available to them.

A husband's marital power in customary law marriages is even more extensive and its limits are unclear. A married woman is not only denied legal and economic independence, but aspects of her personal

freedom are also subject to her husband's control. In Swaziland's 2010 report on progress towards the UN Millennium Development Goals it is acknowledged, for instance, that some married women have to ask their husband's permission to visit an antenatal clinic, which he can refuse.

Marital power violates a large number of women's rights including their rights to equality, self-determination and to own property. It violates article 16 of

Under international law, states may be responsible for the acts of private citizens if they fail to act with due diligence to prevent human rights violations. Such prevention requires effective criminal laws against marital rape, forced and early marriage, and domestic violence. In the face of threats of such violence, the state must take action, for example by allowing victims to obtain court injunctions requiring the perpetrator to stop using violence against them, and enforcing the injunctions when necessary. The state must also provide services such as shelters, long-term housing solutions and assistance to help women earn a living so that they can make their own choices, free from dependence on violent partners.

***‘People need to be aware that the inability of women to equally control the property they own with their husbands leads to situations of dependency and possible cases of abuse. We see many women who are not able to leave abusive husbands because it would mean they have nowhere to live, no money, and no family support.’***

Statement issued by Swaziland Action Group Against Abuse in response to a Supreme Court ruling on women’s right to own property, May 2010

CEDAW, which requires state parties to take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations.

## **DENIED ACCESS TO LAND AND PROPERTY**

The Deeds Registry Act of 1968 prohibits women in civil rites marriages from legally registering immovable property, such as land, in their own name (with the rare exception of those married outside of community of property). This prevents them from owning freehold land, known as “title-deed land”, found largely in urban areas.

Although the Constitution provides for women’s equal access to land for “normal domestic purposes”, in reality most women in rural areas, where land is held communally under the sway of Swazi customary law, are denied independent access to land. Women cannot inherit land under customary law, so widows may be dispossessed from their homes by relatives of their deceased husband. A 2006/7 official survey reported that six per cent of women between 15 and 49 years were widows and half of them had been dispossessed of their property.

## **A LANDMARK CHALLENGE**

In 2009, Mary-Joyce Doo Aphane, a Swazi attorney and long-standing women’s rights activist, brought a legal challenge to test the effectiveness of the Constitution. The previous year, she and her husband (to whom she is married in community of property) had entered a legal process to buy title-deed land which they wanted to own jointly. However, because section 16(3) of the Deeds Registry Act of 1968 provides that “immovable property... shall not be ...registered in the name of a woman married in community of property”, Doo Aphane was advised that the land would have to be legally registered under the sole name of her husband. She took the case to court.

Doo Aphane’s case was successful at the High Court. Mindful that almost half a decade had passed since the enactment of the Constitution, the presiding judge varied the



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wording of the offending section of the Act to enable women to own property in their own names. The state appealed against the ruling and in May 2010 it was overturned by the Supreme Court on technical grounds. However, the judges agreed that the law was unconstitutional and gave parliament a year to amend it.

***Women's organizations in Swaziland are battling to reform laws that treat women as second-class citizens. The government has failed to change these laws, despite repeatedly promising to do so. The result is that women in Swaziland are not protected by the law and face discrimination that is permitted by law.***

**Cover: A woman in Swaziland doing her washing. Since the adoption of the new Constitution, the government has not acted on its promise to change other laws to grant women equality.**

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## **INTERNATIONAL COMMITMENTS**

Swaziland ratified CEDAW without entering any reservations. By doing so, the state voluntarily committed to take steps to respect, protect and fulfil the equal rights of women. It is obliged to "take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women." It has also committed to improving the position of women through policies and programmes and to addressing prevailing gender stereotypes.

Swaziland has also signed but not ratified the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa. By signing the Protocol, Swaziland has a responsibility not to behave in a manner that would undermine the object and purpose of the Protocol. Millennium Development Goal (MDG) 3 also commits Swaziland to promote gender equality and empower women. As acknowledged in the state's 2007 MDG progress report, a review and repeal of all discriminatory laws and the need for stronger legal rights for women are key challenges to the achievement of this goal. The 2010 report highlighted this issue again, stating that without this reformed legal framework "it is difficult to deal with disparities in the country and lack of guidance in some of these areas [of the law] lead to feminization of poverty".

## **ACTION NEEDED NOW**

Please write to the Prime Minister of Swaziland and the Minister of Justice calling on the government of Swaziland 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 under the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW).
- Ensure the swift enactment of legislation to protect and promote the right of all women to be free from all forms of violence, in line with CEDAW obligations.
- State publicly the process and time frame for the repeal or reform of existing discriminatory laws, and the enactment of new laws designed to promote and protect the rights of women.

Please send appeals to:

Prime Minister  
Dr Barnabas Sibusiso Dlamini  
PO Box 395, Mbabane  
Swaziland  
Fax: +268 404 3943

Minister of Justice and Constitutional  
Affairs  
Rev. David Matse  
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Index: AFR 55/007/2010  
English

November 2010

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