

## 1. Introduction

This is a joint submission by the Coordinating Assembly of Non-Governmental Organisations, the Justice and Law Initiative, Southern Africa Human Rights Defenders Network (The Defenders Network or SAHRDN), Women and Law in Southern Africa Research and Educational Trust Eswatini (WLSA)<sup>1</sup> and the Youth Sustainable Development Centre on Eswatini to the 39th Session of the Working Group on the Universal Periodic Review.

1. The **Coordinating Assembly of Non-Governmental Organisations (CANGO)** is a membership based, umbrella organisation for NGOs in Eswatini with a membership of more than seventy NGOs. Its mandate is to coordinate, facilitate joint advocacy, build capacity – both institutional and technical and manage grants. The member organisations are clustered into consortia; namely children, youth, gender, food security and livelihoods, media, HIV/AIDS, Human Rights and Governance, and the Elections Support Network.
2. The **Justice and Law Initiative (JULISA)** is a registered, not for profit organisation whose mandate is to advance access to and delivery of justice through promoting human rights practice, institutional accountability and deepening citizen participation in policy development and implementation processes. This is done through research and capacity-building as well as advocacy and networking at national, regional and international levels.
3. Founded in 2013, the **Southern African Human Rights Defenders Network (the Defenders network or SAHRDN)** is a non-profit sub-regional network consisting of representatives from civil society organisations from Southern Africa. The SAHRDN coordinates regional efforts to provide rapid, practical, comprehensive

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<sup>1</sup> This submission was drafted through the assistance of the Advancing Rights in Southern Africa Program (ARISA). With support from USAID, the PROGRESS Consortium is currently implementing the Advancing Rights in Southern Africa (ARISA) Program to improve the recognition, awareness, and enforcement of human rights in the region, including protection of the region's most vulnerable and marginalized groups. The Progress Consortium is made up of Freedom House, the American Bar Association (ABA), Internews and PACT. The ARISA Programme will run for a period of five (5) years with a focus on the following thematic issues which have been identified as crucial for the promotion of human rights in Southern Africa:

- Women's customary land rights;
- Rights of indigenous populations;
- Media freedom and digital rights; and

The rights of human rights defenders as a cross-cutting theme

and inclusive protection support to HRDs at high risk, defend civic space, and empower HRDs to mitigate effects of repression. To this end, the SAHRDN contributes to the respect and recognition of HRDs as legitimate actors and agents of change with universally recognised and constitutionally guaranteed rights. The SAHRDN supports HRDs in engaging with supranational reporting and protection mechanisms.

4. WLSA is a women's rights organization which aims to contribute to the socio-economic, political, and legal advancement as well as protection of women and girls in Eswatini. This is achieved through strategic action research in the socio-legal field, lobbying and advocacy for legal reforms, policy changes, laws (including Swazi law and custom); and practices which discriminate and disadvantage women and girls. WLSA's focus areas include *inter alia* customary land rights issues, and the protection of women human rights defenders.
5. **Youth Sustainable Development Centre (YSDC)** is a non-profit organisation that is working on youth economic empowerment through sustainable development, which further mobilises youth as sustainable development agents, problem solvers and human rights advocates.

The focus of this report is on the situation of human rights defenders and the various rights violations they are facing in Eswatini. It identifies key challenges that human rights defenders (HRDs) are facing namely: harassment; suppression of freedom of expression, association and assembly, and arbitrary arrest and detention.

This submission provides recommendations to the state party to ensure that the rights of human rights defenders are protected and promoted in the country through repealing or amending repressive legislation such as the Sedition Act and Suppression of Terrorism Act. It further recommends the state party to ensure that the work of human rights defenders is not unjustifiably restricted, and that relevant stakeholders such as the national human rights institution and traditional leaders uphold the rights of human rights defenders.

## 2. Human Rights Issues Relating to Human Rights Defenders in Eswatini

During the Southern Africa Human Rights Defenders Summit in 2019, HRDs from Eswatini highlighted the main challenges HRDs are facing in the country.

