

Customary laws and practices relating to land property and the right to equality in Swaziland's Constitution

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1 Introduction

This article aims to reveal that the guarantees of fundamental rights to equality and non-discrimination upheld in Swaziland's Constitution¹ as well as the international human rights instruments to which Swaziland is a party are not as secure in the way in which they are currently provided. The equality rights and the right to non-discrimination provided for in this Constitution are not absolute. Examples of the manner in which customary laws and practices pertaining to land ownership and access are interpreted illustrate the how the right to equality is compromised, resulting in gender discrimination in Swaziland. These discriminatory practices degrade women and place them in dehumanising situations that serve to keep them from effective participation in their own development and the development of the communities to which they belong.² As the most important property resource, land is used as a tool to perpetuate discrimination against women. Traditional ownership rights are often interpreted through customary laws and practices to ensure unequal access between men and women to the use of land.

It will be established that, as in the rest of Africa, the violation of women's property rights has its origins in historical Swazi customary land tenure systems of ownership that are patriarchal and do not recognise women's claim over land except through their ties with men. In Swaziland, changes to the traditional restriction of women's access to and control over land is markedly resisted, even though the new Constitution guarantees everyone equal rights to property.³ Even

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¹The Constitution of the Kingdom of Swaziland Act 1 of 2005 which became operational in 2006.

²Franciska *et al*, *Realizing women's equality rights in Africa: The delicate balance between culture and universality of rights* (unpublished) 3.

³See ss 19(1), 28(1) and 211(2).

in those communities where women are permitted access to land rights in response to the new constitutional guarantees, women still do not enjoy full rights in the same manner as men. For instance, unmarried women with children fathered by earlier partners⁴ may potentially be allowed grants of land by a chief. However this is done only through their maiden family. This may result in a lack of capacity to alienate the property in their own right, including passing it on as an inheritance for their children.⁵ Besides the exclusion of women from inheriting land, the inability to access land ownership has resulted in new difficulties for women, culminating in discriminatory practices and attitudes towards granting women the same rights as men when they need to utilise land for customary rituals such as burial whether for themselves or their children.

Following the introduction, the paper will bring into focus the conceptual framework of the protection of the right to equality in Swaziland's laws. The next section will outline the background to customary land law in Swaziland. Thereafter, a case will be made for justifying the assertion that inequality continues to exist in land ownership and access rights as shown by violations against women sanctioned by Swazi customary practices. These struggles include the inability, particularly for women in households headed by single women, to pass ownership of land rights to their heirs; the subtle coercion of women to widowhood status as well as customary law interpretations used in the burial rites of children born of women in households headed by single women. A conclusion will follow, where it will be argued that the perpetuation of the inferior status of women in relation to land rights despite the basic constitutional guarantees of non-discrimination against women is due to the persistent attitude of neglect by politicians of their duty to enact decisive laws to address this inequality.

2 Customary law and land resources

2.1 *The constitutional framework on customary law*

While the constitutional provisions assert fundamental rights including protection of the right to equality, the Constitution equally provides for and recognises customary law and traditional institutions. Section 252 provides for the recognition of customary law as one of the legal systems in the country. In particular, this section provides for the application of customary laws when it states that:

Subject to the provisions of this Constitution, the principles of Swazi customary law (Swazi law and custom) are hereby recognised and adopted and shall be applied and enforced as part of the law of Swaziland.⁶

⁴Such children are referred to in a derogatory way as 'crayons', comparing them to the different colours typically found in a box of colouring pencils, commonly referred to as crayons.

⁵'Mother of "crayons" wants rights over land' (2013-06-15) *Weekend Observer* 15-16.

⁶Section 252 (2).

Moreover, the new Constitution recognises the traditional institutions that were in existence at its promulgation,⁷ in chapter 24 where section 227(1) advocates a Swazi traditional government administered in accordance with Swazi law and custom and traditional institutions that are pillars of the monarchy, and section 115(6) provides for the continued regulation of traditional institutions under Swazi law and custom.

On the other hand, the Constitution spells out that customary law is not to be applied if it is '... inconsistent with the Constitution or a statute, or repugnant to natural justice or morality or general principles of humanity'.⁸ Provisions underlying the recognition of customary law therefore subject it, *inter alia*, to the Constitution itself. This is in line with section 2, which proclaims the constitutional supremacy of Swaziland's Constitution. The relationship between customary law and the fundamental rights protected in the Constitution that include the right to non-discrimination on the basis of gender, may be interpreted to mean that any customary law or practice contrary to the constitutional values, including those contained in the Bill of Rights are not acceptable in the regulation of the Swazi society. However, none of the rights protected in the Constitution is absolute. The substance of the rights promised in the Bill of rights should invariably be interpreted by courts, tribunals and forums, in conformity with the Constitution's underlying ideals.⁹ It remains to be seen how far some traditional matters, including those emanating from property rights in traditional communities, can be successfully challenged in these courts in view of the exclusion of these matters from their jurisdiction.

