

WOMEN'S EQUAL PROPERTY AND LAND RIGHTS HOLD KEY TO REVERSING TOLL OF POVERTY AND HIV/AIDS IN SWAZILAND: A HUMAN RIGHTS REPORT AND PROPOSED LEGISLATION

THE INTERNATIONAL WOMEN'S HUMAN RIGHTS CLINIC
GEORGETOWN UNIVERSITY LAW CENTER

EXECUTIVE SUMMARY.....	292
I. SWAZI WOMEN FACE DISCRIMINATION IN ACCESS TO PRIVATE PROPERTY AND COMMUNAL LAND FROM BIRTH TO DEATH	294
<i>A. Women's Inequality Stems from the Degrading and Discriminatory Marital Power the Husband has Over His Wife</i>	296
<i>B. Abolishing Marital Power Will Remedy Women's Lack of Access and Control Over Personal Property, Private, and Communal Land</i>	299
<i>C. Proposed Amendments Eliminate Outdated, Inequitable, and Overlapping Land and Property Policies</i>	302
<i>D. Existing Legislation and Customary Practices Must be Harmonized with the Constitution and International Law</i>	304
II. SWAZI LAW AND CUSTOM GOVERNING SWAZI LAND ALLOCATION AND ADMINISTRATION FAIL TO PROTECT WOMEN FROM DISCRIMINATORY CUSTOMARY PRACTICES	306
<i>A. Women Suffer When Men Only Are Allocated Swazi Nation Land</i>	307
<i>B. Customary Practices Expel Women from their Marital Home, Separate Them From Their Children and Subject them to Homelessness, Poverty, and Violence</i>	311
<i>C. Other African Countries Allocate Communal Land to Women and Prohibit the Forced Removal of Women from Communal Land</i>	317
III. DISCRIMINATORY LAWS AND FAMILY CONTROL CURTAIL WOMEN'S RIGHT TO ACQUIRE, OWN, AND ADMINISTER PRIVATE PROPERTY.....	318
<i>A. Private Property Laws Deny Married Women Independent Control and Access to Her Own Property</i>	319
<i>B. Women's Historic Exclusion from Land and Property Regimes Effectively Limits Their Access to Government Land</i>	325
<i>C. Backed by Customary Law, Husbands and In-Laws Deny Women Access to and Control Over Their Personal Property</i>	328

This human rights report was authored by Brook Kelly, Marika Maris, Nicolas Mitchell, and Karen Morao, Spring 2007 student advocates with the International Women's Human Rights Clinic at Georgetown Law. It was supervised by then, Attorney-Fellow, Tzili Mor, under Clinic Director, Susan Deller Ross. The report was produced in conjunction with two Swazi Non-Governmental Organizations: The Women and Law In Southern Africa Research Trust (WLSA), headed by Lomcebo Dlamini, with invaluable input and feedback from Patience Bennett, Lomcebo Dlamini, Sibongile Dlamini, Edward Mathabela, Sibonelo Mdluli, Bonginkhosi Sengway, and Jabu Tsabedze; and the Council of Swaziland Churches, the Department of Justice, Peace, and Reconciliation, headed by Lungile Magagula. Support for this clinic project was provided by DLA Piper, New Perimeter Fund. The clinic would also like to thank U.S. participating attorneys, Eliza Bechtold and Whitney Stevens (DLA Piper, New Perimeter), and Tamar Ezer (Open Society Institute, Public Health Program, Law and Health Initiative).

D. Swazi Laws and Customary Practices Require Married Women but not Married Men to Obtain Spousal Consent for Accessing Personal Credit and Loans332

IV. PROPERTY AND LAND LAW AND CUSTOMS TREAT WOMEN AS NON-ENTITIES OR CHATTEL AND SUBJECT THEM TO ENDEMIC ECONOMIC AND PHYSICAL ABUSE334

A. Property Laws and Practices Treat Women as Lacking Full Legal Personhood 335

B. Stripped of their Resources by Law, Women Suffer Violent Physical and Economic Abuse 341

V. CUSTOMARY AND CIVIL LAWS STRIP WOMEN OF PROPERTY AT THE BREAK UP OF MARRIAGE345

A. Because Married Women Can Not Own Property, They Receive Nothing of Value at the Break Up of Marriage..... 346

B. Because of Their Legally-enforced Economic Dependency, Women Must Remain in Abusive Relationships 350

C. Courts Must Consider Both Financial and Non-Financial Factors To Justly Divide Property Between Spouses at the Break-Up of Marriage.....354

VI. TO ENSURE THAT WOMEN’S RIGHTS ARE FULLY REALIZED, BOTH EFFECTIVE TRAINING INITIATIVES MUST BE IMPLEMENTED, AND MAGISTRATE COURTS MUST HAVE JURISDICTION OVER CLAIMS356

A. Training and Education are Necessary to Stop Discrimination Against Women in Land Allocations 357

B. Magistrate Courts Should Have Jurisdiction to Hear Claims Regarding Land and Property Violations to Ensure Accessible Justice359

VII. PROPOSED AMENDMENTS ENSURE JUST AND FAIR LAND AND PROPERTY RIGHTS IN LINE WITH THE SWAZI CONSTITUTION AND HUMAN RIGHTS LAW 361

A. Swazi’s Recently Enacted Constitution Calls for Customary Property Practices to Conform with Non-Discrimination Guarantees 361

B. Discriminatory and Harmful Customary Laws Cannot Justify Harming Women and Violating their Core Rights..... 362

VIII. EQUAL LAND AND PROPERTY LAWS WILL PROTECT THE HEALTH AND ECONOMY OF THE NATION.....365

A. Laws and Practices Barring Women from Accessing Property Increase the Entire Country’s Vulnerability to HIV.....365

B. Women’s Lack of Land and Property Rights Undercuts Swaziland’s Economic Development 369

IX. CONCLUSION..... 373

APPENDIX: ANNOTATED VERSION OF THE PROPERTY AND LAND EQUALITY BILL..... 373

EXECUTIVE SUMMARY

Women in Swaziland suffer from myriad discriminatory and harmful customary and civil laws that govern their property rights, making women dependent on men for their survival, often placing them at greater risk of perpetual destitution and exposure to HIV/AIDS infection. These laws and customs, based on outdated stereotypes of women’s inferiority, stigmatize and dehumanize women by reducing

them to second class citizens and condemning them to a life of exclusion, humiliation, and poverty.

Discriminatory Property Laws and Customary Practices Prevent Women from Accessing Communal and Private Land, Administering Personal Property, and Receiving Property at the Break Up of Marriage

The laws of Swaziland greatly restrict women's rights to land and personal property at all stages of life, discriminating against women on the basis of gender, marital status, and marital regime. Under Swazi law and custom, a chief allocates communal Swazi Nation Land to a woman only through her husband, male relatives, or male children. Because land rights vest in males and women are considered inferior, a woman has no security on communal land, and may be evicted by her husband, her in-laws, and her chief for almost any reason, including adultery, witchcraft, and the inability to bear male children. A woman will also struggle to access private property because she has insufficient economic resources, she cannot register the land in her name when she is married under civil rites, and she requires her husband's permission to administer the land. Furthermore, a husband married under customary law or civil rites may exercise his marital power to control community property as well as his wife's personal property and income without her consent, treating her like a minor. A married woman may not sell livestock and crops that she raised, dispose of household items, access her bank account, or obtain a bank loan without the consent of her husband. Finally, at the break up of customary and civil rites marriages, a woman is deprived of property to which she has contributed because she owns nothing of value, her husband can unilaterally dispose of property to deprive her of her share, and the traditional authorities and civil courts unfairly divide the marital estate.

Swaziland Has an Obligation Under the Constitution and International Treaties to Eliminate Harmful and Discriminatory Property Laws

These harmful discriminatory laws violate women's fundamental human rights guaranteed by the Constitution of Swaziland and binding regional and international treaties. For example, the new Constitution of Swaziland grants women the equal right to property and dignity, and prohibits discrimination on the basis of gender. The Constitution also declares that all civil and customary laws that violate constitutional provisions are void, and requires Parliament to enact legislation to eliminate such laws. Similarly, Swaziland has ratified and is thus bound by international and regional treaties, such as, the African [Banjul] Charter on People's and Human Rights (African Charter), the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), the International Covenant on Civil and Political Rights (ICCPR), the International Covenant on Economic, Social, and Cultural Rights (ICESCR), and the Convention on the Rights of the Child (CRC) to eliminate laws that harm and discriminate against the property rights of women. In accordance with the Constitution and regional and international treaties, the Parliament of Swaziland must enact non-discriminatory legislation that:

Abolishes the marital power;

- Requires the allocation of Swazi Nation Land to women regardless of marital status;
- Provides security of tenure to women on Swazi Nation Land;
- Permits women to register private property in their names regardless of marital status;
- Gives women the right to obtain credit and open bank accounts without discrimination;
- Mandates mutual spousal consent to alienate or mortgage joint property;
- Allows sole administration of separate property;
- Instructs civil courts to justly and fairly distribute property at the break-up of all marriages; and
- Requires that government Ministries and NGOs implement training programs on women's equal rights to property and land.

NON-DISCRIMINATORY PROPERTY LAWS WILL EMPOWER WOMEN AND BENEFIT ALL SWAZIS

The people of Swaziland desire non-discriminatory laws that empower women and the government of Swaziland has committed itself to passing such laws by enacting the Constitution and ratifying regional and international treaties that respect fundamental human rights. Because these proposed changes ensure that women are no longer dependent on men, the proposed legislation will help to reduce the rate of HIV/AIDS in the country as well as improve the economy of Swaziland.

I. SWAZI WOMEN FACE DISCRIMINATION IN ACCESS TO PRIVATE PROPERTY AND COMMUNAL LAND FROM BIRTH TO DEATH

Swazi women confront pervasive discrimination in access to and control over private property and communal land. From childhood to adulthood, women's legal status is less than that of men. Under Swazi law and custom, baby boys can have communal land allocated to them in their own names, whereas their grandmothers, mothers, and sisters can never be allocated communal land in their names.¹ Girls are less valued than boys to the point that a woman can be evicted from her home under Swazi law and custom for giving birth only to female children.²

As adults, women do not enjoy the same rights of majority that men have, preventing them from being full legal and economic actors in Swazi society. Their dispossession from property condemns them to poverty and consequently subjects them to increased risk of HIV/AIDS infection due to their inability to negotiate safe sex practices or by being forced to resort to provide sexual services for basic necessities of food and shelter for them and their children. Single adult women can buy and register private land in their own names; single women, however, often lack the socioeconomic means to buy private land and are stigmatized by society for remaining unmarried.³ Additionally, under Swazi law and custom, single

1. *See infra* Part II.A (Swazi Nation Land Allocation); Part IV.A (Dignity).

