



# UPR Reporting - eSwatini

ESWATINI'S THIRD UNIVERSAL PERIOD REVIEW  
39<sup>th</sup> SESSION (OCTOBER NOVEMBER 2021)

SUBMITTED BY: The Rock of Hope Eswatini

The Rock of Hope is a Manzini based organization that deals with the rights of the lesbian, gay, bisexual, transgender, and intersex (LGBTI). It was founded in January 2011 and formally registered in 2012, Rock of Hope is hard at work nationally to ensure that the LGBTI community gains acceptance within the communities in which they reside. The Rock of Hope’s main area of focus in the past has been on health advocacy, working to eliminate all non-financial barriers that prevent LGBTI people from accessing high quality health care. The scope of this work eventually expanded to creating safe social spaces in the broader community through religious advocacy and community engagement, as well as legal advocacy through sensitization and coalition building with lawyers and police officers in an effort to eliminate barriers to protections by the state.

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**Background information**

The formulation of this report came about through funding from the Out and Proud project. Seven local LGBTI organizations through various consultations gave their input towards the completion of this document. These are the Rock of Hope Eswatini, HealthPlus 4 Men (HP4M), Eswatini Sexual and Gender Minorities (ESGM), House of Our Pride (HOOP), Lesbians Bisexual and Queer Rights Swaziland(LBQRS), TransSwati, Men Without Borders (MWB). Correspondingly, the Southern Africa Litigation Centre and Centre for Civil and Political Rights participated in the inspection and revision of this document.

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## 1. Introduction and context in Eswatini

Studies in the region confirm that institutionalized criminalization of same-sex sexual acts reinforces stigma and produces exclusion and marginalization of Lesbian Gays Bisexuals Transgender Intersex (hereinafter called LGBTI) persons in families, churches, educational, health care and employment contexts<sup>1</sup>. Such criminalization further results in low self-esteem, higher suicide rates, substance abuse, mental illness, anxiety and stress. According to the Southern Africa Trans Diverse Situational Analysis,<sup>2</sup> it is a common but inaccurate belief in Eswatini that trans-diverse people do not exist. This belief has resulted in abuses against the community going unnoticed. There is stigma, discrimination, abuse, and violence, both structurally and through individual acts. This status quo is also coupled by lack of an effective legal framework, policies and administrative measures to support LGBT.

## 2. Legal framework in Eswatini

There is currently no legislation overtly recognising and protecting LGBTI identifying individuals in Eswatini. Even though the 2005 Constitution of the Kingdom of Eswatini<sup>3</sup> states that all persons are equal before the law, discrimination against women and sexual and gender minorities (including transgender and gender non-conforming persons) continues to be pervasive in all spheres. Furthermore, because of the lack of an overt and express recognition of discrimination based on sexual orientation, the rights provided for in the Swaziland Constitution are strictly interpreted in an ultra-conservative manner, and not open for a more embracing and broad interpretation and application.

Eswatini law functions under a dual legal and governance system, being Roman Dutch Law as well as Swazi Law and Custom (hereinafter called SLC), SLC remains uncodified. This unwritten law has been criticised as being patriarchal in nature and only recognises sexual orientation that is cis gender.

There is no specific law(s) that recognises same sex couples in the country. Same sex relations remain a taboo. The LGBTI community remains at high risk of being violated against and at risk of unfair justice because of the continued existence of the Sodomy Act of 1907. The Act is self is not enforced and during the previous review, the state acknowledged recommendations by other member states.

<sup>4</sup>The National health policy serves to acknowledge Key populations which refers to gay men as MSM (men who have sex with men). However, it does not specifically refer to individuals according to their orientation. This projects a de-humanising aura and only considering individuals according to their sexual practise. According to the National Multi-sectoral HIV and AIDS Strategic Framework (NSF) 2018 – 2023, the definition of Key populations is attributed to sex workers, MSM, transgender and People Who inject Drugs.