The protection of the right to equality guaranteed in the Constitution has been hailed as a milestone for women as it 'overturns centuries-old Swazi Customs' that discriminate against women. However, the enforcement of the anti-discrimination provisions of the Constitution is not yet a practical reality, especially in the rural parts of the country where customary law regulates the lives of the majority of the population. For instance, the Constitution recognises the right of all, irrespective of gender, to access Swazi nation land.¹⁰ However, the practical reality is that in most cases women cannot unilaterally gain access or inherit property, including land under local customary law. This unequal result can be traced largely to the nature and concept of land ownership under Swazi law and custom.

⁷At independence in 1968, Swaziland preserved some of its traditional institutions. These were outlined under s 62(2) of the then Constitution as immune from legislative interference. These included the offices of the King and Queen Mother, the appointment, removal and suspension of senior traditional leaders, the composition, procedure and role of the Swazi national council, the national first fruits ceremony, the regimental system and the authorisation of a person to act as a regent.

⁸Paragraph (3) of s 252 of the Constitution.

⁹Andrews "Big love"? The recognition of customary marriages in South Africa' (2007) 64 *Wash and Lee L Rev* 1483 at 1492.

¹⁰See s 211(2) of the Constitution. In Swazi customary law, Swazi land is custodially held on the nation's behalf by the King in his capacity as the *Ingwenyama*. For a long time, only married men could be allocated a portion of this land.

2.2 *The nature of customary land tenure and ownership*

As the legal system prescribes, a dual system of customary land tenure is experienced in Swaziland. Land is held under customary tenure and regulated by Swazi law and custom as well as by freehold tenure, regulated by Roman-Dutch common law as modified by statute.¹¹

The legal basis for Swazi nation land can be traced to the Concessions Partition Act¹² adopted during the colonial era. In terms of this legislation, about one-third of Swaziland was set aside for exclusive occupation by Swazis. This is the land that became commonly referred to as the Swazi areas and it was under the control of the 'paramount chief'.¹³ The area also found definition in a later piece of legislation, the Natural Resources Act, as:

... any land set apart for the sole and exclusive use and occupation of Africans under the Concessions Partition Act No 28 of 1907 and land set aside for African land settlement in terms of the Swazi Land Settlement Act No 2 of 1946, and shall include any land registered in the name of the *Ingwenyama* in Trust for the Swazi Nation.¹⁴

At independence, all Swazi nation land was vested under the direct control of the King, provided that, 'The *Ngwenyama* (the king) may exercise all rights of ownership over such land including power to make grants, leases or other dispositions ...'¹⁵ The new Constitution reiterates this position where it equally vests all Swazi nation land in the *Ingwenyama*.¹⁶

Thus, traditional land is wholly owned by the King in Swaziland, held in trust for the nation. The King grants the right to allocate to community members the use of the land through the traditional authorities led by Chiefs located throughout the country. The most common means of acquiring land from a traditional authority, referred to as '*kukhonta*' (to pay allegiance), has for a long time required that only males could be given rights to use Swazi nation land. As much as such acquisition by the male person is made for and on behalf of all members of the family; with the rights enjoyed by all irrespective of gender, there were and

¹¹The land held in trust by the King on behalf of the Swazi nation has been commonly referred to as Swazi Nation land, and is defined by Whelpton 'The indigenous law and custom of the Kingdom of Swaziland' (unpublished report) 84 as '*umhlaba wakaNgwane*' (land of Ngwane) or '*umhlaba wemaSwati*' (Swazi nation land). Also see Moodley *The customary law of intestate succession* (LLD thesis University of South Africa (Pretoria)) (2012) 223 when referring to Davis, O'Meara and Dlamini *The Kingdom of Swaziland: A profile* (1985) 40.

¹²Act 28 of 1907.

¹³According to the Swazi Areas Act 41 of 1916.

¹⁴Act 71 of 1951

¹⁵Section 94(2) of the Independence Constitution Act 50 of 1968. This position was further reinforced, particularly by the King's Suspension of the Constitution Order of 12th April 1973.

¹⁶Section 211(1) states that 'From the date of the commencement of this Constitution, all land in Swaziland, save privately held title deed land, shall continue to vest in *Ingwenyama* in trust for the Swazi Nation as it vested on the 12th April 1973'.

still are certain limitations to this enjoyment of rights for women. It may be concluded that the legal procedure confers more or less equal rights to land irrespective of gender. However, this is subject to such limitations as the fact that the management of land is invariably vested in men. Decisions affecting rights to land are made by men to women's exclusion, conferring on them the right to control the use of land. This limitation is confirmed by the customary rules of land inheritance. Female persons may not unilaterally acquire land and inherit or claim family land rights, but only in circumstances where a male member of the family acts as proxy on their behalf to acquire the land.

The limitations imposed by customary law on women's rights to access land have become controversial in contemporary Swazi society. The limitations on the exercise of rights to land by women are still experienced in spite of the provisions in the Constitution which provide for their eradication. The gender stereotypes perpetuated by customary cultural practices and attitudes in relation to land rights are still deeply entrenched.