2. *See infra* Part II.B (Eviction).

3. WOMEN AND THE LAW IN SOUTHERN AFRICA RESEARCH TRUST, FAMILY IN TRANSITION: THE EXPERIENCE OF SWAZILAND 113, 192-193 (1998) [hereinafter FAMILY IN TRANSITION] (Men have more

WOMEN'S EQUAL PROPERTY AND LAND RIGHTS

women cannot be allocated Swazi Nation Land, and the male members of the family often have control over the woman's own livestock.⁴ When women marry, their legal status under both the civil and customary system is that of a minor. Most married women cannot own property in their name, cannot be allocated communal land in their name, and cannot secure bank loans or use their bank accounts without permission from their husbands.⁵

The limitations on women's property rights hurt all of Swaziland by preventing women from being full participants in economic, political, and cultural life. This report maps out where violations to women's property rights exist and what changes should be made to remedy the discrimination women face. The findings are based on legal research of domestic, regional, international and comparative law and on interviews conducted in March 2007 in Swaziland by the Georgetown University International Women's Human Rights Clinic, in partnership with the Swaziland branch of Women and the Law in Southern Africa (WLSA) and the Council of Swaziland Churches. Over seventy-five people were interviewed from many sectors of society, including rural and urban women and men, parliamentarians, government ministers, religious leaders, lawyers, and women's and family's rights advocates.

The report analyzes violations of domestic and international law caused by women's limited property rights in Swaziland and the effects that these violations have on women, families and Swazi society as a whole. Part I discusses discrimination against women stemming from the various Swazi marital regimes and their proprietary consequences; the effects of outdated, uncoordinated and discriminatory property laws and customary practices; and Swaziland's obligation to harmonise or eliminate legislation that discriminates against women's equal rights to property in contravention of the new Constitution of Swaziland (Constitution) and international law. Part II analyzes the communal land system, known as Swazi Nation Land, and how allocation of and control over communal land discriminates against women. This section explores the negative effects of excluding women from Swazi Nation Land allocation and the devastating results of unjust evictions from Swazi Nation Land. Part III focuses on the limited rights and control women have over private and personal property. Most women have neither the right to register or own private property nor the right to control personal property. Part IV lays out the ways in which women's limited property rights constitute degrading treatment and can lead to economic and physical abuse. Both customary and civil law violations of a woman's right to property are discussed through the lens of the right to be free from degrading or inhuman treatment. Part V, on women's right to property at the break-up of marriage, connects a woman's limited rights to property during marriage to the unjust distribution of property at the break-up of marriage. Part VI emphasises the necessity of effective educational trainings on women's right to equal property for the public and for government officials as well as an expansion of the Magistrate Courts' jurisdiction to all matters concerning

access to wage labor opportunities because they can migrate to other locations and countries for employment, whereas women are expected to stay at the homestead to take care of the family).

4. *Id.*; see *infra* Part III.C.

5. See *infra* Part I.A (Marital Power); Part III.D (Loans, Credit, Banking).

women's property rights. Part VII calls for the elimination of customary practices that discriminate against women and violate their right to property. Evolution of customary practices and the will for change evidenced by interviews with people in Swaziland and the language of equality in the new Constitution and ratified international treaties are discussed as an impetus for legal reform. Part VIII ties women's limited property rights to nationwide concerns of health and economic development.

A. Women's Inequality Stems from the Degrading and Discriminatory Marital Power the Husband has Over His Wife

A woman's right to property and private and communal land in Swaziland discriminatorily hinges on her gender and marital status. Single, divorced, and widowed women have the same legal rights as men to purchase and administer private property in their own name.⁶ Upon marriage, however, most women lose these rights and are unable to own or administer property due to their husbands' marital power, which reduces women's status to that of a child.⁷ As R.T. Nhlapo, eminent scholar on Swaziland, explains, "marital power leaves a woman with no "locus standi in judicio (i.e. she must be represented in legal proceedings by her husband), no independent contractual capacity, and very little control over the joint property of marriage."⁸ Without a man, neither single nor married women may have access to or control over Swazi Nation Land, the communal land which makes up about seventy-four percent of the land in Swaziland where almost seventy percent of the population lives.⁹ Loss of property rights upon marriage affects women not only in marriage but also upon dissolution of marriage. In civil marriage with marital power a husband can, for example, sell off all joint property before divorce, leaving nothing for the woman during division of property.¹⁰ When a customary marriage breaks up the husband retains all of the property of value, including the marital home, while the woman is left destitute.¹¹ The restrictions on property rights imposed on women because of marital power denies them the economic and physical security of house, home, subsistence, and improvement of living conditions that men enjoy.

6. R. T. Nhlapo, *The Legal Situation of Women in Swaziland and Some Thoughts on Research*, in 2 THE LEGAL SITUATION OF WOMEN IN SOUTHERN AFRICA 97, 125-126 (Julie Stewart & Alice Armstrong eds., 1990).

7. See Deeds Registry Act 37 of 1968 s. 16(2-3) (Swaz.).

8. *Supra*, note 1; see also U.S. Dept. of State, Bureau of Democracy, Human Rights, and Labor, *Country Reports on Human Rights Practices - Swaziland* (Mar. 8, 2006), available at <http://www.state.gov/g/drl/rls/hrrpt/2005/61595.htm>.

9. Swaziland Environment Authority, *National Assessment Report of Swaziland to the World Summit on Sustainable Development Johannesburg (2002)* at 4, available at <http://www.environment.gov.sz/files/wssd.pdf>.

10. Interview with Lindiwe Khumalo Matse, Divorce Attorney, in Manzini, Swaziland (Mar. 9, 2007) ("The most common cases I hear are in the context of divorce matters. With in marriage people don't sue because they still have to live together. What comes to mind is a woman asking for divorce - after he received the summons he disposed of the property and home to a third party. We are still trying to find out where the proceeds are.").

11. See *Infra* Part V (Divorce).

WOMEN'S EQUAL PROPERTY AND LAND RIGHTS

Under both the civil and customary marriage system, marital power exists to varying degrees and subjugates women by giving the husband power over the person and property of the wife. There are four different marital regimes possible in Swaziland with varying types of property consequences for women:

1. In community of property with marital power, where all property is jointly owned but registered solely in the man's name;¹²

2. Out of community of property with marital power, where property is separately owned according to an antenuptial agreement but controlled by the husband;

3. Out of community of property without marital power, where property is separately owned according to an antenuptial agreement and controlled solely by the owner of that property; and

4. Swazi law and custom, where the husband has complete marital power over the wife's person and property.¹³

The sheer number of marital regime choices is confusing and few people know of the discriminatory implications of marriage before they enter into the marriage contract, or that they have the option to contract out of the husband's marital power, leading to discriminatory consequences for women in marriage. Ms. Nondumiso Kunene, Housing and Property Manager at the SwaziBank, sees many women who enter the bank to obtain loans only to find out that the proprietary consequences of their marriage do not permit them to do so without their husband's consent: "Unfortunately, the choice that you make [of which marital regime to marry under] is a choice that you make... while you are still young, and you don't know the implications of things."¹⁴ For most women, even if they are aware that they can opt out of the husband's marital power, often times their future husband will not agree to sign such an antenuptial agreement. Lindiwe Khumalo Matse, a divorce attorney, explained her own failure in convincing her husband to enter into an out of community of property marriage: "I met my husband when I was very young and I wanted [an] out of community of property [marriage] but he said in [community of property]. We debated and couldn't agree. We disagreed and for eight years we didn't have a certificate because we disagreed. I ended up giving in."¹⁵

12. Deeds Registry Act 37 of 1968 s. 16(3) (Swaz.) (s. 3: "Immovable property, bonds or other real rights shall not be transferred or ceded to or registered in the name of a woman married in community of property.").

13. Nhlapo, *The Legal Situation of Women*, *supra* note 6, at 114-15 ("marital power under customary law is all-encompassing and reduces the wife to a position analogous to that of 'one of the children' of the household. This has obvious implications for her personal autonomy (what she may wear, or engage in).").

14. Interview with Ms. Nondumiso Kunene, Housing and Property Manager at the SwaziBank Headquarters, in Mbabane, Swaziland (Mar. 6, 2007).

15. Interview with Lindiwe Khumalo Matse, Divorce Attorney, in Manzini, Swaziland (Mar. 9, 2007).

A marriage under Swazi law and custom provides the husband with even more expansive marital power than any civil marriage.¹⁶ According to renowned legal expert, R.T. Nhlapo, “marital power under customary law is all-encompassing and reduces the wife to a position analogous to that of ‘one of the children’ of the household. This has obvious implications for her personal autonomy (what she may wear, or engage in).”¹⁷

When Black Swazis marry under The Marriage Act, sections 24 and 25 exclude them from the potential protections provided by civil law. By mandating that property rights of Black spouses, even if married by civil law, are to be governed by Swazi law and custom, the Marriage Act discriminates on the basis of race and gender, and creates extreme uncertainty as to which marital system a couple is governed under.¹⁸ A principle Magistrate Judge explained that “[i]f you’re married in community of property, [under] sections 24 and 25 of the Marriage Act... you [are] in danger of having Swazi law and custom governing the proprietary consequences [of your marriage], which [is] a contradiction because you have taken the decision in the first place that you do not want to contract a marriage in terms of Swazi law and custom, but you have something sneaking through the back door. Haunting you.”¹⁹ This haunting provision stems from a racist and discriminatory colonial period where Black Africans were intentionally and formally prevented from participation in and protection under the legal system established by the colonizers.²⁰ The creation of dual legal systems where white colonizers were governed under their civil laws and Black Africans were governed under traditional or customary laws prevented Blacks from accessing the proprietary protections enjoyed by white colonists.²¹ Because most Swazis are unaware of sections 24 and 25 of the Marriage Act, women are unknowingly entering marriages where the husband has complete power over their person and property, not only violating their right to property as a woman, but also discriminating against Black women on the basis of race.²² In a survey that asked Black married couples whether they thought they were married civilly in community of property or under Swazi law and custom, they all thought they were married in community of property, showing that Swazis are unaware that their marital regime is altered by the pass-through provision.²³

16. Nhlapo, *The Legal Situation of Women*, *supra* note 6, at 114-15.

17. *Id.*

18. The Marriage Act 47 of 1964 ss. 24 & 25 (1964) (Swaz.) (s. 24: if both parties to the marriage are Africans, “the marital power of the husband and the proprietary rights of the spouses shall be governed by Swazi law and custom.”; s. 25(1): “If both parties to a marriage are Africans, the consequences flowing from the marriage shall be governed by the law and custom applicable.”).