The state blatantly mentioned how it did not support and recognise the engagement and relationship of two lesbian women. In an article by the Times of Swaziland 16/12/2011, a well-known traditionalist who later went on to be Ludzidzini Governor mentioned how same-sex relations were a disgrace to the Swazi culture and were frowned upon<sup>5</sup>.

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<sup>1</sup> OutandProudriskandvulnerabilityassessment- notyetpublished

<sup>2</sup> <http://www.aidsaccountability.org/wp-content/uploads/2017/02/Trans-SIT-Analysis.pdf>.

<sup>3</sup> [CONSTITUTION OF THE KINGDOM OF SWAZILAND 2005 \(wipo.int\)](http://www.wipo.int)

<sup>5</sup> <http://www.times.co.sz/news/71784-thuli-rudd-acquitted-of.html>

Also, homosexual identifying individuals have been met by hostility and disapproval; and in some cases banishment in the community. The couple aged 18 and 21, moved to Mvutshini from the Lubombo region and were later chased away by the community for being gay. This was reported in an article by the Times of Swaziland and Mamba Online re-shared it<sup>6</sup>.

### 3. Labour rights and employment

Eswatini labour laws including the Wages Act No. 16 of 1964; Employment Act 1980, No. 5/1980, Industrial Relations Act (No. 1 of 2000) speak to labour rights of workers in the country. These laws through the court and ILO mechanisms have been challenged on discrimination in the work place *i.e.* The Industrial Court of Appeal case<sup>7</sup>, where the court addressed the question whether providing disparate wages for similar work constituted discrimination. The Court referred to section 20 of the Swaziland Constitution which sets out the prohibited grounds of discrimination. Section 20 does not include health, sexual orientation or other status.<sup>8</sup>The Court held that this did not mean that the list of grounds was a closed list.<sup>9</sup>

The State has ratified a number of the International Labour Organizations Fundamental Conventions to ensure the full enjoyment of workers' rights; including; Discrimination (Employment and Occupation) Convention No 111, 1958 which currently with the ILO is being debated to read sexual orientation. In the country, Labour and employment relations are governed by Employment and Industrial Relations Acts. These laws were enacted to improve the status of workers, provide for the collective negotiation of terms and conditions of employment and also provide dispute resolution mechanisms.

The Employment Act 1980 reviewed 2002 Part V: 29 states that *no employer shall, in any contract of employment between himself and an employee discriminate against any person or between employees on grounds of race, color, religion, marital status, sex, national origin, tribal or clan extraction, political affiliation or social status.* However, continued violations of this Act are continuously witnessed with people having their contracts of employment terminated over their sexual orientation yet the letter states other reasons. Also, there continues to be discrimination of trans-identities as their gender identity is disregarded in the working space. Gender identity is what defines trans-identities and not sex; this causes a disregard for transgender identities as they are forced to present in their birth sex and not as per their gender identity. Under the Out and proud project, during the implementation of the Emergency Fund; two lesbian women had reported how they had their employment status terminated because of their orientation. They mention how this was done verbally and with no written evidence.

## RECOMMENDATIONS

<sup>6</sup>( [SWAZI GAY MEN THROWN OUT OF VILLAGE - MambaOnline - Gay South Africa online](#)

<sup>7</sup>Satellite Investments v Dlamini and Others, [2011] SZICA 5.

<sup>9</sup>. Ibid "Society throws up a vagary of new and unprecedented situations that the Legislature, in all its manifold wisdom would not have anticipated. The question then is, if there is a type of discrimination, which is obviously untenable and totally insupportable, should the Courts, when approached by a litigant to distraint such conduct, turn a blind eye thereon for no other reason than that it is not specifically proscribed in either section? My answer is an emphatic No!

If that were to be so, it would mean that the Courts would thereby fail to protect victims of overt discrimination and the Courts' hands would be withered and be unable to move in order to give needed protection for no other reason than that the Legislature, many years ago, in 1980, for argument's sake, never anticipated the type of discrimination alleged by a complainant before Court. This would amount to the Courts failing to perform their duties."