3 The constitutional and international law protection of fundamental rights

The right to equality and non-discrimination is central to securing a life of dignity for everyone. The current customs and practices, especially those regulating land resources in Swaziland, fail to adequately protect women's right to equality to property ownership and thus violate their right to realise their full human dignity. This is in spite of the realisation that Swaziland's Constitution¹⁷ contains an enforceable Bill of Rights¹⁸ which amongst its provisions provides for the protection to equality and non-discrimination.¹⁹ While the right to property for everyone is guaranteed in the Bill of Rights, a general commitment to equality before the law and to equal protection of the law is also provided for. To this effect the section provides that,

All persons are equal before the law and under the law in all spheres of political, economic, social and cultural life and in every other respect and shall enjoy equal protection of the law.²⁰

The section²¹ defines 'discriminate' as meaning

¹⁷The Constitution of the Kingdom of Swaziland Act 1 of 2005 (hereafter referred to as the 'Constitution').

¹⁸Provided for under ss 14-39 under chapter III of the Constitution entitled 'Protection and promotion of fundamental rights and freedoms'.

¹⁹Sections 14, 20 and 28 of the Constitution.

²⁰*Id* s 20(1).

²¹*Id* s 20(3).

... to give different treatment to different persons attributable only or mainly to their respective descriptions by gender, race, colour, ethnic origin, birth, tribe, creed or religion, or social or economic standing, political opinion, age or disability.

The Constitution clearly does not allow the state or any person to discriminate unfairly, either directly or indirectly against any person on the stated grounds, which include gender. This protection afforded by Swaziland's Constitution is in line with the same protection provided for under most international human rights instruments, such as the Universal Declaration of Human Rights²² and the two UN Conventions²³ to which the country is a state party. To an extent then, the Bill of Rights in the Constitution reflects some of the values enshrined in International treaties and regional agreements reflecting the obligations to which Swaziland has bound herself as a state party.²⁴

In contemporary Swazi society, discrimination against women as regards the protection of the right to equal access to property is based on social and cultural stereotypes about the perceived role and status of women. These stereotypes are to a large extent embraced by law, custom and practice. The new Constitution has been hailed as a positive commitment to gender equality. In recognition of the past and current discrimination against women in Swaziland, the Constitution is dedicated to the guarantee of equal rights and equal opportunity for men and women in political, economic and social activities.²⁵ However, the Constitution does not include equal opportunity in cultural activity as one of the factors that can be the basis of discrimination. This is in spite of the fact that culture underlies most of the discrimination suffered by women in Swaziland. This omission seems to be compensated for by the guarantee in the Constitution that 'a woman shall not be compelled to undergo or uphold any custom to which she is in conscience

²²The Universal Declaration of Human Rights, GA Res 217 (III) A, UN Doc A/810 (1948-12-10). Article 7 states that 'all are equal before the law and are entitled without any discrimination to equal protection before the law.' In art 1, equality and dignity is reiterated; 'All human beings are born free and equal in dignity and rights'. Article 2 lays down that 'everyone is entitled to all rights and freedoms set forth in the Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status'.

²³These include the International Covenant on Civil and Political Rights (ICCPR) of 1966, as well as the International Covenant on Economic, Social and Cultural Rights (ICESOC) of 1966. Article 26 of the ICCPR, states that that 'all persons are equal before the law and are entitled without any discrimination to the equal protection of the law'. The Convention clearly mandates equal treatment of men and women by all state parties to it.

²⁴These include the Universal Declaration on Human Rights, the International Covenant on Civil and Political Rights (ICCPR) acceded to on 2004-03-26, the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), likewise acceded to on 2004-03-26. On the regional front, the African Charter on Human and People's Rights (the African Charter), ratified on 6 October 1995 and its protocol on women's rights, signed on 7 December 2004, the SADC Protocol on Gender and Development of 2008.

²⁵Section 28(1) of Swaziland's Constitution.

opposed'.²⁶ However, as it will be pointed out in the discussion below, this guarantee for women is not applied in practice due to some of the dictates of custom and practice in Swaziland.

Moreover, the freedom for everyone to own property is guaranteed in the Constitution, where it provides that 'a person has a right to own property either alone or in association with others'.²⁷ The guarantee of '... equal treatment with men...' and '...equal opportunities...' is also extended to women by the Constitution.²⁸ The judgment in *The Attorney General v Aphane*²⁹ confirms that everyone has the right to acquire property irrespective of gender. However, this decision related to property acquired under title deed land and thus access to, and control of, Swazi nation land for women continues to be a challenge. The right to own property as provided for in the Constitution must be read with section 211(2) which states:

Save as may be required by the exigencies of any particular situation, a citizen of Swaziland, without regard to gender, shall have equal access to land for normal domestic purposes.

Thus, as an emerging practice, some traditional authorities are now allocating land to women in their own right through the traditional method of '*kukhonta*' referred to above.³⁰ Even then, women's ownership of the land is still limited as they cannot alienate the land rights, especially if they are unmarried. However, control over land by women remains questionable in some instances as emerges in the struggles women encounter when needing to utilise land for rituals such as burial.