19. Interview with Principle Magistrate Judge, in Mbabane, Swaziland (Mar. 6, 2007).

20. *See Bhe and Others v. the Magistrate, Khayelitsha and Others*, 2005 (1) BCLR 1 (CC) at 54 para. 143 (S. Afr.) (overruling an inheritance law that applied only to Black South Africans as discriminatory and racist because it only applied to Africans with the intention to disenfranchise and disadvantage the native population).

21. *See id.* at para. 143.

22. R. T. NHLAPO, MARRIAGE AND DIVORCE IN SWAZI LAW AND CUSTOM 41-42 (1992).

23. *See id.*

WOMEN'S EQUAL PROPERTY AND LAND RIGHTS

The pass-through provision should be removed because it is egregiously disadvantageous to women and is normally not enforced by the court. In practice, judges usually make an exception for sections 24 and 25 of the Marriage Act, allowing Swazis who believed they were married under civil law to be governed under civil law.²⁴ Legislation should codify the judge's practices in order to prevent continued discrimination on the basis of race and sex.

B. Abolishing Marital Power Will Remedy Women's Lack of Access and Control Over Personal Property, Private, and Communal Land

In order to ensure that women have full rights to their personal property, Swaziland must abolish the marital power. The people of Swaziland are ready to do away with this control over women. Twenty-nine out of thirty-one people interviewed on this question believe that the marital power should be abolished. These interviewees came from all walks of life, from Parliament members to non-governmental organization (NGO) workers to lawyers to rural women. People interviewed agreed that marital power should be abolished because it treats women as minors. A law student interviewed explained: "customary law basically doesn't really recognize women as... [I]t still treats women as minors... So I would like to see women standing up for themselves and being recognized as they are."²⁵

Many countries around the world and in Africa have already done away with the marital power, requiring that spouses have equal rights to use property and that both are consulted before any action is taken with respect to property.²⁶ Swa-

-
24. Interview with Principle Magistrate Judge, in Mbabane, Swaziland (Mar. 6, 2007).
 25. Interview with Sihlengiwe Dlamini, law student, at Univ. of Swaziland, Swaziland (Mar. 6, 2007).
 26. Married Woman's Property Act, CAP 176 (1953, amended 2000) s. 3 (Belize), available at http://www.commonlii.org/bz/legis/consol_act/mwp176333.pdf (all the rights, powers and authorities of the husband existing at common law have been abolished); Bolivia, Initial periodic report of States Parties to the Committee on the Elimination of Discrimination Against Women, U.N. Doc CEDAW/C/BOL/1 (1991), available at <http://www.un.org/womenwatch/daw/cedaw/reports.htm> (under Bolivia) (both spouses manage property acquired during marriage and the consent of both spouses is needed to dispose of or encumber property); Bosnia and Herzegovina, Initial through Third periodic report of States Parties to the Committee on the Elimination of Discrimination Against Women, U.N. Doc. No. CEDAW/C/BIH/1-3 (2004), available at <http://www.un.org/womenwatch/daw/cedaw/reports.htm> (under Bolivia) (One spouse cannot independently handle or burden joint property without the consent of the other spouse); Birte Scholz & Mayra Gomez, *Bringing Equality Home: Promoting and Protecting the Inheritance Rights of Women: A Survey of Law and Practice in Sub-Saharan Africa* 42 (The Centre on Housing Rights and Evictions (COHRE) 2004) (citing Deeds Registry Act, CAP 33:02 (1960, amended 1996) (Bots.)) (both parties to marriage must be involved in joint property decisions; marital power abolished); Bulgaria, *Second and third periodic report of States Parties to the Committee on the Elimination of Discrimination Against Women*, U.N. Doc CEDAW/C/BGR/2-3 (1994), available at <http://www.un.org/womenwatch/daw/cedaw/reports.htm> (under Bulg.) (spouses have equal rights of possession, use, disposal, and management over common property); Burundi, *Initial periodic report of States Parties*, U.N. Doc No. CEDAW/C/BOL/1 (2000), available at <http://www.un.org/womenwatch/daw/cedaw/reports.htm> (under Burundi) (citing CODE OF THE PERSON AND THE FAMILY (1993 amendment) (Burundi)) (abolished wife's obedience); Law on Marriage and Family, art. 29 (1989) (Cambodia), available at <http://www.worldlii.org/kh/legis/lotmaf230/> (equal rights to use, obtain benefits and manage joint property); Marriage Law art. 17(1) and (2) (1981, amended 2001) (P.R.C.), available at <http://www.asianlii.org/cn/legis/cen/laws/ml198197/> (husbands and wives shall enjoy equal rights to dispose of jointly-owned property); Colombia, *Fifth and sixth periodic report of States Parties to the Committee on the*

Elimination of Discrimination Against Women, U.N. Doc. No. CEDAW/C/COL/5-6 (2005) available at <http://www.un.org/womenwatch/daw/cedaw/reports.htm> (under Colom.) (citing Act 28 (1932) (Colom.)) (women do not require spouses' authorization or permission from a judge to administer and dispose of personal belongings and of those jointly owned with husband); Croatia, *Second through third periodic report of States Parties to the Committee on the Elimination of Discrimination Against Women*, U.N. Doc. No. CEDAW/C/CRO/2-3 (2003), available at <http://www.un.org/womenwatch/daw/cedaw/reports.htm> (under Croatia) (citing Family Law, art. 249 (1999) (Croat.)) (spouses are co-owners of equal shares of mutual property acquired during marriage); Cuba, *Fourth periodic report of States Parties to the Committee on the Elimination of Discrimination Against Women*, U.N. Doc. No. CEDAW/C/CUB/4 (1999) available at <http://www.un.org/womenwatch/daw/cedaw/reports.htm> (under Cuba) (citing FAMILY CODE (Cuba)) (spouses require each other's consent to acts connected with the ownership, administration or alienation of the common property of a marriage); Eritrea, *First through third periodic report of States Parties to the Committee on the Elimination of Discrimination Against Women*, U.N. Doc. No. CEDAW/C/ERI/1-3 (2004), available at <http://www.un.org/womenwatch/daw/cedaw/reports.htm> (under Eri.) (citing EPLF Family Law, art. 45 (proclamation 1/1991) (Eri.)) (both spouses require a written consent of the husband or wife to enter into mortgage; repealed marital power of husband as head of household); FAMILY CODE, art. 50(1), 66 (revised 2000) (Eth.), available at <http://mail.mu.edu.et/~ethiopia/laws/FamilyLawHome.htm> (spouses retain "equal rights in the management of the family," and in the administration of common property); The Secretary General, *Report of the Secretary-General submitted in accordance with Commission resolution 2001/34*, para. 15, delivered to the Economic and Social Council and the Commission on Human Rights, U.N. Doc. E/CN.4/2002/53 (Jan. 15, 2002), available at <http://www.unhcr.ch/Huridocda/Huridoca.nsf/TestFrame/dbc76479922d0282c1256b990053c4b2?OpenDocument> (citing CIVIL CODE art. 131 (Guat.)) (disposition of or encumbrance on jointly owned real estate requires the consent of both spouses. Both spouses have the right to administer the household's financial resources and administration of assets jointly or separately); Italy, *Third periodic report of States Parties to the Committee on the Elimination of Discrimination Against Women*, U.N. Doc. No. CEDAW/C/ITA/3 (1997), available at <http://www.un.org/womenwatch/daw/cedaw/reports.htm> (under Italy) (citing 1975 Reform (Italy)) (co-ownership and an equal share in all assets acquired during marriage; explicit recognition to the caring work of women); Kazakhstan, *Second periodic report of States Parties to the Committee on the Elimination of Discrimination Against Women*, at 59, U.N. Doc. CEDAW/C/KAZ/2 (Mar. 17, 2005), available at <http://www.un.org/womenwatch/daw/cedaw/reports.htm> (under Kazakhstan) (citing Law on Marriage and the Family, art. 33 (Dec. 17, 1998) (Kaz.)) (spouses mutually agree on ownership, management, and disposition of common property); Kenya, *Fifth and sixth periodic reports of States parties to the Committee on the Elimination of Discrimination Against Women*, para. 183, U.N. Doc. CEDAW/C/KEN/5-6 (Oct. 16, 2006), available at <http://www.un.org/womenwatch/daw/cedaw/reports.htm> (under Kenya) (citing MSK v. SNK, (2005) K.L.R. (Kenya)) (High Court decided that domestic duties amount to contribution to matrimonial property); Kuwait, *Combined initial and second periodic reports of States parties to the Committee on the Elimination of Discrimination Against Women*, at 78, U.N. Doc. NO. CEDAW/C/KWT/1-2 (May 1, 2003), available at <http://www.un.org/womenwatch/daw/cedaw/reports.htm> (under Kuwait); Kyrgyzstan, *Initial reports of States parties to the Committee on the Elimination of Discrimination Against Women*, (10th Sess., 1999), para. 147, U.N. Doc. CEDAW/C/KGZ/1 (Aug. 28, 1998), available at <http://www.un.org/womenwatch/daw/cedaw/reports.htm> (under Kyrgyzstan) (citing MARRIAGE AND FAMILY CODE Part II, art. 23 (Kyrg.)) (Spouses have equal rights in the ownership, acquisition, administration, enjoyment and disposition of jointly owned property, regardless of who is bringing in outside income); Lao People's Democratic Republic, *Combined initial, second, third, fourth and fifth periodic reports of States parties to the Committee on the Elimination of Discrimination Against Women*, (32nd Sess., 2005), at 59, U.N. Doc. CEDAW/C/LAO/1-5 (Aug. 18, 2003), available at <http://www.un.org/womenwatch/daw/cedaw/reports.htm> (under Lao People's Democratic Republic) (citing Family Law, art. 27 (Laos)) (Husband and wife have equal rights over conjugal property notwithstanding who actually acquired the asset); Lithuania, *Initial report of States parties to the Committee on the Elimination of Discrimination Against Women*, (23rd Sess., 2000), at 24, U.N. Doc. CEDAW/C/LTU/1 (1998), available at <http://www.un.org/womenwatch/daw/cedaw/reports.htm> (under Lithuania) (citing MARRIAGE AND FAMILY CODE art. 21 (Lith.)) (need consent of both spouses to use property); Luxembourg, *Initial report of States*

WOMEN'S EQUAL PROPERTY AND LAND RIGHTS

ziland is one of the last countries in the region to still have this restriction on women's rights.