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- A. The State should put in place measures to ensure that companies and employers implement the procedural and substantive labour standards at the work place.
- B. The state should amend the applicable laws to acknowledge LGBTI and give the people appropriate status.
- C. The State should ensure that all labour regulations in the country address the issue of similar wages for similar work for everyone including the LGBTI.

#### **4. Public health and health rights**

The National Multisectoral HIV and AIDS Strategic Framework (NSF) 2018 – 2023 segregates the HIV healthcare of LGBTI people categorising them under Key populations<sup>10</sup> therefore leaving out lesbians and intersex individuals during the healthcare plight. HIV and AIDS service programmes are targeted to certain groups of the LGBTI cascade and leaving out the rest. The constitution under Chapter III (18) states that the government should provide health services to ALL without discrimination<sup>11</sup>. However, there have been continuous reports such as the “Are we doing Alright Study of 2019” which recorded the testament of LGBTI persons’ experiences of discrimination and stigma when accessing health services in health facilities. ‘More than half of participants mentioned that healthcare staff had treated them disrespectfully because of their sexual orientation or gender identity. Gender minority participants were significantly more likely to be treated disrespectfully. Also, more than 40% of all participants had been insulted in a healthcare facility, and almost one third (30%) had been denied care because of their sexual orientation or gender identity. Participants’ sexual orientation and gender identity also directly influenced healthcare, almost half (44%) of all participants reported trying to hide a health concern related to their sexual orientation or gender identity from a healthcare provider’<sup>12</sup>.

#### **RECOMMENDATIONS**

- A. The state should put in place policies that recognize LGBT in national Health Care programs.
- B. The State should introduce programs to sensitize government health workers about the needs of LGBT and how to treat them equally.
- C. The state should create safe places at all Health facilities that accommodates LGBTI

#### **5. Criminal justice system and rights of an accused person**

<sup>13</sup>The Criminal Procedure and Evidence Act 1938 under section 185(5) states that ‘Any person charged with sodomy or assault with intent to commit sodomy may be found guilty of indecent assault or common assault, if such be the facts proved.’ Coupled with societal perceptions, continued sexualisation of LGBTI identities and the general non- recognition of LGBTI persons this tends to expose and aggravate the discrimination faced by LGBTI persons. Under the Act, a person convicted of rape shall, if the Court finds aggravating circumstances to have been present, be liable to a minimum sentence of nine years without the option of a fine and no sentence or part thereof shall be suspended.

Hate speech experienced by LGBTI based on their SOGIE is very rife especially in rural communities. The scarcity of proving the crime because it calls for witnesses under the traditional courts discourages reporting and further perpetuates stigma and discrimination. However, the duality of the Eswatini legislative framework has led to LGBTI viewed as

<sup>10</sup> The National Multi-sectoral HIV and AIDS Strategic Framework (NSF) 2018 – 2023, the definition of Key populations is attributed to sex workers, MSM, transgender and People Who inject Drugs.

<sup>11</sup> [CONSTITUTION OF THE KINGDOM OF SWAZILAND 2005 \(wipo.int\)](https://www.wipo.int/constitution-of-the-kingdom-of-swaziland-2005)

<sup>12</sup> <https://www.therockofhopesd.org/roh-research-and-publications>

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outcasts and never getting an opportunity to be recognised as members of society.

Section 3 of the Sexual Offences and Domestic Violence (SODV) Act of 2018 provides the definition of the crime of rape as sexual penetration that happens without consent. *The elements of the offence of rape are: Intention to rape; an act of sexual penetration; Against the will of the victim (without consent). 'Penetration' means to insert something into any orifice of the victim. The Act makes the offence of rape much broader than what it used to be in that the offence is now gender-neutral which means men and boys can also be raped as opposed to the pre-SODV era where the crime of rape only applied to rape by a man of a woman or girl. Sexual penetration also includes insertion of the sexual organs of an animal – previously the offence of rape only applied to anal penetration. A case of a Trans Prisoner who was raped in prison was reported to the Human Rights Commission in 2020; the case is twofold, the fact that rape occurred in Prison, and the incarceration in that specific prison was based on cis sexual orientation and gender identity.*

#### RECOMMENDATIONS

- A. The State should amend the Criminal Procedure and remove all the provisions that perpetuates discrimination against LGBTI.
- B. The State should sensitize State Prosecutors and other players in the Criminal Justice System on LGBTI issues.
- C. The State should put all measures that will make it easy for LGBTI to approach the Court system.