3.2 Traditional laws and cultural practices violating women's rights to equality and dignity in land ownership and control

3.2.1 The right to own land but no right to bequeath land as an inheritance

It has been established above that the attitudes and customary laws in respect of land ownership have been largely influenced by the historical customary land tenure system in Swaziland. Nhlapo's assertion that 'Swazi customary succession is "uncompromisingly patrilineal"' and that all the rules 'aim at identifying a male

²⁶*Id* s 28(3).

²⁷*Id* s 19(1).

²⁸*Id* s 28(1).

²⁹[2010] SZSC 32.

³⁰See above at 4.

heir' still hold true in contemporary traditional communities of Swaziland.³¹ Land was acquired and owned by men, and women could only access it through their male counterparts. It still remains a challenge to shake off such attitudes towards land ownership, despite the changes that have been brought about particularly through the provisions of the Constitution guaranteeing equal rights for women in accessing and controlling land in Swaziland. Section 211(3) has the potential to confirm the prevailing attitudes when it provides for the right for everyone to domestic land use, but begins by providing for exclusions to the right in certain undefined circumstances. The section provides: 'Save as may be required by the exigencies of any particular situation ...' It may be concluded when reading this phrase that the right to control and use land by women may be denied on this pretext. A provision couched in these terms has great potential to promote the corruption of Swazi law and custom when it comes to ownership of land and may result in an interpretation that, in certain circumstances, it may be necessary to discriminate against certain Swazis with regard to access to land. Invariably, discrimination in the acquisition and ownership of land for domestic use would be levelled at women in particular owing to the influence of the country's historical perceptions of the customary land tenure system. The corruption of Swazi law and custom by the eviction of women, particularly widows, is promoted by section 211(3).

One of the consequences flowing from the constitutional recognition of the right to access land in Swaziland is the undefined and elusive manner in which women can fully access and own land in traditional communities. At one level the Constitution guarantees them this right, but leaves it open for communities, especially under traditional leadership, to define the situations when to grant them the right and when to deny it. This also leaves it to the communities' and families' leadership to further define the extent of ownership of land resources. Often, decisions that define the extent of the rights are made in forums where women are not represented at all.³² In most cases, unmarried women are the ones that are negatively affected where, even if granted use of land, their rights will be subordinated to their families. As a result they are unable to alienate land granted to them, especially to their children. This attitude of not recognising children of a

³¹Nhlapo 'The legal situation of women in Swaziland' in *The legal situation of women in southern Africa* (1990) 97, 124. The International Women's Human Rights Clinic, Georgetown University Law Center 'The promise of a new constitution – achieving equal inheritance rights for women in Swaziland: A human rights report and proposed legislation' (2009) 40 *Georgetown Journal of International Law* 441 at 446.

³²Community land ownership and management decisions are invariably made by the chief and his inner council comprised solely of male members of the community. In Rose 'Women's strategies for customary land access in Swaziland and Malawi: A comparative study' (2002) 49 *Africa Today* 123-149 at 127 it is confirmed that 'Swazi ... men rather than women exercise significant land use rights ..., make decisions about land use on homesteads'.

single woman as having a right to inherit land from their mothers means that these children are disqualified from access to land. This constraint can translate to the exclusion of these children from contributing to the economic development of the community, particularly in the form of economic projects that require access to the land as a resource for economic activity. The interpretation given to this custom is that these children should access land through their patrilineal families to meet their needs.³³ This expectation for the children is actually contrary to the accepted rule of Swazi law and custom that a child's guardianship is subject to the guardianship of the family which has guardianship over its mother.³⁴ Their plight is often made worse where such children are also not accepted and recognised by the paternal families, either in custom³⁵ or formal law. The observation that the 'discriminatory practices in land rights places women in degrading and dehumanising situations and also prevents them and their children from effective participation in their own development and the development of communities to which they belong, is true Swaziland. This is particularly the case for women living under traditional authority and subject to customary law.³⁶

3.2.2 Burial on Swazi nation land and discrimination

Swaziland has a very strong cultural or traditional political governance system. It has often been argued that culture contributes to the continued discrimination of women and can have adverse effects on the promotion of women's rights in Africa.³⁷ In fact, it is acknowledged that:

the pervasive exercise of traditional policies and practices that discriminate against women ... across sub-Saharan Africa constitutes the most pervasive way in which rights of women in Africa today are abused.³⁸

The manifestation of cultural practices which are clearly abusive of women's equality rights occurs at a particularly sad and vulnerable time for women when they need to use land for burial purposes. The discriminatory practices suffered by women holds the threat that they will not be buried in family and community land if the women choose to exercise their constitutional right not to participate

³³This is due to the commonly held misconception that these children belong with their father's family. The conclusion that can be reached of the proper custom is that as long as the children's guardianship has not been transferred to their biological father's family according to the process outlined below, they still belong to the mother's family (n 33).

³⁴See Whelpton (n 10) 238

³⁵Custom provides for a process of formally acknowledging the paternity of children born of women who are not married to their partners. In most instances, positive acknowledgement of paternity for the children will result in the transfer of guardianship of the child from the maternal family to the biological father's family when certain requirements have been met.