Swaziland should follow the example of South Africa, which progressively abolished the marital power in civil marriages in 1993.²⁷ The amendment gave women equal rights under the law in civil marriages.²⁸ Even after this law was passed, the government continued to focus on equality and discussed the status of women under customary law. It stated that "popular assumption about male status and the 'official code' of customary law need to be re-examined."²⁹ The government specifically referenced Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), stating that South Africa is "committed to [CEDAW's] principle of non-discrimination." In order to balance the inequality that remained under customary law, South Africa passed an act abolishing the marital power in customary marriages, stating that a woman in such a marriage is on a "basis of equality with her husband and subject to the matrimonial property system governing the marriage, full status and capacity, including the capacity to acquire assets and to dispose of them, to enter into contracts and to litigate."³⁰ Par-

parties to the Committee on the Elimination of Discrimination Against Women, (17th Sess., 1997), at 70, U.N. Doc. CEDAW/C/LUX/1 (Dec. 18, 1996), available at <http://www.un.org/womenwatch/daw/cedaw/reports.htm> (under Luxembourg) (husband is no longer the master of the community property nor the head of the family); *New Family Law Moves Through Mozambique's Parliament*, Oxfam (2003) available at http://www.oxfamamerica.org/newsandpublications/news_updates/archive2003/art5516.html (citing Family Act (December 16, 2003) (Moz.)); Married Persons Equality Act, art. 2 (1996) (Namib.) (husbands' marital power as head of the house has been abolished, equal power of spouses to dispose of assets of and administer joint estate, woman doesn't need consent for property ownership); Nigeria, *Combined fourth and fifth periodic reports of States parties to the Committee on the Elimination of Discrimination Against Women*, at 49, U.N. Doc. No. CEDAW/C/NGA/4-5 (April 28, 2003), available at <http://www.un.org/womenwatch/daw/cedaw/reports.htm> (under Nigeria); Paraguay, *Combined initial and second periodic reports of States parties to the Committee on the Elimination of Discrimination Against Women*, (15th Sess., 1996), at 32, U.N. Doc. No. CEDAW/C/PAR/1-2/Add.1 (Nov. 21, 1995), available at <http://www.un.org/womenwatch/daw/cedaw/reports.htm> (under Paraguay) (citing Law No. 1 (1992) (Para.)) (need consent of both spouses for execution of contracts); FAMILY CODE 209 OF 1987 art. 70 (Phil.) available at <http://www.chanrobles.com/executiveordermo209.htm> (joint authority to husband and wife to administer the conjugal property); Poland, *Combined fourth and fifth periodic reports of States parties to the Committee on the Elimination of Discrimination Against Women*, para. 281, U.N. Doc. No. CEDAW/C/POL/4-5 (Dec. 13, 2004), available at <http://www.un.org/womenwatch/daw/cedaw/reports.htm> (under Poland) (citing K.R. [Family and Custody Code] art. 36(1) (Pol.)) (each of the spouses can individually manage their joint property but consent of spouses needed when either plans to go beyond confines of ordinary property management); Matrimonial Property Act 88 of 1984, amended 1993 s. 11 (S. Afr.); Married Persons Property Act of 1929, amended 1981, art. 2(1) (Zimb.) available at http://www.parlzim.gov.zw/cms/Acts/Title05_PERSONS_AND_THE_FAMILY/MARRIED_PERSONS_PROPERTY_ACT_5_12.pdf (excludes the marital power).

27. Matrimonial Property Act 88 of 1984, amended 1993 s. 11 (S. Afr.). At the time, customary marriages were not recognized.

28. *Id.*

29. South African Law Commission, Issue Paper: Harmonization of the Common Law and the Indigenous Law (1996), available at <http://www.saflii.org/za/other/zalc/ip/3/3-CHAPTER-3.html#Heading174>.

30. Recognition of Customary Marriages Act 120 of 1998 s. 6 (S. Afr.).

liament in Swaziland should also create a law recognizing the equality of spouses in both civil and customary marriages.

C. Proposed Amendments Eliminate Outdated, Inequitable, and Overlapping Land and Property Policies

Swaziland must update its existing land related legislation by eliminating outdated, inequitable, and overlapping land and property policies. There are three types of land in Swaziland: Swazi Nation Land, which is communal land, held in trust by the King for the people of Swaziland and allocated by chiefs; Crown Land, which is owned and controlled by the government; and Title Deed Land, which is privately held land. At last count, there were over seventy-nine land related laws and policies governing the three types of land. Many of these laws and policies hark back to the British colonial period, and overlap, unclear in meaning and applicability, and entrench antiquated and sex-discriminatory notions about marriage and women's property rights.³¹

While a recent Swazi Nation Land administrative order was issued in 1998, the vast majority of laws relating to Swazi Nation Land date back and have not been amended since the early to mid twentieth century, causing confusion and insecurity in Swazi Nation Land allocation and tenure.³² British Colonialist law designated Swazi Nation Land to native Swazis and served to relegate native Swazis to rural and less productive plots of land, while colonizers held private deed land to urbanized and more productive land plots. Despite a discriminatory beginning, presently, this land system is the sole source of property tenure for most indigent Swazis ensuring housing and sustenance for those families who have a male member to claim their right to occupy Swazi Nation Land.

These laws, however, have not been adapted to current social conditions, including the HIV/AIDS crisis, or to common concerns about allocation and usage rights of women and girls, transferability of land, and security of tenure, which remain subject to the whims of rural chiefs. Additionally, the current laws fail to conform to the equality provisions in the new Swazi Constitution, and to the binding international human rights treaties that Swaziland has ratified. The government's failure to streamline and update Swazi Nation Land laws harms both men and women because access and usage rights to the land are unclear and insecure.

31. THE NATIONAL LAND POLICY ch. 2.6.3 (Ministry of National Resources and Energy, Draft 2000) ("A 1995 report identified seventy-nine statutes with land-related provisions, and more have been either introduced or identified since that report. While many are and will remain separate of necessity, there are other instances of legislation introducing overlapping, irrational, confusing and/or inefficient law and practice."), ("There is an accretion of legislation relating to land and the environment. This is urgently in need of rationalisation if efficient, transparent and accountable land management is to occur. Much was based upon obsolete and inequitable policies, and much has remained inactive for decades."); *See, e.g.*, The Marriage Act 47 of 1964 ss. 24 & 25 (Swaz.) (mandating the regulation of marital proprietary rights of "Africans" under Swazi law and custom rather than under the civil marriage system unless an ante-nuptial agreement is signed) and The Deeds Registry Act 37 of 1968 s. 16 (Swaz.) (taking away women's right to own property in her own name when married in community of property).

32. *Compare* Swazi Administration Order 6 of 1998 (Swaz.) *with* The Swazi National Treasury Act 81 of 1951 (Swaz.), The Swazi Land Settlement Act 2 of 1946 (Swaz.), The Swazi Land Settlement Rules 2 of 1946(1) (Swaz.), and The Safeguarding of Swazi Areas Act 39 of 1910 (Swaz.).

WOMEN'S EQUAL PROPERTY AND LAND RIGHTS

Laws governing Crown Land are numerous³³ and convoluted with few if any government officials certain of which land plots constitute Crown Land or where the Crown Land plots are located, preventing equitable and efficient sale and use of the land. In an interview with the Deeds Registrar, he stated that: "people don't understand [Crown Land]. People don't know what [it] is..."³⁴ Not even government officials or lawyers with expertise in property laws can clearly identify or define Crown Land.³⁵ This lack of clear oversight over Crown Land breeds corruption and mishandling, often leading to the bypassing of women when Crown Land is distributed, thereby further entrenching women's already limited access to the basic resource of land.

Private Title Deed is the only form of land that is clearly regulated by law under the Deeds Registry Act.³⁶ Regulation of this land type originally protected the interests of the wealthy colonizers who owned privately held commercial farms on the most productive land.³⁷ This sole form of clearly regulated land cannot be registered in the name of most married women.³⁸ Thus, the discriminatory and antiquated property laws deprive women from accessing a secure home and place to grow food to feed themselves and their families. The current property regime is not in line with Swaziland's own constitution or with binding international laws and treaties.

33. The Crown Lands Conditions Act 2 of 1968 (Swaz.); The Crown Lands Temporary Occupation Act 22 of 1964 (Swaz.); The Crown Lands Act 9 of 1949 (Swaz.); The Crown Lands Disposal Regulations 13 of 1912 (Swaz.); The Crown Lands Disposal Act 13 of 1911 (Swaz.).

34. Interview with Juba Dlamini, Deeds Registrar, in Mbabane, Swaziland (Mar. 6, 2007).

35. In interviews where government officials and lawyers were asked what Crown Land was, pervasiveness of conflicting answers led to the conclusion that the definition and administration of Crown Land is unclear. *Compare* Interview with Ms. Nonhlanhla Zanele Dlamini, Ministry of Home Affairs, Gender Coordinator, in Mbabane, Swaziland (Mar. 5, 2007) ("Crown Land is not necessarily owned by government. It's part of Swazi Nation Land, it's just that it's a bit different, the way it's governed. There's still some sort of traditional structure, under inkhundla, they're supposed to have a chief in inkhundla. It's just that it's a bit different from your normal Swazi Nation Land than in the rural area. I think the difference is that you have the rural Swazi Nation Land, then you have the Crown Land that is in the peri-urban area. So it's not necessarily owned by government."), *with* Interview with Albert Lukhele, Secretary, Land Speculation Control Board, in Mbabane, Swaziland (Mar. 9, 2007) ("I think crown land... we are under the British Crown. So, crown land and government is the same thing. It's just that during colonial time we are referring to the crown. In one simple language, it is land that is owned by the government. It is government land."). *Compare* Interview with Sibongile Dlamini, in Ezulwini, Swaziland (Mar. 4, 2007) ("Crown land is only for business."), *with* Interview with Mr. Albert Lukhele, Secretary, Land Speculation Control Board, Mbabane, Swaziland, March 9, 2007 ("With crown land it's mainly individuals. I think a company will be allocated if they want to run some business. But it is mainly individuals for residential purposes.")