There is an existing training manual that is used by the Ministry of Health to train clinicians about Key Populations, however there is a need to revise the language, so that it is reflective of the LGBTI community in full. In the healthcare sector the lack of gender affirming healthcare services for transgender/ trans-diverse people continues to propagate discrimination as individuals cannot identify with their gender identity. Also, this has propagated the utilisation of black market products which endanger their health due to the lack of affirming healthcare. In accordance to Sexual Reproductive health rights, individuals have the right to enjoy the benefits of scientific progress and its applications, and to consent to experimentation. However, trans-diverse individuals are not afforded the opportunity to access the trans-affirmative health care.

We acknowledge especially in State supported health services for LGBTI persons, there is psychosocial support (offered by FHI360 under PEPFAR programming). However, it has also been noted that there are gaps in the psychosocial support provided. The services are not holistically tailored or oriented as they neglect the family. The negative profiling of one's sexual orientation in families, disrupts ones self-identification and acceptance phase during their coming process. This introduces the gap on transition between the person and their family.

## 6. Discrimination and LGBTI

All people, irrespective of sex, sexual orientation or gender identity, are entitled to enjoy the protections provided for by international human rights law, including the respect of rights to life, security of person and privacy, the right to be free from torture, arbitrary arrest and detention, the right to be free from discrimination and the right to freedom of expression, association and peaceful assembly<sup>14</sup>. In this context, the reality is that LGBTI persons are

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<sup>14</sup> [Statement on the right to associate in Eswatini in light of the ESGM case – Southern Africa Litigation Centre](#)

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discriminated against in the labour market, in schools and in hospitals, mistreated and disowned by their own families. They are singled out for physical attack – beaten, sexually assaulted, tortured and even killed in eSwatini.

LGBTI persons are being denied access to employment. Gender identity and expression are met with a frown as transgender identities have hardships when presenting themselves during interview processes. Also, discrimination can be echoed by colleagues in the workplace knowing of one’s sexual orientation<sup>15</sup>. Under the Out and Proud project, a lesbian woman sought assistance after she was unlawfully fired from her workplace due to her sexual orientation. She was fired under the premise that she would be a bad influence to scholars as she was a teacher. In addition, there are generalised policies which do not specifically look into the LGBTI community. A gap exists between the policy formulation processes.

#### RECOMMENDATIONS

- A. The State should review and amend all the laws that promote discrimination against the LGBTI.
- B. The State should enact laws and policies to explicitly protect SOGIE rights.

### 7. Right to education

The schooling system does not acknowledge gender identity and expression. Therefore, this has led to the unlawful dismissal of employees on the basis of their SOGIE; although this is rarely documented. Expression is confined to birth sex representation. Scholars are continuously discriminated against by not being able to identify and express themselves ‘accordingly’<sup>16</sup>. Correspondingly, young LGBTI individuals are not protected by anti-bullying policies at schools as the bullying comes in a form of systematic<sup>17</sup>.

For example, section 29 on the Rights of a Child includes the right to education, but this right is violated for children who identify as LGBTI and the continued discrimination and abuse of these children tends to lead them to drop out of school. There are a number of unreported cases on children that identify as transgender, that experience discrimination and victimization and there is no legislative framework that would ensure the protection of this right.

#### RECOMMENDATION

- A. The State should implement the right to education provided for by the Constitution and ensure that this right is realised by LGBTI people.
- B. The State should ensure that the curriculum reflects on LGBTI issues.
- C. The State should put in place awareness programs to sensitise schools on LGBTI issues.
- D. The State should expand the scope of life skills education to comprehensively include SOGIE.