Some of the key challenges facing human rights defenders in Eswatini include the following:

- The criminalization of human rights work;
- Patriarchy and culture are used to stifle the work of HRDs, particularly women defenders.
- Cyber threats against HRDs.
- The right to privacy is under attack; and
- The suppression of freedom of assembly and expression despite constitutional guarantees.<sup>2</sup>

### 2.1 Defenders and Freedom of Expression, Association and Peaceful Assembly

HRDs, are also subjected to intimidation, harassment, threats and torture. Freedom of expression and access to information are curtailed through laws such as the Sedition and Subversive Activities Act<sup>3</sup> and Official Secrets Act<sup>4</sup>. These laws are used to prevent HRDs from organising and participating in peaceful assembly in the form of meetings or peaceful protest activities. Journalists and activists are reportedly followed and harassed by unknown state agents.<sup>5</sup> There have also been reports of telephonic and internet spying by government.<sup>6</sup> Most human rights defenders are easily isolated from their professional and social communities as individuals do not want to be considered guilty by association.<sup>7</sup> Since every Swazi person “belongs” to a chief, an activist's actions very often impact on their family, especially in the rural

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<sup>2</sup>Southern Africa Human Rights Defenders Network et al “2019 Southern Africa Human Rights Defenders Summit” <https://africandefenders.org/wp-content/uploads/2020/02/SAHRDN-Report-compressed.pdf> (last accessed 24 February 2021) page 32.

<sup>3</sup> No: 46 of 1938

<sup>4</sup> No: 30 of 1968

<sup>5</sup> Report submitted to ARISA by civil society stakeholders during Eswatini in country mission conducted from 6-9 June 2019.

<sup>6</sup> Ibid.

<sup>7</sup> Ibid.

areas.<sup>8</sup> Families are very often punished through evictions and intimidation.<sup>9</sup>

Despite the Eswatini Constitution<sup>10</sup> providing for the rights to freedom of expression, association and peaceful assembly there has not been a systematic law reform process to ensure legislative compliance with constitutional principles, and these rights continue to be violated by the State. While laws such as the Public Order Act<sup>11</sup> have been amended to enable some protections, ensuring the right to freedom of expression, association and assembly; these amendments do not fully address the restrictions and contain loopholes which may be used in practice to curtail these rights because the Act is being implemented with cumbersome requirements to obtain permits before holding a meeting/activity and restrictions with regards to obtaining authorisation to access public buildings.

However, it remains a matter of concern that the Act is being implemented with cumbersome requirements to obtain permits before holding a meeting/activity and restrictions with regards to obtaining authorisation to access public buildings, i.e. to deliver petitions, and for the power of the police to intervene in a gathering in cases of danger to public order or safety, which has led to its abuse in application. For example, when the Swaziland Economic Justice Network (SEJUN) in February 2018 held a march to Parliament to deliver a petition on the National budget that was heavily criticised for not being pro-poor, the march was stopped by Police. The Public Order Act was further used to revoke the permit for the 2<sup>nd</sup> and 3<sup>rd</sup> day of the protests of Trade Union Congress of Swaziland (TUCOSWA) in 2018 and TUCOSWA urgently approached the courts to counter the decision by NATCOM. The case was put in the Court roll to be heard on the 19<sup>th</sup> September as an Urgent application. <https://allafrica.com/stories/201809210158.html>.

Maxwell Dlamini, a student activist and SWAYOCO member was arrested, purportedly for allegedly making seditious remarks at a Worker's Day commemoration event on the 1<sup>st</sup> May 2014. Political activists have been harassed, detained and arrested for wearing T-shirts with political slogans, particularly those of the banned and proscribed political party, the People's Democratic Movement (PUDEMO). On the 2014, seven members of PUDEMO, were arrested for wearing t-

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<sup>8</sup> Ibid.

<sup>9</sup> Ibid.

<sup>10</sup> The Constitution of the Kingdom of Swaziland Act of 2005

<sup>11</sup> No: 17 of 1963

shirts with the PUDEMO name and political messages whilst protesting outside the court premises when members of the public were denied access to Thulani Maseko and Bheki Makhubu's case. They were protesting against among others, matters relating to the administration of justice. Thulani Maseko and Bheki Makhubu were arrested and charged with contempt of court for criticizing the then Chief Justice. Students have been expelled from colleges and universities for being leading or being actively involved in student and national politics. There have also been deaths in custody of political activists.

The Eswatini government has not passed any laws that enable the formation, registration, participation of political parties. The 1973 Decree<sup>12</sup> (the Decree) which states that "all political parties and similar bodies that cultivate and bring about disturbances and ill-feelings within the Nation are hereby dissolved and prohibited" has not yet been repealed and government continues to assert that it is no longer operational in view of the enactment of the Constitution. However, in reality the restrictions contained in the Decree continue to be imposed on HRDs work. It is used by law enforcement officers to suppress political opponents. The Decree is used in practice because political parties remain banned and assemblies are strictly restricted to non-political purposes (thus also barring involvement of political parties in national elections).