36. Deeds Registry Act 37 of 1968 (Swaz.).

37. *Id.* at s. 16

38. *Id.*

D. Existing Legislation and Customary Practices Must be Harmonized with the Constitution and International Law

The King and iNgwenyama, law makers, and Swazis have demonstrated their desire and commitment to ending women's unequal property rights by creating a new Constitution which came into effect in 2006³⁹ and by ratifying regional and international treaties such as the African [Banjul] Charter on People's and Human Rights (African Charter),⁴⁰ the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW),⁴¹ the International Covenant on Civil and Political Rights (ICCPR),⁴² and the International Covenant on Economic, Social, and Cultural Rights (ICESCR),⁴³ all of which oblige the Swazi government to end discriminatory property laws and practices. The Constitution has multiple sections that call for the equality of all people,⁴⁴ supremacy clauses

39. SWAZI. CONST. 2005.

40. African Charter on Human and Peoples' Rights, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), *entered into force* Oct. 21, 1986, *ratified by Swaziland* Sept. 15, 1995, *available at* http://www.achpr.org/english/_info/charter_en.html [hereinafter African Charter] (Preamble: "Considering the Charter of the Organization of African Unity, which stipulates that 'freedom, equality, justice and dignity are essential objectives for the achievement of the legitimate aspirations of the African peoples.'").

41. Convention on the Elimination of All Forms of Discrimination Against Women, art. 2, G.A. res. 34/180, 34 U.N. GAOR, Supp. (No. 46), at 193, U.N. Doc. A/34/46, *entered into force* Sept. 3, 1981, *ratified by Swaziland* Mar. 26, 2004, *available at* <http://www.un.org/womenwatch/daw/cedaw/cedaw.htm> [hereinafter CEDAW] ("States Parties condemn discrimination against women in all forms, agree to pursue by all appropriate means and without delay a policy of eliminating discrimination against women ...").

42. International Covenant on Civil and Political Rights, art. 26, G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S.171, *entered into force* Mar. 23, 1976, *ratified by Swaziland* Mar. 26, 2004, *available at* <http://ohchr.org/english/law/ccpr.htm> [hereinafter ICCPR] ("All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.").

43. International Covenant on Economic, Social and Cultural Rights, art. 3, G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 993 U.N.T.S.3, *entered into force* Jan. 3, 1976, *ratified by Swaziland* Mar. 26, 2004, *available at* <http://www.ohchr.org/english/law/cescr.htm> [hereinafter ICESCR] ("The States Parties to the present Covenant undertake to ensure the equal right of men and women to the enjoyment of all economic, social and cultural rights set forth in the present Covenant.").

44. *See* SWAZI. CONST. 2005 s. 14(1)(f) ("The fundamental human rights and freedoms of the individual enshrined in this Chapter are hereby declared and guaranteed, namely - (f) respect for rights of family, women, children, workers and persons with disabilities); s. 19(1) ("A person has a right to own property either alone or in association with others."); s. 20(1) ("All persons are equal before 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."); s. 20(2) ("For the avoidance of any doubt, a person shall not be discriminated against on the grounds of gender, race, colour, ethnic origin, tribe, birth, creed or religion, or social or economic standing, political opinion, age or disability"); s. 20(3) ("For the purposes of this section, 'discriminate' means 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 opin-

WOMEN'S EQUAL PROPERTY AND LAND RIGHTS

that void existing laws and practice not in line with the Constitution,⁴⁵ and the preamble emphasises the need to harmonise “the good institutions of traditional law and custom with those of an open and democratic society...so as to promote... social, economic, and cultural development.”⁴⁶ Equal property rights are specifically addressed in sections 19(1) and 211(2) which grant all people the right to own property and have equal access to land regardless of gender.⁴⁷

Parliament has the duty to “enact legislation regulating the property rights of spouses,”⁴⁸ in order to bring the current laws and practices in line with section 28 of the Constitution which mandates that “women have the right to equal treatment with men and that right shall include equal opportunities in political, economic, and social activities.”⁴⁹ As a result, Parliament must enact legislation that:

-
- ion, age or disability.”); s. 20(5) (“Nothing in this section shall prevent Parliament from enacting laws that are necessary for implementing policies and programmes aimed at redressing social, economic or other imbalances in society.”); s. 28(1) (“Women have the right to equal treatment with men and that right shall include equal opportunities in political, economic, and social activities.”); s. 211(2) (“... a citizen of Swaziland, without regard to gender, shall have equal access to land for normal domestic purposes.”); s. 233(9) (“In the exercise of the functions and duties of his office a Chief enforces a custom, tradition, practice or usage which is just and not discriminatory,” meaning chiefs must allocate Swazi Nation Land to men and women on an equal basis).
45. **The supremacy clause makes all laws that are inconsistent with the Constitution void, including laws that are not in line with the equality provisions.** *Id.* at s. 2(1) (“This Constitution is the supreme law of Swaziland and if any other law is inconsistent with this Constitution that other law shall, to the extent of the inconsistency, be void.”); s. 252(1) (“Subject to the provisions of this Constitution or any other written law, the principles and rules that formed, immediately before the 6th September, 1968 (Independence Day), the principles and rules of the Roman Dutch Common Law as applicable to Swaziland since 22nd February 1907 are confirmed and shall be applied and enforced as the common law of Swaziland except where and to the extent that those principles or rules are inconsistent with this Constitution or a statute.”); s. 252(2) (“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.”). *But see* s. 252(3) (“The provisions of subsection (2) do not apply in respect of any custom that is, and to the extent that it is, inconsistent with a provision of this Constitution or a statute, or repugnant to natural justice or morality or general principles of humanity.”).
46. *Id.* at Preamble.
47. *Id.* at ss. 19(1), 211(2), s. 19(1) (“A person has a right to own property either alone or in association with others.”); s. 211(2) (“A citizen of Swaziland, without regard to gender, shall have equal access to land for normal domestic purposes.”).
48. *Id.* at s. 34(2) (“Parliament shall ... enact legislation regulating the property rights of spouses including common-law husband and wife.”); *see also* s. 20(5) (“Nothing in this section shall prevent Parliament from enacting laws that are necessary for implementing policies and programmes aimed at redressing social, economic or other imbalances in society.”); s. 28(2) (“Subject to the availability of resources, the government shall provide facilities and opportunities necessary to enhance the welfare of women to enable them to realise their full potential and advancement.”); s. 59(5) (“The state shall afford equality of economic opportunity to all citizens and, in particular, the state shall take all necessary steps to ensure the full integration of women into the mainstream of economic development.”); s. 60(3) (“The state shall give the highest priority to the enactment of legislation for economic empowerment of citizens.”).
49. *Id.* at s. 28; *see also* SWAZ. CONST. 2005 s. 217(a) (“Parliament may make laws – (a) providing for the management of land and settlement of land disputes and for the regulation of any right or interest in land whether urban or rural and whether privately owned or vesting in the King.”).

- Abolishes the marital power;
- Requires the allocation of Swazi Nation Land to women regardless of marital status;
- Provides security of tenure to women on Swazi Nation Land;
- Permits women to register private property in their names regardless of marital status;
- Gives women the right to obtain credit and open bank accounts without discrimination;
- Mandates spousal consent to alienate or mortgage joint property;
- Allows sole administration of separate property;
- Instructs civil courts to justly and fairly distribute property at the break-up of all marriages; and
- Requires that government Ministries and NGOs implement training programs on women's equal rights to property and land.

II. SWAZI LAW AND CUSTOM GOVERNING SWAZI LAND ALLOCATION AND ADMINISTRATION FAIL TO PROTECT WOMEN FROM DISCRIMINATORY CUSTOMARY PRACTICES

Laws excluding women from the distribution and control over communal land violate women's rights. To redress these inequities, equal property rights legislation must be enacted to engender both formal and substantive equality for Swazi women. Under Swazi law and custom, Swazi Nation Land is distributed for a nominal fee at the discretion of the chief, solely to married men or male sons upon an allegiance ceremony, or *khonta*, that includes the payment of cattle.⁵⁰ Single men and women are not supposed to be allocated any Swazi Nation Land; in recent years, however, chiefs have also been known to allocate Swazi Nation Land to single men for cash,⁵¹ further disenfranchising women who have less access to opportunities for wage labour.⁵²

Women's rights are violated by the current Swazi Nation Land allocation practices, leading to harsh consequences: women are denied an adequate standard of living because without access to land, they cannot build a home or grow food for themselves and their family; women's health and lives are endangered because they must attach themselves to and stay with abusive or HIV positive men in order to access the land they need to survive; women have no security of occupation on Swazi Nation Land and may be evicted arbitrarily and with no compensation; and women who are evicted from Swazi Nation Land are torn apart from their children because men retain custodial rights over the children.

Both the Constitution and international law obligate the Swazi Parliament to amend this allocation system because it discriminates against women by excluding them from Swazi Nation Land allocation, therefore cutting them off from the most

50. See generally Interview with Princess Ncoyi, Chief, in Malkerns, Swaziland (Mar. 5, 2007).

51. Interview with Professor of Family Law and Swazi Law and Custom, at Swaziland University, Swaziland (Mar. 6, 2007).

52. FAMILY IN TRANSITION, *supra* note 3, at 192-93 (Men have more access to wage labour opportunities because they can migrate to other locations and countries for employment, whereas women are expected to stay at the homestead to take care of the family).

WOMEN'S EQUAL PROPERTY AND LAND RIGHTS

important resources of land, home, and food.⁵³ Because nearly seventy percent of the population lives on Swazi Nation Land,⁵⁴ the exclusion of women from land allocation has discriminatorily negative effects on a large swath of the population and must be corrected. The following changes seek to address these discriminatory customary property practices.

First, Swazi Nation Land should be allocated to both men and women regardless of marital status for a nominal fee. Chiefs will receive a stipend from the government to compensate them for their duties performed as chief.⁵⁵ Direct access to Swazi Nation Land gives the growing number of female households access to low cost land on which they can build a home and raise food for their family.

Second, to both secure equal allocation of Swazi Nation Land for women and uphold respect for the authority of local chiefs, a village land board, including the chief, should be established to oversee the allocation process in each Swazi chiefdom. In order for the Board to be more representative of the community, the Board must be comprised of at least half women and can include the chief and representatives from the chief's inner council.

Third, Swazi Nation Land should be registered and co-titled in the names of both the husband and wife; if the marriage is polygamous, the plot should be co-titled in the name of each wife and the husband. Mandatory co-titling by spouses will establish security of occupation rights and equal rights to the land for all spouses preventing the devastating effects of illegal, arbitrary and discriminatory evictions currently experienced by many Swazi women.

Fourth, Swazi Nation Land should be allocated not only for residential and communal purposes but also for limited commercial purposes. Commercial Swazi Nation Land will give individual women and cooperatives of women a chance to start businesses on the land and more importantly use the land as collateral for business loans and credit supporting a woman's entrepreneurship and the economic development of herself and her family.

