

## Executive Summary

With a context of high levels of poverty and a devastating HIV/AIDS pandemic, the people of Swaziland are denied a range of human rights, with poverty and HIV/AIDS showing strong feminisation. The Constitution violates the principle of separation of powers in government. Rights to freedom of association, expression and assembly, as well as rights to liberty and security of the person, are regularly violated under the auspices of anti-terror legislation, or restrictive legislation pertaining to the operations of trade unions. While Swaziland has made some commitments to access to education and prevention of the spread of HIV/AIDS, better treatment of HIV/AIDS infected persons, and universal access to primary education are required.

## I. Background and Framework

### *Constitutional and Legislative Framework*

1. A new constitution came into force in 2006 (the Constitution)<sup>1</sup> which is the supreme law of the state, binding the King of the Kingdom of Swaziland (the King) and all of his subjects<sup>2</sup>. Under the new Constitution, the King is no longer permitted by law to rule by decree or to dissolve parliament at will, as was the case beforehand. However, the Constitution confirms the King's monopoly on power, such that in practice, the people of Swaziland enjoy very little in the way of political rights. Swaziland received a score of 7 on the Freedom House Index on political rights, which is the lowest score possible<sup>3</sup>.
2. Ultimate executive power rests with the King. The King is free to appoint executive positions, including those of Prime Minister, Cabinet of Ministers, and Attorney-General<sup>4</sup>. Ultimate legislative power also rests with the King. He may veto any law which has been passed through parliament without the need for the consent of any other person<sup>5</sup>. Consequently, the international legal norm known as 'separation of powers in government' is not adhered to, as the King is the head of both the executive and legislative parts of the government. The Constitution states that the judicial branch of the government is independent, and is subject solely to the authority of the Constitution itself<sup>6</sup>.
3. The Swazi parliament consists of two Houses: the Senate and the House of Assembly. The Senate consists of thirty members, of which twenty are directly appointed by the King. The remaining ten members are appointed by the House of Assembly<sup>7</sup>. The House of Assembly consists of not more than seventy six members, of which ten are directly appointed by the King. Of the remaining members, sixty are in practice selected from *tinkhundla* areas<sup>8</sup>.
4. Under the *tinkhundla* system, Members of Parliament (MPs) are selected via a three phase election process. The nomination process, which is not specified in law, has been criticised as it allows local chiefs to block nominations and intimidate subjects. The primary election to select a candidate at a chiefdom level and the secondary election at an *inkhundla* level have been criticised as the voter's identification number is written on the ballot paper. The candidate of the largest chiefdom in the *inkhundla* almost always wins the secondary election<sup>9</sup>.
5. Some human rights are enshrined in the Constitution<sup>10</sup>. There is a near total absence of economic, social or cultural human rights in the Constitution. Many of the statutory and

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<sup>1</sup> The Constitution of the Kingdom of Swaziland (The Constitution), 2004.

<sup>2</sup> Ibid. Article 2.

<sup>3</sup> Freedom House, *Freedom in the World*, 2010.

<sup>4</sup> The Constitution. Chapter VI.

<sup>5</sup> Ibid. Articles 106 and 107.

<sup>6</sup> Ibid. Chapter VIII.

<sup>7</sup> Ibid. Article 94.

<sup>8</sup> Ibid. Article 95.

<sup>9</sup> EISA Election Observer Mission Report, Swaziland, 2008

<sup>10</sup> Ibid. Chapter III.

customary laws which govern the everyday lives of Swazi people are not in harmony with the human rights protections that the Constitution prescribes.