There is widespread concern with civil society and HRDs about the NGO Bill<sup>13</sup> that is currently under consideration by government. This Bill contains elements that may be used to curtail the work of HRDs and their organisations by restricting activities and closing off the already shrinking civic space and thereby making it difficult for civil society organisation to operate freely and effectively.

## 2.2 Freedom from Torture, Inhuman and Degrading Treatment or Punishment

The Eswatini government has argued that torture can be addressed under the existing criminal laws hence there is no need to specifically criminalise it. Despite advocacy efforts and calling for accountability by HRDs, the government has

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12 Proclamation by his Majesty King Sobhuza II 12<sup>th</sup> April 1973

13 Non-Governmental Organisations Bill of 2017

resisted carrying out appropriate investigations where there are allegations of torture, resulting in this practice, particularly by security forces, continuing with impunity.

### 2.3 LGBTIQ Defenders and their Rights

HRDs are also able to solicit, receive and utilise resources for the purpose of protecting human rights (including the receipt of funds from abroad). However, the ability of HRDs to work freely on human rights is largely dependent on the type of rights they are advocating for. With “non-controversial” rights such as children's rights, there is greater freedom whereas with civil and political rights, and socio-economic rights, there is hostility from government. In this regard, HRDs working on such issues have limited freedoms to form organisations.

The criminalization of human rights work has been particularly evident when it comes to Lesbian, Gay, Bisexual, Transgender and Intersex (LGBTI) work. This is a violation of individuals' freedom of association rights. The United Nations Special Rapporteur on Freedom of Peaceful Assembly and of Association has noted that the enjoyment of freedom of association rights is particularly important for high risk groups who are minorities or marginalized.<sup>14</sup> In Eswatini homosexuality is still considered to be a taboo with anti-sodomy laws still in place.<sup>15</sup> As a result of the conservative and traditional aspects of the country, LGBTI people remain underrepresented and do not occupy a significant space for their voices to be heard. It is therefore important to enforce the freedom of association rights of LGBTI persons in a safe and accepting environment. A milestone in the advocacy of LGBTI persons' rights in Eswatini was the first pride march that was held in Mbabane in 2018.<sup>16</sup> However, in September 2019, the Eswatini's Registrar of Companies refused to register the Eswatini Sexual and Gender Minorities (ESGM), an organization that works to protect and promote LGBTI rights in Eswatini.<sup>17</sup> The Registrar argued that ESGM's purpose was unlawful since

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<sup>14</sup> Report of the UN Special Rapporteur on the Rights to Freedom of Peaceful Assembly and of Association, UN Doc A/HRC/38/34 (26 July 2018), pg12.

<sup>15</sup> Report submitted to ARISA by civil society stakeholders during Eswatini in country mission conducted from 6-9 June 2019.

<sup>16</sup> Ibid.

<sup>17</sup> Southern Africa Litigation Centre “Eswatini High Court Postpones Case on the Refusal to Register an LGBT Advocacy Group” <https://www.southernafricalitigationcentre.org/2020/06/25/media-advisory-eswatini-high-court-postpones-case-on-the-refusal-to-register-an-lgbt-advocacy-group/> (last accessed on 24 February 2021).

same-sex sexual acts are illegal in the country.<sup>18</sup> ESGM approached the Eswatini High Court in Mbabane for relief and argued that the Registrar's refusal violated ESGM members' rights to dignity, to associate and express themselves freely, to be treated equally and not to be discriminated against.<sup>19</sup> The matter is still pending before the court.

## 2.4 Independence of the Judiciary and Availability of other Redress Mechanisms

Apart from adding to the numbers of judicial officers, there has been no concerted effort to reform the judiciary, particularly in relation to its independence. There is no security of tenure for judges and in an attempt to protect their jobs, they deliver judgments that appease the status quo, at the expense of the HRDs. This is evident from the negative attitude and biased manner in which human rights cases and HRDs are treated in legal processes as well as in the judgments themselves. The well recorded case of Thulani Maseko and Bheki Makhubu is illustrative of this attitude of the courts, where the judge was visibly and expressly biased in dismissing all applications brought on behalf of these HRDs; granting all the State's applications; and rejecting all evidence by the HRDs but accepting all the evidence by the State regardless of legal principles of admissibility and proof.