Last, to codify security of occupation, legislation should enumerate the circumstances under which a person can be evicted from Swazi Nation Land and should prohibit discriminatory justifications for evictions, such as adultery, that disparately impact women.

A. Women Suffer When Men Only Are Allocated Swazi Nation Land

Distribution of Swazi Nation Land solely to men discriminates against women in violation of the Constitution sections 20(1)-(2) and 21(2) that grant equality in every aspect of life and law, including equal access to land regardless of gen-

53. SWAZ. CONST. 2005 s. 20(5) ("Nothing shall prevent Parliament from enacting laws that are necessary for implementing policies and programmes aimed at redressing social, economic or educational or other imbalances in society.").

54. Swaziland Environment Authority, *National Assessment Report of Swaziland to the World Summit on Sustainable Development Johannesburg (2002)* at 8, available at <http://www.environment.gov.sz/files/wssd.pdf>.

55. Swaziland Administrative Order 6 of 1998 s. 39(1).

der.⁵⁶ Current land allocation practices are also inconsistent with international obligations under CEDAW which require states parties to eliminate discrimination against women in economic and social life, including the rights of women to enjoy an adequate standard of living, and acquire, manage, administer, and enjoy property on equal terms with their spouse.⁵⁷ Reaffirming her obligations to the new Constitution, Chief Princess Ncoyi explained, “[I]n the past, women were not allowed to acquire land on their own, but with the new Constitution, it is becoming possible. If [women] were to come, I would [allocate them Swazi Nation Land] because the Constitution says so.”⁵⁸ However, even if women could be allocated Swazi Nation Land, a woman’s subordinate status in her marital family combined with the customary marital powers inherent under Swazi law and custom would continue to violate a woman’s right to equal access and control over property under the Constitution and international law.

Women do not have equal access to and control over land they live on with their husbands because Swazi law and custom dictates that access to land be conditional based on a woman’s marital status and relationship with her marital family.⁵⁹ In a woman’s natal family, she is treated as a “temporary member” because she is expected to leave the natal family when she marries.⁶⁰ When the woman marries she becomes part of the husband’s family. This status, however, is also tenuous because she will never be accepted into her marital home on the same terms as her husband.⁶¹

Additionally, customary marital powers give the husband and his family final decision making authority to determine if the wife can use the land, how the wife can use the land, and what she can do with anything grown on the land; the husband on the other hand is not subject to any of the same restrictions. Some Swazis argue that the land allocation system does not discriminate against women because neither single men nor single women can be allocated land. This view, how-

56. See SWAZ. CONST. 2005 ss. 20(1)-(2), 211(2), s. 20(1) (“All persons are equal before 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”); s.20(2) (“For the avoidance of any doubt, a person shall not be discriminated against on the grounds of gender, race, colour, ethnic origin, tribe, birth, creed or religion, or social or economic standing, political opinion, age or disability”); s. 211(2) (“[A] citizen of Swaziland, without regard to gender, shall have equal access to land for normal domestic purposes.”); see also s. 19(1) (“A person has a right to own property either alone or in association with others.”).

57. *Id.* at s. 19(1) (“A person has the right to own property either alone or in association with others”); CEDAW, *supra* note 41, at art. 14(2)(h) (“To enjoy adequate living conditions, particularly in relation to housing, sanitation, electricity and water supply, transport and communications”); CEDAW, *supra* note 41, at art. 15(2) (“[T]hey shall give women equal rights to conclude contracts and to administer property”); CEDAW, *supra* note 41, at art. 16(1)(h) (“The same rights for both spouses in respect of the ownership, acquisition, management, administration, enjoyment and disposition of property, whether free of charge or for a valuable consideration.”).

58. Interview with Princess Ncoyi, Chief, in Malkerns, Swaziland (Mar. 5, 2007).

59. Human Development Group Eastern and Southern Africa the World Bank, Swaziland: Reducing Poverty Through Shared Growth, report no. 19658-SW (Jan. 12, 2000) at 15.

60. FAMILY IN TRANSITION, *supra* note 3, at 96.

61. *Id.*

ever, ignores the both the developed practice of single men “buying” communal land directly from chiefs and the reality of the husband’s power over the wife’s use and control of the land. Abigail Fakudze, a teacher, explained how even though a woman works the fields for the family, it is her husband who controls the land and anything that comes from the land: “[O]ur history says that a woman doesn’t have land... she doesn’t own, she tills the land until sunset, but she doesn’t own [it]. When it’s time for harvest, it’s the man who goes [and sells] at the market with the van that’s full of cotton or maize. But she’s been tilling the land and making sure that the crop sees the light of day.”⁶²

Women’s access to and control over Swazi Nation Land hinges on their marital status and relations with their in-laws, violating the Constitution, which requires all Swazis, regardless of “gender... equal access to land for normal domestic purposes,”⁶³ as well as “the right to own property either alone or in association with others.”⁶⁴ Additionally, the practice violates international obligations under CEDAW Article 16(1)(h), which requires states parties to ensure “[t]he same rights for both spouses in respect of the ownership, acquisition, management, administration, enjoyment and disposition of property, whether free of charge or for a valuable consideration.”⁶⁵

1. The Exclusion of Women from Swazi Nation Land Distribution Dooms Women and Children to Poverty, Food Insecurity, Ill-Health, and Abuse

Denying women access to and control over Swazi Nation Land to build a home and cultivate crops has a grave effect on women’s ability to maintain an adequate standard of living,⁶⁶ plunging them into a perpetual cycle of poverty in a country where almost seventy percent of the population survives on subsistence agriculture on Swazi Nation Land.⁶⁷ Because Swazi Nation Land is available for a nominal fee, access to Swazi Nation Land constitutes the only opportunity most low income women have to access land for their survival and welfare. Swazi law and custom, by excluding women from the critical resource of land, denies women this right to an adequate standard of living.

Swazi women often shoulder the burden of raising and caring for the family alone, without the help of men, and would benefit the most from equal access to

62. Interview with Ms. Nonhlanhla Zanele Dlamini, Ministry of Home Affairs, Gender Coordinator, in Mbabane, Swaziland (Mar. 5, 2007).

63. SWAZ. CONST. 2005 s. 211(2).

64. *Id.* at s. 19(1). Even if the “right to own” in the Constitution was not intended to extend to occupation rights over Swazi National land, section 20 of the Constitution explicitly and unequivocally prohibits sex discrimination defined as “different treatment to different persons attributable only or mainly to their...gender...” S. 20(3).

65. CEDAW, *supra* note 41, at art. 16(1)(h) (“The States Parties to the present Covenant recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions.”).

66. *See* ICESCR, *supra* note 43, at art. 11(1).

67. National Assessment report of Swaziland to the World Summit on Sustainable Development 2002, 4 Swaziland Environment Authority, *available at* <http://www.environment.gov.sz/files/wssd.pdf>.

Swazi Nation Land because women's households, accounting for more than one-third of rural households, have the highest poverty rates in Swaziland.⁶⁸ These high poverty rates often stem from a lack of economic resources. Because it is difficult to leave family and household duties, for which women are still solely responsible, to seek employment outside of the home, women have less access to wage labor opportunities than men, making the purchase of private land nearly impossible for most women.⁶⁹ Additionally, absent male partners who have migrated to other locations to work often fail to send remittances back to the wife and children.⁷⁰ This again makes it necessary for the Swazi government to mandate the allocation of Swazi Nation Land for a nominal fee to both men and women on an equal basis so that female households can access this land to maintain and improve an adequate standard of living for their family.

Because many women have no access to land without a man, their economic security is endangered, forcing them to tolerate abusive relationships. The Swazi government has an obligation to prevent these dangers to women's welfare. Under the Constitution section 28(2) "the Government shall provide... opportunities necessary to enhance the welfare of women," and could best do this by ensuring that women are allocated Swazi Nation Land to live and grow food on.⁷¹ Ignoring the dangers women face when they have no access to land is also in violation of the ICESCR, which ensures women the right to an adequate standard of living including a right to housing and continuous improvement of living conditions.⁷²

The marital powers of customary marriage combined with women's lack of economic independence force many women into a position where they cannot refuse unprotected sex with their husband or boyfriend even if they know he has HIV/AIDS endangering their lives and health in violation of the African Charter⁷³ and the ICESCR⁷⁴ and heightening the need for women to have land in their own right

68. Ministry of Economic Planning and Development, The Kingdom of Swaziland, Swaziland: Poverty Assessment By the Poor, Report on Participatory Poverty Assessment, at 3 (Aug. 1997); Human Development Group, *supra* note 59, at vi.

69. FAMILY IN TRANSITION, *supra* note 3, at 113, 192-93.

70. Ministry of Economic Planning and Development, The Kingdom of Swaziland, Swaziland: Poverty Assessment By the Poor, Report on Participatory Poverty Assessment, at 7 (Aug. 1997).

71. SWAZ. CONST. 2005 s. 28(2); *see also id.* at s. 20(5) ("Nothing in this section shall prevent Parliament from enacting laws that are necessary for implementing policies and programmes aimed at redressing social, economic or educational or other imbalances in society"); s. 59(5) ("The State shall afford equality of economic opportunity to all citizens and, in particular, the State shall take all necessary steps so as to ensure the full integration of women into the mainstream of economic development.").

72. ICESOR, *supra* note 43, at art. 11 (requiring States Parties to "recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions.").

73. African Charter, *supra* note 40, at art. 16(1) ("Every individual shall have the right to enjoy the best attainable state of physical and mental health."); art. 18(1) ("The family shall be the natural unit and basis of society. It shall be protected by the State which shall take care of its physical health and moral.").

74. ICESCR, *supra* note 43, at art. 12(1) (requiring States parties to recognize the "right of everyone to the enjoyment of the highest attainable standard of physical and mental health.").

WOMEN'S EQUAL PROPERTY AND LAND RIGHTS

in order to maintain independent economic security. Sibongile Dlamini, a lawyer for the Swaziland Chapter of Women and the Law in Southern Africa, explained the connection between lack of resources and transmission of HIV/AIDS: “[B]ecause women tend to lack the power, the resources, they will agree on what the man has to say. Even if the man would actually say, let’s have unprotected sex. They will say okay. This man feeds me. I’ve got no other alternative, so I’ve got to do what he says.”⁷⁵ In a country that has the highest HIV infection rates in the world, women’s exclusion from the Swazi Nation Land allocation system has devastating effects on women and families.⁷⁶

Women and girl children are the ones left to care for the family when the male head of household prematurely dies of HIV/AIDS making the need for economic and food security through land all the more necessary. Because women cannot be allocated Swazi Nation Land in their own right, the only way for them to acquire land for themselves and dependants is through attaching themselves to men or through the cash based title deed private land system. As one Swazi woman stated, “How can [a woman] look after children if she has no property rights?”⁷⁷ There is growing concern that landless women are turning to high risk trades such as prostitution as a desperate means of survival in an increasingly money based economy.⁷⁸ Access to Swazi Nation Land, which requires only a nominal fee, would be the only way for many of these women to obtain land in order to build a home and grow food for their family’s survival.