## **II. Promotion and protection of human rights on the ground**

### *Equality and non-discrimination*

6. Many women in Swaziland are forced to live as second-class citizens, as both poverty and the ravages of the HIV/AIDS pandemic are strongly feminised. 67% of Swazi citizens living below the poverty line of US\$1.25/day are women<sup>11</sup>. 31% of adult females in Swaziland are HIV positive, compared to 20% of adult males<sup>12</sup>. Violence against women is endemic in Swaziland, with almost a third of women having experienced at least one incidence of sexual violence before the age of eighteen, often at the hands of a husband or boyfriend<sup>13</sup>.
7. The UN Human Rights Committee has stated that both spouses should have “equal rights and responsibilities in the family”<sup>14</sup> in its comments on the International Covenant on Civil and Political Rights (ICCPR)<sup>15</sup>, to which Swaziland is party. Swaziland is also party to the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW)<sup>16</sup>. Article 16 of CEDAW requires states to be proactive with regards to legislation and policy measures with a view to eliminating discrimination against women in matters pertaining to marriage and family life<sup>17</sup>. The laws which govern the daily lives of Swazi women are not up to the standards required by Swaziland’s voluntary commitments under international human rights law.
8. Section 16(3) of the Deeds Registry Act, 1968 states that “immovable property... shall not be... registered in the name of a woman married in community of property”<sup>18</sup>. This law encapsulates the traditional concept of ‘marital power’, whereby women are not permitted to conduct legal proceedings without the consent of the husbands. The concept of marital power is inherently discriminatory. Furthermore, ‘marital power’ creates a situation of female-to-male economic dependence, leaving Swazi women lacking empowerment. This dependence leaves many women unable to exit a relationship, even if it is abusive, as the alternative would be destitution. It also makes it more difficult for women to negotiate safe sex, which is of particular importance bearing in mind the omnipresence of the threat of HIV/AIDS infection.
9. The law in Swaziland does not offer adequate protections against violence against women and girls, particularly sexual and domestic violence. Domestic violence and marital rape are not specifically criminalised in Swaziland. As customary law marriages involving girls as young as thirteen have been reported, some of which were forced marriages, the law leaves many vulnerable young women defenceless against the sexual advances of men they may have no desire to have a sexual relationship with. Although the Constitution does allow a woman to opt out of “any custom to which she is in conscience opposed,” this places an undue burden on the woman, especially when her freedom of choice may be suppressed by family or community pressure, or the threat of violence, ostracism, or destitution. Discriminatory and inadequate laws create a culture of impunity with regards to violence against women and girls<sup>19</sup>.

### *Freedom of religion or belief, expression, association and peaceful assembly and right to participate in public and political life*

10. An emergency decree passed in 1973 restricted freedom of speech, association and assembly, and banned all political parties and opposition to the absolute monarchy. Although the state of

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<sup>11</sup> ACTSA, *Briefing Paper: Swaziland*, 2010. p.6.

<sup>12</sup> *Ibid.* p.16.

<sup>13</sup> Reza et al., *Sexual violence and its health consequences for female children in Swaziland: a cluster survey study*. *Lancet* **373**, 2009. pp.1966–72.

<sup>14</sup> UN Human Rights Committee (HRC), *CCPR General Comment No. 19: Article 23*. 27 July 1990.

<sup>15</sup> International Covenant on Civil and Political Rights, 999 UNTS 171.

<sup>16</sup> Convention on the Elimination of All Forms of Discrimination Against Women, 1249 UNTS 13.

<sup>17</sup> *Ibid.* Article 16.

<sup>18</sup> Deeds Registry Act, 1968.

<sup>19</sup> Amnesty International, *Too late, too little: The Failure of Law Reform for Women in Swaziland*, 2010.

emergency has officially been lifted, many of the provisions of the 1973 decree remain in force, *de jure* or *de facto*. Parliamentary elections held in September 2008 were deemed to fall short of international standards<sup>20</sup>; with the banning of political parties only individual candidates could run.

11. Trade unions are permitted to exist by Swazi law (65% of the private workforce is unionised); however there are severe restrictions on trade union rights. Unions must represent 50% of employees in a workplace to be automatically recognized. If this quota is not achieved, then recognition depends on the employer. Procedures for announcing a strike can last up to 74 days, and voting procedures on strike action are overly complex. The Industrial Relations Act prohibits protest actions in “essential services”, however this list of services exceeds the International Labour Organisation (ILO) definition.<sup>21</sup>
12. Trade unions play an important role in the democracy movement and as a consequence have been targeted by police. Trade union leaders, such as Jan Sithole, have repeatedly been arrested<sup>22</sup> and legal trade union activity has been met with heavy-handed police tactics. In March 2008, textile workers rallying for improved wages, housing and working conditions in a legal strike organised by the Swaziland Manufacturing and Allied Workers Union (SMAWU) were met with tear gas, rubber bullets and baton charges and, as a result, over a dozen protesters were injured<sup>23</sup>.
13. The Suppression of Terrorism Act, 2008 (STA)<sup>24</sup> allows the prime minister to declare anything or anyone a terrorist entity, due to vague definitions within its provisions. Prosecutions can carry a sentence of up to 25 years imprisonment. Several of the STA provisions threaten the enjoyment of the right to the freedom of expression, which is protected by Article 19 of the ICCPR and Article 9 of the African Charter on Human and Peoples’ Rights (ACHPR)<sup>25</sup>, to which Swaziland is party. Four political organisations have been proscribed under the STA.
14. The proposed Public Services Bill, drafted in 2009, will prevent public officers from holding an office in or being visibly associated with a political formation or organisation. If it is passed into law, the bill will contravene a number of international conventions to which the Kingdom of Swaziland is party, including ILO Convention 87 on Freedom of Association<sup>26</sup>. The vague terminology used in the bill leaves its provisions open to abuse. ACTSA views the Public Services Bill as a continuation of the deployment of legislation as a tool of repression, by building on the restrictions of the STA<sup>27</sup>.