³⁶See Franciska *et al* (n 1) 4.

³⁷*Id* (n 1) 4.

³⁸*Ibid*.

in rituals to mourn the death of their husbands. Unmarried women also face this cultural discrimination when they have to bury their own children. The discrimination experienced by women when accessing land for burial use has a direct bearing on their lack of access to resources, particularly land.

In *Maphokela Shabalala v Nelson Mabuza*³⁹ Mamba AJ observed that:

a death, funeral and or burial of a deceased person is a very solemn, sensitive, sorrowful and sacred event. It commands respect from both friend and foe alike. The corpse of a human being may never be used as a tool by anyone to settle petty social scores or differences.⁴⁰

According to Swazi law and custom, once a person is deceased, procedurally, the next of kin of the deceased meet and the family head leads the discussion on the burial procedure. Amongst the other matters the family has to attend to, is the formal duty to inform the royal household under whose jurisdiction the family falls and recommend to the royal house the procedure for and date of the burial whilst seeking permission to proceed to bury the deceased.⁴¹ The chief, under whose command the royal house falls, has the power in terms of Swazi law and custom to prevent the burial of the deceased in certain circumstances.⁴² The reasons for such refusal by the chief would generally be based on the fact that the deceased paid allegiance to another chief and was therefore not a member of the community, or the insubordination of the deceased towards the chief's authority whilst the former was still alive. The insubordination may take the form of the subject not recognising the authority of the chief, or not honouring the demands of the *indlunkhulu* or *umphakatsi* (the chieftaincy), such as *kuhlehla* (rendering physical labour) which is nowadays often translated into payment of money for its projects.⁴³ The conduct of women, particularly when they do not accept that they must publicly mourn their deceased husbands, has in recent times been used as a reason in some traditional communities and families not to grant permission for the women's own burial when they die. This can potentially cause a great deal of difficulty for their next of kin who would bear the responsibility of finding somewhere appropriate to bury them.

³⁹Case no 117/06.

⁴⁰Paragraph 15

⁴¹The head of the royal house, the chief, is legally empowered to regulate and monitor the use of all land under his jurisdiction and Swazi law and custom dictates that a death in his area must be reported to him and permission to access land for burial must be sought from him prior to such burial. Also see *Maphokela Shabalala v Nelson Mabuza*, High Court Case no 117/06 per Mamba AJ, para 11; *Dlamini Thokozile v Chief Mkhumbi Dlamini* Appeal Case 2/2010, cited as [2012]SZSC 3, confirmed at para 10 (1) that as a lawful chief of an area where the appellant sought to bury the deceased, the chief is seized with jurisdiction to make rules and orders to be obeyed by all his subjects..

⁴²Paragraph 11

⁴³Magagula 'Pay E1500 to bury your relatives here or else ...' (2011-12-10) *Times of Swaziland*.

3.2.3 Choosing not to participate in widowhood rites

These are rites or ceremonies that widows are expected to perform upon the death of their husbands as part of the process of ritual separation from their late husbands.⁴⁴ In Swaziland the rites involve certain restrictions on the behaviour of the widow, and the expectation that she remain confined for the purposes of mourning.⁴⁵ In addition, the widow is often forced to wear restrictive and identifiable mourning garments.⁴⁶ In most cases these clothes will be worn throughout the mourning period and not removed until the necessary ceremonies have been performed.⁴⁷ This clearly discriminates against women as Swaziland's Constitution guarantees women's equal rights with men.⁴⁸ The Constitution also guarantees that 'a woman shall not be compelled to undergo or uphold any custom to which she is in conscience opposed'.⁴⁹ One of the most radical and practical interpretations that have been attached to this section by most Swazi women is that it accords them relief from mourning their deceased husbands by having to wear the widow's weeds and performing widowhood rites. On the other hand, practical reality dictates that in the traditional communities to which the women belong, the contrary expectation is that they participate in all the widowhood rites including wearing widow's weeds. Traditionally, a woman who rebels against such expectations would be punished and ostracised both in her marriage family and in the general community to which she belongs,⁵⁰ and this reaction against a woman who fails to publicly mourn her husband is true even today. In reality, those women who have taken advantage of the interpretation of the Constitution which absolves them from formally mourning their deceased husbands can potentially be subjected to a new form of discrimination. The risk of potential discrimination is well illustrated in a media report of a traditional leader appealing to community members to desist from voting for widows nominated to stand for the country's Parliamentary elections. The chief held that 'electing a woman in mourning would be uncultured and embarrassing',

⁴⁴*Id* (n 23) 6.

⁴⁵Ncube and Stewart (eds) *Widowhood, inheritance laws, customs and practices in southern Africa* Women and Law Southern Africa Research Project (1995) 34.

⁴⁶*Id* at 35. Usually, the woman is expected to dress in black clothes and in some instances literally carry/wear weeds in the form of grass strings referred to as 'tintsambo'. See the report at 38-39.