B. Customary Practices Expel Women from their Marital Home, Separate Them from their Children and Subject them to Homelessness, Poverty, and Violence

In reality women are not recognized under Swazi law and custom. A woman may be evicted from her home if she is not acting in a particular way.

Mr. Vulindlela David Msibi, Parliament Member

Women in Swaziland live under the constant threat of removal from their land for arbitrary and discriminatory reasons, which could leave them homeless, penniless, and childless. Women are not secure in their ability to stay on Swazi Nation Land because customary practice allows husbands, in-laws, and chiefs to remove women from the land at will. A Swazi chief stated that women should have the same rights to stay on the land as men, however in practice they do not: “[W]hen the man goes to the chief’s kraal to acquire the land, he says he has a wife. That

75. Interview with Sibongile Dlamini, in Ezulwini, Swaziland (Mar. 4, 2007).

76. UNAIDS, *Swaziland: Country Situation Analysis*, available at http://www.unaids.org/en/Regions_Countries/Countries/swaziland.asp (last visited on May 15, 2007) (Swazi women make up more than half of the cases of HIV infection in the country); UN Integrated Regional Information Networks (IRIN), *Swaziland: HIV Prevalence Rate among Pregnant Women Rises* (April 5, 2005), available at <http://www.aegis.com/news/irin/2005/IR050419.html>.

77. Interview with WLSA Legal Officer, in Ezulwini, Swaziland (Mar. 4, 2007).

78. Interview with Ms. Nonhlanhla Zanele Dlamini, Ministry of Home Affairs, Gender Coordinator, in Mbabane, Swaziland (Mar. 5, 2007); Interview with Albert Lukhele, Secretary, Land Speculation Control Board, in Mbabane, Swaziland (Mar. 9, 2007).

home as a whole is his and the wife's home... actually in Swazi law and custom, a wife cannot be chased away... But people do it. It's something that people do and it has brought a lot of problems."⁷⁹ Though the Constitution at section 211 states that citizens of Swaziland without regard to gender should have equal access to land for normal domestic purposes, women continue to be denied access through their forced removal off of Swazi Nation Land.⁸⁰ Interviews conducted in Swaziland and research into Swaziland's laws indicates that women live under the constant threat of removal from land. These evictions treat women as if they have absolutely no rights to the land, since they are susceptible to being removed from their land and homes at the will of their husbands, family members or chiefs. A study by Women and Law in Southern Africa found that a husband and his family, with the approval of a chief, can expel a wife for alleged witchcraft or adultery and send her back to her natal home, while a man does not experience a similar fate.⁸¹ A woman in a customary marriage acknowledged that her husband could also make her leave the matrimonial home if she didn't have children or only had girls.⁸² Women also shared stories of being removed from land by chiefs claiming to want to redistribute land. Finally upon breakdown of marriage, women rather than men are compelled to leave the marital land and home. The discriminatory eviction of women from their matrimonial homes leaves women destitute and desperate, and violates their rights under international and domestic law.

1. Customary Laws Allows Women to be Forcibly Evicted from their Homes and Dispossessed of their Property

On its face, eviction discriminates against women because women are singled out to be forcibly removed from their land while men enjoy a secure tenure on Swazi Nation Land. Removals of women from Swazi Nation Land violate the domestic and international rights to equality and property because men can retain the land, the home, and all the property in it, while women must leave their homes without taking their personal belongings.

When a woman is accused of witchcraft or adultery, it is a sentence for her to leave her home alone, whereas men are never forced off the land alone. A chief from the Dlamini family stated that a woman could be chased off the land for an allegation of adultery or witchcraft, seemingly by anyone in the community, and often has to leave her things behind when she is forced out of her home.⁸³ In

79. Interview with Princess Ncoyi, Chief, in Malkerns, Swaziland (Mar. 5, 2007). The World Health Organization has also observed that women can be expelled at will from land: "Though it is argued that a man needs to have a wife to be able to access Swazi National Land...a man can expel the same woman who made it possible for him to access the land." WHO, Dr I. T. Zwane, Consultant for WHO, *Assessing Quality of Care and Responsiveness of Health Services for Women in Crisis Settings: Swaziland Case Study*, (June 2005), available at http://www.who.int/hac/techguidance/ph/womenshealth/Swaziland_report_women_in_crisis_june2005.pdf.

80. SWAZ. CONST. 2005 s. 211(2).

81. SARA MVUDUDU AND PATRICIA MCFADDEN, RECONCEPTUALISING THE FAMILY IN A CHANGING SOUTHERN AFRICAN ENVIRONMENT 85 (2001).

82. Interview with Thabsile Dlamini, a woman in a customary marriage, in Swaziland (Mar. 7, 2007).

83. Interview with Chief and Parliamentarian, in Ezulwini, Swaziland (Mar. 5, 2007).

contrast, a man does not have to leave the land for adultery but may simply pay a fine. The chief explained that women are forced to leave the land on accusations of adultery because the husband is seen as the head of the household: "Oh, well, that's a custom... The woman came to the home of the man, with the mind that she has come to be a wife and be stable in that home. And she is not allowed to have another man beside the one she is living with."⁸⁴ If a man is charged with witchcraft, his entire family must leave, so that women are penalized for the acts of their husbands, whereas men are not punished for the acts of their wives.

Men and women are also treated unequally during marriage and upon dissolution of marriage. Women have to leave their marital homes if the spouses choose to no longer be together, since the homes are often on their in-laws homesteads. Men can remain in the home which the couple built together. Women also are susceptible to being removed from land if they do not bear male children. Since customary marriage allows for polygamy, if a man favors another wife who has given him sons, he may evict a wife who has not had children or a wife who has only had girls.

Women are subject to easier removal from land by chiefs because women do not feel as secure in their rights to the land and leave the land without argument, whereas men are more secure in their tenure and are less likely to be removed by chiefs. One woman related that her cousin was forced to leave her Swazi Nation Land with the claim that the chief wanted the land back.⁸⁵ She was skeptical of the explanation, but did not feel that she had any recourse to get the land back. The Chief Editor of the Swazi Observer also shared a story he covered where a woman was removed from land when she was most vulnerable: "She had been deprived by a chief because her children had all died. She was an old lady, and I think she was not using the fields, and they were taken away."⁸⁶

The Constitution and international law which Swaziland has ratified state that all persons must be treated equally, and such disparate treatment of women clearly violates this right. The Constitution states that "all persons are equal before the law and shall enjoy equal protection of the law."⁸⁷ Section 20(2) goes on further to specify that there should be no discrimination on the grounds of gender, which is defined as giving different treatment to different persons attributable only or mainly to their gender.⁸⁸ Likewise, international law that Swaziland has ratified guarantees that all people are equal under the law and should not be discriminated

84. Interview with Charles Mavuso, Judicial Commissioner, in Swaziland (Mar. 5, 2007).

85. Interview with a woman in a polygamous marriage, in Swaziland (Mar. 7, 2007).

86. Interview with Musa Ndlangamandla, Chief Editor of the Swazi Observer, in Swaziland (Mar. 6, 2007).

87. SWAZ. CONST. 2005 s. 20(1).

88. *Id.* at s. 20(3).

against based on gender.⁸⁹ CEDAW specifically states that spouses should have the same rights to ownership, management, and enjoyment of land.⁹⁰

When women are forced to leave their homes, they must also leave behind their personal property—even that which they have paid for.⁹¹ A WLSA legal officer stated that since women often build their homes on the compound of their husbands' families, they get nothing when they are forced off of the land.⁹² Though in practice women are denied their property, they have a constitutional right to this property that they leave behind, which may include homes they have helped build, fields they have helped cultivate, and household items that they have purchased. The Constitution at sections 14 and 19 recognize the right of all persons to property.⁹³ International treaties to which Swaziland is a party also recognize the right to property,⁹⁴ which requires that a person be secure in his or her ownership of items and should not be stripped of belongings. Women are clearly being deprived of their right to property and take desperate measures, such as trying to leave with parts of the house that they contributed to making, in order to take away some property from the matrimonial home: "I remember one time where the woman went and took off the roof of the house because that was hers."⁹⁵ Women should not be forced to take such measures; they should be protected in their rights to stay on the land and keep their personal property.

89. CEDAW, *supra* note 41, at art. 15(1); ICCPR, *supra* note 42, at art. 26 ("All persons are equal before the law and are entitled without any discrimination to the equal protection of the law."); African Charter, *supra* note 40, at art. 3 (every individual shall be equal before the law and is entitled to equal protection of the law). The ICESCR also includes a reference to non discrimination, stating that the rights of the convention must be exercised "without discrimination of any kind" as to sex. ICESCR, *supra* note 43, at art. 2(2). Swaziland has also signed the Protocol to the African Charter on Human and Peoples' Rights, which guarantees the equality of men and women.

Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa art. 8 adopted by the 2nd Ord. Sess., OAU, Maputa (Aug. 13, 2003), *signed by Swaziland* Dec. 7, 2004, available at <http://www1.umn.edu/humanrts/africa/protocol-women2003.html> [hereinafter Women's Protocol to the African Charter] ("Women and men are equal before the law and shall have the right to equal protection and benefit of the law.").

90. CEDAW, *supra* note 41, at art. 16(h).

91. Interview with woman separated under customary law, in Lavumisa, Swaziland (Mar. 8, 2007).

92. *Id.* This practice of building the home on the husband's family's homestead is known as patrilocality, and is "hardly favourable to the wife due to her in-laws' inherent bias in favour of their son." WOMAN AND LAW IN SOUTHERN AFRICA RESEARCH AND EDUCATIONAL TRUST, MULTIPLE JEOPARDY: DOMESTIC VIOLENCE AND WOMEN'S SEARCH FOR JUSTICE IN SWAZILAND 36 (2001) [hereinafter MULTIPLE JEOPARDY].