#### *Right to life, liberty and security of the person*

15. Members of political movements proscribed under the STA have often been subject to harassment by the security services. Mario Masuku, the President of PUDEMO, was arrested by the Royal Swazi Police in November 2008 and charged with “giving support to the commission of a terrorist act”<sup>28</sup>. After spending eleven months in prison he was acquitted of all charges on the first day of his trial as the prosecution could produce no evidence<sup>29</sup>. Wandile Dlodlu, the president of SWAYOCO, was also arrested under the STA in November 2008 and was subjected to torture and other ill-treatment during his detention<sup>30</sup>.
16. Stephen Siphon Jele was arrested in 2010 for wearing a ‘PUDEMO’ t-shirt at Labour Day celebrations and was found dead in his police cell on 4<sup>th</sup> May 2010. The verdict from a

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<sup>20</sup> Commonwealth Secretariat, *Swaziland National Elections: Report of the Commonwealth Expert Team*, 2008. pp. 25-29 in particular.

<sup>21</sup> International Trade Union Confederation (ITUC) survey, at: <http://survey.ituc-csi.org/+Swaziland+.html>

<sup>22</sup> ACTSA, *Briefing Paper: Swaziland*, 2010. p.12.

<sup>23</sup> ITUC, *Swaziland, the repressive side of an absolute monarchy*, Union View **13**, 2009. p. 9.

<sup>24</sup> Suppression of Terrorism Act, 2008.

<sup>25</sup> Amnesty International, *Suppression of Terrorism Act undermines Human Rights in Swaziland*, 2009.

<sup>26</sup> ILO Convention No. 87 on Freedom of Association and Protection of the Right to Organise, 1948.

<sup>27</sup> ACTSA, *Swaziland Public Services Bill: a guide*, 2010.

<sup>28</sup> Suppression of Terrorism Act, 2008. Section 11(1)(b).

<sup>29</sup> ACTSA, *Briefing Paper: Swaziland*, 2010. p.14.

<sup>30</sup> Amnesty International, *Suppression of Terrorism Act undermines Human Rights in Swaziland*, 2009. p.9.

government inquest into his death claimed he committed suicide<sup>31</sup>. These findings were inconsistent with those of an independent pathologist's report and were rejected as fictitious by Jele's family and friends<sup>32</sup>.

#### *Right to Health*

17. At 26%, Swaziland has the highest HIV/AIDS prevalence rate in the world<sup>33</sup> with tuberculosis (TB) being the leading cause of mortality in HIV/AIDS patients<sup>34</sup>. In 1999, the King declared HIV/AIDS a national disaster. Article 60(8) of the Constitution states that "the State shall... take all practical measures to ensure the provision of basic health care services to the population"<sup>35</sup>. Poverty and lack of food continue to impede the ability of people living with HIV/AIDS to access services and adhere to treatment. The lack of adequate primary care infrastructure means that people have to travel long distances to access prevention, testing and treatment services, so the cost of transportation proves prohibitive for many. There is still not sufficient, coherent, high-level commitment to primary prevention of HIV/AIDS and dual infection with TB. Traditional medicine is widely practiced and does not always align well with evidence-based HIV/AIDS care<sup>36</sup>.

#### *Right to Education*

18. Article 29(6) of the Constitution states that "every Swazi child shall within three years of the commencement of this Constitution have the right to free [primary] education..."<sup>37</sup> Article 60(8) states that "the State shall promote free and compulsory basic education for all..."<sup>38</sup>. In 2002, the Government introduced a budget allocation for grants to support education for Orphans and Vulnerable Children (OVCs).