⁴⁷*Id* at 38. The average mourning period for widows in Swaziland is two years.

⁴⁸Section 28(1) of Swaziland's Constitution, see part 2 of the paper discussing the Constitutional protection against discrimination for women.

⁴⁹*Id* s 28(3).

⁵⁰Women and Law in Southern Africa Research and Education Trust (WLSA) *Inheritance in Swaziland: The law and practice* (1994) at 98-99. There were recent reports of a widow who decided to stop publicly mourning her husband by prematurely removing her mourning gowns so that she could participate in the election campaign for the next parliament. Women in formal mourning would typically be excluded from running for election as tradition dictates that women in mourning cannot be in the presence of the King who often has to attend parliament in his official capacity. See Nkambule 'Widow dumps *inzilo* for elections' (2013-06-22) *Swazi Observer*.

pointing out that according to Swazi law and custom, women in mourning were 'not supposed to hold office'. This view is contrary to the dictates of the Constitution allowing women the freedom to choose how to mourn the death of their husbands. The chief held that even where the woman is not visibly mourning the husband, she is still considered a widow with limited rights recognised under Swazi law and custom. According to him, the law prevented mourning women from being potential candidates for elections to parliament. His interpretation of the law was that when it comes to 'these matters', in his area, Swazi law and custom was supreme with regard to women's rights.⁵¹

This discrimination translated to a threat of punishment against women, even at the time of the widow's death. The attitudes of some leaders of the communities in which women reside has in certain instances resulted as threats not to grant permission to their relatives to bury them in their communities when they die. This invariably discriminates against women who fail to adhere to the communities' expectations regarding the mourning of husbands, so that they have to make alternative plans for their own burial when they die. This clearly illustrates the observation that the protection accorded to women in section 28(3) of the Constitution gives women protection with one hand and takes such protection away with the other.⁵² Moreover, the formulation of the guarantee for women under section 28(3) places an undue burden on the individual woman to protect herself against such customary practices instead of the state taking responsibility to prohibit and condemn all forms of harmful practices which are likely to negatively affect women.⁵³ Furthermore, when listing the grounds on which women may not be discriminated against in section 28(1), the Constitution omits to outlaw discrimination against women on the basis of culture. Thus when one reads section 28(3), it becomes clear that women in Swaziland may be subjected to a custom which brings hardship to them, but because it is based on culture, women would still be expected to adhere to it. It may be argued here that it is on the basis of cultural expectation that widows are required by communities still to adhere to the cultural ways of mourning their husbands or else face the hardship of not being allowed to access burial rights when they die. The case for an order of court sought by the chief of 'Gundvwini' to stop a funeral of a deceased woman illustrates the reluctance of traditional authorities to allow burial for women in their areas of jurisdiction even for reasons for which the deceased women are not responsible.⁵⁴ How much more so in cases where the

⁵¹Magagula 'Don't vote for widow-Chief' (2013-08-18) *The Times of Swaziland* available at www.times.co.sz/news/90512 (accessed 2013-08-18).

⁵²Hall 'Women fight for a place in the Constitution' (2003-10-06) *Inter Press Service News Agency* available at www.ipsnews.net/africa/interna.asp?idnews=20482 (accessed 2012-01-10).

⁵³*Ibid.*

⁵⁴Mamba 'Logcogco runs to court to stop funeral' (2012-09-01) *The Swazi Observer* available at www.observer.org.sz/index.php?news (accessed 2012-09-01) where, although the deceased grew up in the area in question in their maternal grandparents' household, they would not be allowed

women were found to have previously refused to participate in the mourning processes for their deceased husbands?

Whether the refusal to allow the burial is for reasons of failing to honour the authority of the *indlunkhulu* or not accepting the mourning procedures for her late husband, these customs bear heavily on women and result in discrimination against them as the poorest section of the population in Swaziland. Recently, reported events in one community aptly demonstrate women's struggles against discrimination and poverty. Here the area's traditional authorities demanded E1500 (one thousand emalangeneni)⁵⁵ from the family of the deceased before they could be allowed to conduct a funeral within the area.⁵⁶ Women, as the most affected by poverty in the country, often cannot afford such payments, resulting in frustration for them by order of the *umphakatsi*. In the above case, a family reported how they had to make alternative and inconvenient arrangements to bury their sister away from the family's lifelong area of residence because they were unable to raise the required sum of money.

3.2.4 Women's struggle for the right to bury children born out of wedlock

In contravention of women's right to equality with men, there are manifestations of discrimination against women when the right to use the community's burial land for deceased children born out of wedlock is denied. This is most evident where women need to bury their children in their own maternal homes. Several recent cases reported in local media illustrate this predicament for women.⁵⁷

In Swazi law and custom, the child's right to be buried within a particular traditional community under a chief's leadership is always linked to the child's father. Payment of allegiance by the family, especially by the father, guarantees the burial of his children within the community's lands when they die. By implication, if the father stops paying such allegiance, the child loses the right of burial in the area. In most cases a man would stop paying allegiance to a particular chief when he ceases to be a subject under the leadership of that chief. Usually, this would be a formal process involving '*kuvalelisa*' (bidding goodbye) in the area.⁵⁸ In such a case, in the new area where he becomes a subject is

burial because their biological parents had settled elsewhere.