### 8. Religious rights

Discrimination based on Religion; Church denominations are common platforms for discrimination over one’s sexual orientation and gender identity. In a recent incident, ‘a gay

<sup>15</sup> [Swaziland | Parents demand removal of LGBTI teacher - MambaOnline - Gay South Africa online](#)

<sup>16</sup> <https://aminutewithdk.blogspot.com/2019/07/lgbtqia-experiences-in-school-and.html>

<sup>17</sup> [https://drive.google.com/file/d/1j18oTn-UK\\_0zLlaHncEfcS12eKEWMYLw/view?usp=sharing](https://drive.google.com/file/d/1j18oTn-UK_0zLlaHncEfcS12eKEWMYLw/view?usp=sharing)

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pastor was suspended' and abolished from church over him being bisexual. <sup>18</sup>The Times of Swaziland newspaper on Monday (4 March 2019) published details of an audio recording it said included the pastor from Siphofaneni 'proposing love to another man'. After such, the church expelled the pastor and shunned him on the basis that his acts were ungodly. This is one of many cases that an LGBTI member has experienced in the church space. Ongoing sensitizations remain futile as LGBTI members continue to raise awareness on their continued violations with no changes in attitude and treatment. Social gender and sex expectations are used against the LGBTI community. The doctrine continues to be weaponized and biblical quotations are used against LGBTI persons.

Sports participation is met with negative attitudes conclusively rife with stereotypical views. This is demonstrated by how LGBTI persons are boxed in cis profiling denominations in sports. For instance, choral participants and soccer participants are meant to participate resembling their birth sex. Also, female or feminine participants in the football sporting code are met with the perception that they are LGBTI; this continues to violate their right of assertion and expression. Participants are allocated according to their birth sex in sporting codes and there is continued negligence of their gender identity.

Moreover, the lack of Sexual Orientation Gender Identity Expression (SOGIE) education has led to fostered stereotypical views which have led to the discrimination of various participants in the various sporting codes. In addition, making reference to cultural events one may identify as transgender but still be expected to participate in cultural activities of the sex they were born on how an individual should align with the regiment that represents their birth sex and not their gender identity. For transgender identities, they may take part in these events if they have a social pass; even at the risk of concealing their identities and present themselves as cis- gendered people. In most cases, it would even lead to the family of the transgender person to compensate or perform a ritual to cleanse the atrocity as deemed by tradition.

The use of derogatory language against LGBTI persons is very common. According to the Out and proud Risk and Vulnerability study conducted during the period of July – September 2020, it was discovered that the psychological impact of derogatory language at family level was evident. This is especially evidenced by cases during the COVID-19 lockdown period of LGBTI persons becoming homeless/ destitute due to the derogatory language imposed against them. Correspondingly, the non-legal identification of LGBTI persons by the state propagates stereotypical views which label LGBTI persons as minority groups; propelling hate and discrimination. The lack of institutionalised and comprehensive education (formal and informal) on SOGIE, opens up for pressurised and perpetuated stigma and discrimination experienced by families at community level because of ignorance, lack of knowledge and closed spaces are not conducive to dialogue about SOGIE. The fear of the unknown is reciprocated by LGBTI persons and their families.

## **9. Property rights**

For example, in order to access land, SLC recognises a cis male to be directly allocated land or a cis woman to have a son to be allocated land and this excludes and discriminates against anyone who identifies as LGBTI. In addition, SLC have procedures to approach decision making structures at community level that dictate a specific dress code based on what is deemed appropriate for a specific sex.

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<sup>18</sup> ['Bisexual' Pastor Suspended By Swaziland Church in Latest Example of LGBTI Discrimination \(theworldnews.net\)](https://www.theworldnews.net/news/sexual-orientation-gender-identity-expression)

RECOMMENDATIONS
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| <ul style="list-style-type: none"><li>A. The state should amend the land laws and ensure equity among all citizens despite sexual orientation.</li><li>B. State should take all the necessary measure to promote allocation to LGBTI.</li></ul> |
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