HRDs in Eswatini are able to submit concerns and proposals to the relevant government institutions. However, in as much as criticisms and complaints may be submitted to government, consideration of these and responses or subsequent engagement with HRDs is not guaranteed and hardly takes place. Many petitions, policy and law reform proposals have been submitted to government without response or subsequent change to the policy or law.

There has not been any government collaboration with national human rights mechanisms on protecting HRDs. There has also been no cooperation with civil society and HRDs on promoting and protecting the rights of HRDs. The Commission on Human Rights and Public Administration (CHRPA) has not implemented any activities to promote and protect the rights of HRDs, and there has been no human rights education and public awareness on the rights of HRDs. HRDs have decried the

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<sup>18</sup> Ibid.

<sup>19</sup> Ibid.

fact that their cases of violations have been reported to the CHRPA, but have not been acknowledged or actioned upon.

### 3. Implementation of UPR Recommendations

Recommendations from processes such as the UPR have called on the international community to support Eswatini implement its human rights obligations through capacity-building and technical assistance, which are key mandates of international organisations. This support can also be tailored to the needs of specific groups such as the police or judiciary. In order to strengthen human rights culture and practice, Eswatini should take stock of the capacity constraints of the national human rights infrastructure and related agencies so as to identify areas of strengthening. There should also be monitoring of practical implementation of the training.

### 4. Impact of Patriarchy and Tradition

Promoting human rights in the context of Eswatini, which is a patriarchal and very traditional society creates additional challenges for women human rights defenders (WHRDs). These include various acts of sexual harassment. WHRDs who are vocal are viewed as acting contrary to socio-cultural norms; hence they are subject to greater prejudice than male HRDs. Furthermore, because women are culturally viewed as minors who are subject to family decisions, they may experience additional pressure from their families to stop or reduce their activism. Due to the restrictive and repressive environment, WHRDs are hesitant in reporting these cases, and where such reports have been made to civil society actors, requests for confidentiality have been made.

### 5. Conclusion and Recommendations

This submission has identified that the human rights defenders' rights to privacy, freedom of association and peaceful assembly remain limited, and they are continuously faced with threats and harassment. The government has relied on

various security legislation such as the Sedition and Subversive Activities Act to monitor human rights defenders and restrict their work. In order to remedy the issues identified in this submission WLSA recommends that the Eswatini government should:

- i. Take measures to align all laws and policies with the principle of equality and non-discrimination as stated in the Constitution, particularly as it relates to LGBTI people and human rights defenders;
- ii. Decriminalize same sex relations and permit LGBTI organizations to register;
- iii. Repeal or amend laws that restrict civil rights, and the work of human rights defenders;
- iv. Ensures that human rights defenders are protected, and that reports of harassment, abuse and the restriction of fundamental freedoms by law enforcement are adequately investigated and prosecuted;
- v. Ensure that adequate investigations are conducted for all pending charges against HRDs and HRDs convicted under the Suppression of Terrorism Act
- vi. Adopt measures to create an enabling environment for social and political dialogue with relevant national, regional and international human rights stakeholders and mechanisms
- vii. Enact enabling legislation for the establishment of an independent and impartial (CHRPC) to undertake activities as a national human rights institution in accordance with the Paris Principles;
- viii. Establish a national mechanism for reporting to international and regional mechanisms and follow-up on implementation of recommendations from these mechanisms;
- ix. Adopt measures to ensure the independence of the judiciary, including by ensuring the appointment of impartial judges, as well as prosecuting and punishing those responsible for acts undermining the independence or impartiality of judicial proceedings;
- x. Ensure the rules relating to the appointment and removal of judges are in line with the Basic Principles on the Independence of the Judiciary;
- xi. Ensures that it is up to date with all State Party reports, and ensure meaningful participation with civil society;
- xii. Ratifies the Optional Protocols that enable submission of individual complaints of violations to relevant human rights structures;

- xiii. Ensures that the composition of committees, working-groups and similar bodies working on ratification and implementation of human rights instruments are inclusive, in particular that HRDs and their organisations are represented;
- xiv. Accepts invitations to Special Procedure mandate holders to the country for engagement with relevant stakeholders;
- xv. Repeal or amend the Sedition and Subversive Activities Act, the Official Secrets Act and the Suppression of Terrorism Act