⁵⁵An equivalent of ZAR1500.

⁵⁶See (n 67) above.

⁵⁷Dube '10 year old finally buried after dispute' (2012-07-16) *The Swazi Observer* available at www.observer.org.sz/index.php?news=40894 (accessed 2012-07-16) where the child was buried in the area after the family was fined; Magagula 'Umphakatsi fines family eleven cattle for digging grave' (2012-01-21) available at www.times.co.sz/News/36862.html (accessed 2012-09-03) where a woman faced difficulty in burying her child born out of wedlock in her new marriage home.

⁵⁸The process of bidding farewell by a subject according to Swazi law and custom was confirmed in the case of *Ndlangamandla v Hadebe* [2012] SZHC 57 at 23-24, paras 39 and 40.

where his family would be expected to follow and to access burial rights. This often causes much hardship for women who are not recognised as conduits in the same way men are for their children to access burial rights. Local media again reported that a ten year old child could not be buried in an area because her late father had formally ceased to be a subject in that area and had settled elsewhere.⁵⁹ The child was finally buried in the area after her family was required to pay a fine in the form of a cow. As is often the case, the responsibility to raise the fine will be borne by the mother. The husband, who could legally provide the link to the child for it to access burial rights, would, as in most cases, have left the area, having deserted the wife and children due to unresolved family misunderstandings. The traditional leader is seen to insist on adherence to a custom which links burial rights for children to their father when the latter is not there to facilitate the expected custom of burial and when only their mother is at hand. Perpetuation of a custom that does not recognise a woman as a conduit for children's burial is contrary to the provisions of section 233(9) of the Constitution which recognises the functions and duties of a chief as that which 'enforces a custom, tradition, practice or usage which is just and not discriminatory'.⁶⁰ Instead of burdening a woman with payment of a fine when she is faced with the catastrophe of the death of her child, the chief can play an important role in eradicating the discriminatory custom of recognising only men as conduits for burial of children, and thereby promote equal rights of men and women through access to land rights for domestic use.

Women's struggle to bury their children is even more burdensome where the paternity of the children has not been acknowledged by the father's family. Most communities disallow the burial of these children precisely because of the custom that links access of burial rights for children to their fathers. However, in most cases, the children's paternity would not have been customarily acknowledged by the father's family,⁶¹ which leaves the mother of the child with the problem of where to bury her child. This is well illustrated by a report in the local media where a funeral had to be stopped as a result of a dispute within the family, with some members of the family contending that the deceased should not be buried as he was not a legitimate member of the family.⁶² It has often been argued that African societies do not embrace and recognise the concept of illegitimacy as used in the

⁵⁹*Id* (n 79) and (n 80) above.

⁶⁰This is a provision dealing with '*Tikhulu*' (Chiefs) and is under chapter XIV on Traditional Institutions.

⁶¹The customary procedure of acknowledging a child by a potential father in Swaziland would involve a whole process of reporting the pregnancy by the woman's people to the man's people, whereby the latter family on the advice of their son may either acknowledge the child as belonging to their family or deny that the child so belongs to the family. This would be dependent on a number of factors such as the resemblance of the child to its paternal relatives.

⁶²See (n 80) above.

Western sense.⁶³ Illegitimacy is the consequence of the absence of a marriage between the child's biological parents.⁶⁴ Swaziland's Constitution specifically provides for the abolition of the concept of illegitimacy as understood in the western sense.⁶⁵ Swazi law and custom imputes the maternal family's guardianship to a child born out of wedlock and such a child is considered as entitled to protection in this family. This is in line with the best interests of the child as expressed in most human rights instruments protecting children. This is also in accordance with the assertion that custom regards a Swazi child's entitlement to 'two homes' whilst alive, thus guaranteeing the child protection from both the maternal and the paternal family. This meant that, according to Swazi culture, a person could access rights from both families and the respective communities in which these families reside. Children are supposed to be accorded such rights in their own right. Therefore, preventing them from accessing burial rights in these communities is a misrepresentation and an erosion of Swazi customary law, which protects both women and children from exclusion from access to resources such as land for their needs, such as the need to bury these children.

Women's struggle to access burial ground is linked to their lack of capacity to access, own and control land under Swazi law and custom. Despite this lack of right to land, evidence from the historic Swazi communal land tenure system shows that women were allowed significant indirect access and rights to use communal resources, including access to land to bury their deceased children, irrespective of their children's legitimacy status.⁶⁶ What transpires today in the form of reluctance to allow women access to this right is a travesty of Swazi law and custom that promotes the violation of women's equal rights to use land for domestic purposes in accordance with section 211(2) of the Constitution.