19. A limited number of primary age children and OVCs receive free schooling and there is evidence of a lack of infrastructure including teaching staff and physical environments in which to teach. Fee-paying children are charged unreasonable extra 'fees' (e.g. 'computer fees') and are excluded if they do not pay them. Dropout rates are currently very high<sup>39</sup>.

### **III. Achievements, best practices, challenges and constraints**

20. The 2003 national strategy for the provision of free antiretroviral treatments has seen treatment rates rise to 47,000 by the end of 2009<sup>40</sup>.

21. Swaziland has ratified major international human rights treaties, including the ICCPR and CEDAW, as well as numerous ILO conventions. Limited progress has been made on implementation.

22. A Human Rights Commission has been recently established. It remains to be seen whether it will prove to be an independent and effective agency.

### **IV. Capacity-building and technical assistance**

23. Swaziland has received considerable financial assistance and resource augmentation to its recent law reform programme, including from the EU, the UN and the Commonwealth<sup>41</sup>. Consequently, over one hundred new bills have been drafted and are awaiting passage through

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<sup>31</sup> The Swazi Observer, *Inquest Report: Siphon Jele killed himself*, 5<sup>th</sup> March 2011. At:

<http://www.observer.org.sz/index.php?news=21961>

<sup>32</sup> ACTSA, *Briefing Paper: Swaziland*, 2010. p.15.

<sup>33</sup> Ibid. p.3 and 16.

<sup>34</sup> Medecins Sans Frontieres, *Fighting a dual epidemic: Treating TB in a high HIV prevalence setting in rural Swaziland*, 2010.

<sup>35</sup> The Constitution. Article 60(8).

<sup>36</sup> ACTSA, *Briefing Paper: Swaziland*, 2010. p.15-18.

<sup>37</sup> The Constitution. Article 29(6).

<sup>38</sup> Ibid. Article 60(8).

<sup>39</sup> Swazi Ministry of Economic Planning and Development, *Swaziland on the Road to Development*, 2010. pp.23-30.

<sup>40</sup> ACTSA, *Briefing Paper: Swaziland*, 2010. p.17.

<sup>41</sup> Ibid. p.9.

parliament. In order to complete an extensive programme of education, both to state officials and to the general public, about the new laws, there may well be the need for further external assistance. ACTSA is concerned that similar issues are deployed as excuses to justify the delays in the passage of the laws themselves. As the new laws have already been drafted, no further dedicated resources are required for this part of the programme.

## Recommendations by ACTSA to the Government of the Kingdom of Swaziland

### *Constitutional and Legislative Framework*

- Review the Constitution of the Kingdom of Swaziland to ensure the complete separation of executive, legislative and judicial powers in government. Ensure the constitution allows for free and fair elections and for political parties to exist and operate freely.
- Become a party to all of the outstanding international human rights treaties, in particular, the Optional Protocol to the Convention Against Torture, the First Optional Protocol to the ICCPR, and the Optional Protocol to CEDAW.

### *Equality and non-discrimination*

- Amend or repeal all laws that discriminate against women, and enact new laws to protect and promote women's rights, in line with Swaziland's international legal obligations under CEDAW.
- Ensure that all public and judicial officials receive adequate training on the changes in the law, and that the public are informed about the rights women hold.

### *Freedom of religion or belief, expression, association and peaceful assembly and right to participate in public and political life*

- Immediately un-ban all political parties and ensure that multi-party, democratic elections are introduced in line with the SADC Principles, and those provisions of the ICCPR which are concerned with self-determination and democracy.
- Respect and implement the ILO mandates and conventions on labour standards, working closely with the trade union movement.
- Abandon or amend the proposed Public Services Bill.

### *Right to life, liberty and security of the person*

- Amend or repeal the Suppression of Terrorism Act in order to bring legislation in line with Swaziland's obligations under the ICCPR and the ACHPR.

### *Right to Health*

- Make an enhanced commitment to primary prevention of HIV/AIDS and dual infection with TB, including an improved programme of public education which starts in schools. Ensure there is access to treatment and support.

### *Right to Education*

- Honour the constitutional commitment to universal access to free primary schooling. This must include action to preclude the illegal exclusion of any child for non-payment of 'extra fees', with all such breaches being investigated by the Minister for Education.