Discrimination against women regarding the exercise of their right to use domestic land to bury their children is most evident in situations where their children's paternity would have not been conclusively acknowledged by the father's family. It happens quite often in most Swazi communities that a child remains under the guardianship of the maternal family all its life owing to the paternity not having been conclusively acknowledged. When a child in this position dies, its remains can be stranded. Allowing a customary practice limiting women's rights to access burial land for the children is in violation of the children's constitutional right to dignity.⁶⁷

⁶³Omotola 'Primogeniture and illegitimacy in African customary law: The battle for survival of culture' (2003) 17 *Speculum Juris* 181 at 194 quoting Schoeman 'Choice of law and legitimacy: Back to 1917' (1999) 116 *SALJ* 288 at 292.

⁶⁴*Id* 195.

⁶⁵Section 31 of Swaziland's Constitution.

⁶⁶There is historic evidence of women's management of land resources in everyday life, for farming, accessing material to make handicrafts, etc. See Rose (n 30) 123.

⁶⁷The constitutional right to human dignity is protected under s 18 and specifically under s 29(2) for children.

The African Charter⁶⁸ accords every person this right when it provides: 'Every individual shall have the right to the respect of the dignity inherent in a human being and to the recognition of his legal status'. The same article observes further that 'all forms of ... degradation of man ... shall be prohibited'. This right is given further emphasis in Swaziland's Constitution where it provides for the protection of every person's dignity by holding that 'A person shall not be subjected to ... degrading treatment ...'⁶⁹ All these protections extend to women as well as children in ensuring that they are not subjected to any form of degrading treatment while still alive and further to making sure that when they die, their remains are equally accorded such dignity. Moreover, in protecting the rights of children, the Constitution provides for the enjoyment of the same rights and protection for all children irrespective of whether they were born in or out of wedlock.⁷⁰

4 Conclusion

Despite the standard-setting international, regional and new constitutional guarantees protecting the right to equality for all in Swaziland, the position of women remains a challenge when these rights have to be translated into practical reality. Both international law and the Swazi Constitution provide explicit protection for equality rights and the right to non-discrimination for everyone. However, the customary laws and practices relating to land ownership still conflict with both constitutional and international human rights norms. Even where change has been experienced to reflect the values that allow women the right to access land ownership, this has been half-hearted, prompting a conclusion that whilst everyone can be said to enjoy *de jure* access and control over land, the traditional biases of those responsible for the administration of the land means that the *de facto* position is that women are accorded limited rights to it. In reality, women are not free to exercise and access certain critical rights over communal land. Some of the pressing recent manifestations of the challenges to equality are seen in certain traditional practices and policies that violate the right to equality. The customary practices directly linked to access and control of land discriminate against women when applied to the daily lives of rural people in Swaziland, especially when women need to be buried or have to bury their children. The equality rights of women, particularly in households headed by single women, are particularly vulnerable to the violation of this important right. The need to protect the equal rights of women, particularly rights to land under traditional authorities, is critical. This is particularly relevant in view of the impending parliamentary elections in the country. Women are presently advocating for land

⁶⁸Section 5 of Swaziland's Constitution.

⁶⁹*Id* s 18(2).

⁷⁰*Id* s 29(4).

reforms and are calling for a new female dominated parliamentary representation that will hopefully be sensitive towards the plight of women and will initiate legal reforms that will ensure their equal rights to land.⁷¹

The case of the *Attorney General v Aphane* has provided a major boost to the struggle for gender equality in Swaziland by asserting the right for women to own property equally with men.⁷² A good deal of mileage has been gained through the decision in this case regarding the protection of rights for women, especially to protections against discrimination. However, the challenge raised in this case related purely to formally legislated laws. Unlike in other jurisdictions in the region,⁷³ no case has yet come before the courts challenging gender equality in respect of customary laws and practices that disadvantage women's protection, particularly against discrimination. To address some of the concerns of gender discrimination, the country needs to enact decisive laws that will outlaw and abolish the harmful customary laws and practices operating against women in regard to property and land ownership in particular. The agenda to reform or repeal discriminatory laws, particularly those against women, and bringing the laws into conformity with constitutional democratic principles, has been on the cards since the promulgation of the Constitution. However, progress on this initiative has been marred by a noticeable 'lack of political will'.⁷⁴

⁷¹*Id* (n 4) 1.

⁷²[2010] SZSC 32. See also (n 27) above at 6, where the court ruled that the law discriminated against women on property ownership and that such discrimination cannot be justified under the Constitution.

⁷³Recently, in Botswana, in the case of *Mmusi v Ramantele* (MAHLB-000836) [2012] BWC 1, challenged a Ngwaketse customary law that grants the youngest born son the right to inherit the family home, which clearly violates the right to equality enshrined in the Botswana Constitution. See Lee 'Landmark women's rights case in Botswana' (2012-10-10) *Open Society Initiative for Southern Africa* available at <http://www.osisa.org/womens-rights/botswana/landmark-womens-rights-case-botswana> (accessed 2013-11-11).

⁷⁴Dlamini-Ndwandwe 'The Constitution and women's property rights in Swaziland' (2011) 26 *SAPL* 408 at 424, as well as The International Women's Human Rights Clinic, Georgetown University Law Center (n 31) and (n 28) above at 7.