93. SWAZ. CONST. 2005 s. 19 ("[A] person has a right to own property either alone or in association with others").

94. African Charter, *supra* note 40, at art. 14 (The right to property shall be guaranteed.); African Women's Rights Protocol, *supra* note 89, at art. 19(c) (parties shall take all appropriate measures to promote women's access to and control over resources such as land and guarantee their right to property); CEDAW, *supra* note 41, at arts. 15 & 16(h) (women have equal rights to conclude contracts and to administer property and spouses must have the same rights "in respect of the ownership, acquisition, management, administration, enjoyment and disposition of property").

95. Interview with WLSA Legal Officer, in Ezulwini, Swaziland (Mar. 4, 2007).

WOMEN'S EQUAL PROPERTY AND LAND RIGHTS

These removals of women from land by chiefs violate the right to be free from forced eviction.⁹⁶ The Committee on Economic, Social and Cultural Rights (CESCR) states that counties should implement measures to provide “the greatest possible security of tenure to occupiers of houses and land” and places a “specific obligation” on states to ensure that the law is enforced against agents of the government or private parties who carry out forced evictions.⁹⁷ The CESCR defines the term ‘forced eviction’ to mean “the permanent or temporary removal against their will of individuals, families and/or communities from the homes and/or land which they occupy.”⁹⁸ According to the Centre on Housing and Evictions Rights, an international NGO, the taking of property from women falls within the definition of forced eviction.⁹⁹ In addition, the UN Commission on Human Rights has passed a specific resolution on women’s equal access to land and adequate housing, stating that governments must “address the issue of forced relocation and forced evictions from home and land, and to eliminate its disproportionate impact on women.”¹⁰⁰ The Commission found that women were more susceptible to poverty and inadequate living conditions than men due to their insecurity of land tenure.

2. Once Evicted from Swazi Nation Land, Women Must Leave Their Children Behind

Swaziland must ensure that women are not removed from their homes on Swazi Nation Land because this removal has consequences on the well being of the women and their dependents and on the cohesion of their families. When women are removed from their homes on communal land, they may have nowhere else to live. Some women spend years roaming the country seeking new land to live on, only to be turned away at each chiefdom they visit.¹⁰¹ Women are also separated from their children upon eviction, breaking families apart.

The removal of women from their homes violates their right to an adequate standard of living because women are left homeless and with no possessions. A woman from the Lavumisa region, in the South of Swaziland, shared her story of wanting

96. In addition, evictions by chiefs violate the Constitution, which states chiefs must enforce practices which are “just and not discriminatory.” SWAZ. CONST. 2005 s. 233(9).

97. Committee on Economic, Social and Cultural Rights, *General Comment No. 7, The Right to Adequate Housing* (art. 11.1 of the Covenant): forced evictions, (16th Sess., 1997), U.N. Doc. E/1998/22 , annex IV, at paras. 8 and 11 (1997), available at [http://www.unhchr.ch/tbs/doc.nsf/\(symbol\)/CESCR+General+Comment+7.En?OpenDocument](http://www.unhchr.ch/tbs/doc.nsf/(symbol)/CESCR+General+Comment+7.En?OpenDocument).

98. *Id.*

99. Centre on Housing Rights and Evictions, *Bringing Equality Home: Promoting and Protecting the Inheritance Rights of Women*, available at <http://www.cohre.org/store/attachments/COHRE%20Bringing%20Equality%20Home.pdf>.

100. Commission on Human Rights Resolution 2003/22, *Women's Equal Ownership, Access to and Control Over Land and the Equal Rights to Own Property and to Adequate Housing*, (56th Sess., 2003), available at [http://www.unhchr.ch/Huridocda/Huridoca.nsf/\(Symbol\)/E.CN.4.RES.2003.22.En?Opendocument](http://www.unhchr.ch/Huridocda/Huridoca.nsf/(Symbol)/E.CN.4.RES.2003.22.En?Opendocument).

101. See Interview with widow and SWANNEPHA Employee, in Mbabane, Swaziland (Mar. 9, 2007) (sharing story of how she has visited four chiefdoms and has not been allocated land because she is a woman and her in-laws will not attest that she should receive land).

to end her marriage because her husband was taking on another wife.¹⁰² She didn't want to stay in the relationship without love, and was forced to leave her land and home. She could not afford to educate and house her son, so she needed to put him in a hostel. She could not even take the furniture she had purchased from the home, so she lost everything. Her treatment depicts the devastating consequences of evictions from land, which leave women struggling to subsist. A study in Ghana discovered that when women are protected from evictions, their standard of living is higher: "[A]n increased security of land tenure among women is expected to have a positive impact on the household food supply, the household incomes, the family welfare and women's agricultural productivity."¹⁰³ Eviction from land violates the right to an adequate standard of living for every person and his family, including the right to "adequate food, clothing and housing, and to the continuous improvement of living conditions."¹⁰⁴

Evictions of women from Swazi Nation Land also tear apart families, forcing children to live without their mothers. When a woman leaves the homestead, under Swazi law and custom she must typically go by herself and her children are left with their father.¹⁰⁵ This separation of the family violates section 27 of the Constitution, which recognizes the right of the family to be protected. Furthermore the Constitution says that motherhood is entitled to "special care and assistance by society and the State,"¹⁰⁶ so the government should do its utmost to prevent the separation of children from their mothers. International law also recognizes the importance of the family and seeks to protect the family unit, specifically stating that the State has a duty to preserve the cohesion of the family. The African Charter, Article 18 states that the family is the natural basis of society and "shall be protected by the State which shall take care of its physical health and moral."¹⁰⁷ In addition, the Human Rights Committee (HRC), which oversees the ICCPR, has emphasized that "when a group of persons is regarded as a family under the legislation and practice of a State, it must be given protection."¹⁰⁸ The family is destroyed rather than protected when it is broken apart by evictions of women endorsed by chiefs. Children have a right to stay with their mothers not only by virtue of the right to family protection, but also because of specific rights of children to have their best interests considered. The Convention on the Rights of the Child (CRC), states that the "best interests of the child shall be the primary con-

102. Interview with woman in customary marriage, in Swaziland (Mar. 8, 2007).

103. BEATRICE AKUA DUNCAN, *WOMEN IN AGRICULTURE IN GHANA* 48 (2004).

104. ICESCR, *supra* note 43, at art. 11; *see also* Women's Protocol to the African Charter, *supra* note 89, at art. 16 ("Women shall have the right to equal access to housing and to acceptable living conditions.").

105. Interview with a woman in a polygamous marriage, in Swaziland (Mar. 7, 2007).

106. SWAZ. CONST. 2005 s. 27(4); *see also id.* at s. 60(5) ("The State shall make reasonable provision for the welfare and maintenance of the aged and shall protect the family and recognise the significant role of the family in society.").

107. African Charter, *supra* note 40, at art. 18.

108. Human Rights Committee, General Comment No. 19, *Protection of the Family: The Right to Marriage and Equality of the Spouses*, (39th Sess., 1990), para. 8, available at <http://www.ohchr.org/english/bodies/hrc/comments.htm> [hereinafter HRC General Comment 19].

WOMEN'S EQUAL PROPERTY AND LAND RIGHTS

sideration” in all actions undertaken relating children.¹⁰⁹ Children are best served by living with and being raised by their mothers rather than being separated from them. In order to protect the family unity and the best interests of children, forced evictions should be prohibited.

C. Other African Countries Allocate Communal Land to Women and Prohibit the Forced Removal of Women from Communal Land

To fulfill its domestic and international obligations, Swaziland must allocate land to women and prohibit the removal of women from their homes on Swazi Nation Land. Parliament must enact legislation guaranteeing women the right to be allocated Swazi Nation Land and enumerating the circumstances under which a person cannot be evicted from Swazi Nation Land. Parliament should specifically ensure that spouses are both registered as having title to the land and that no one can be removed from land except for just cause, which would not include witchcraft, adultery, or gender. Several other countries in Africa have recognized that their moral and legal obligations require that legislation be enacted to grant secure land tenure to women.

The requirement that land be allocated to all persons regardless of gender, marital status and place of birth is commonly found in the land acts of other African nations. The Rural Land Proclamation of the Federal Government of Ethiopia requires that land be allocated to men and women without distinction,¹¹⁰ and the Village Land Act of Tanzania obligates the government to treat women no less favorably than men in determinations of allocations.¹¹¹ Namibia in its new land reform also guarantees the right of women to be allocated land and includes women on the boards which allocate land.¹¹² Namibia recognized that placing women on land allocation boards would better represent the interests of the community and ensure non-discrimination in land allocations.

Other African countries have also recognized the problem of forced evictions and resolved this problem through legislative changes. Ethiopia, for example, amended its family code to prevent “situations previously faced by women, wherein they and their children were forced out of the family home following a divorce.”¹¹³ South Africa has specified that everyone has the right to adequate

109. Convention on the Rights of the Child art. 3, G.A. Res. 44/25, Annex, 44 U.N. GAOR Supp. (No. 49) at 167, U.N. Doc. A/44/49 (1989), entered into force Sept. 2, 1990, ratified by Swaziland Sept. 7, 1995, available at <http://www.unhcr.ch/html/menu3/b/k2crc.htm> [hereinafter CRC]; see also African Charter on Rights and Welfare of the Child, art. 4, OAU Doc. CAB/LEG/24.9/49 (1990), entered into force Nov. 29, 1999, signed by Swaziland July 29, 1992, available at <http://www1.umn.edu/humanrts/africa/afchild.htm> (stating that the best interests of the child shall be the primary consideration). Swaziland has signed the African Charter on the Rights and Welfare of the Child.

110. Rural Land Proclamation 89 of 1997 s. 5-6 (Eth.).

111. Village Land Act 5 of 1999 s. 23 (Tanz.).

112. Communal Land Reform Act 5 of 2002 s. 17 (Namib.).

113. U.S. Dep't of State, Bureau of Democracy, Human Rights and Labor, *Ethiopia Report on Human Rights Practices for 2000* (citing Revised Family Code of 2000 art. 82(6) s. 5 (Eth.)), available at <http://www.state.gov/g/drl/rls/hrrpt/2000/af/index.cfm?docid=789>. The Code specifically states that even when one spouse must leave the home, a court should consider which spouse should stay on

housing, which includes that no one may be “evicted from their home, or have their home demolished, without an order of court made after considering all the relevant circumstances.”¹¹⁴ Swaziland should follow this trend and enact a law prohibiting evictions of women from their homes on Swazi Nation Land.

III. DISCRIMINATORY LAWS AND FAMILY CONTROL CURTAIL WOMEN’S RIGHTS TO ACQUIRE, OWN, AND ADMINISTER PRIVATE PROPERTY

Women in Swaziland are denied the ability to fully own and control private land and property simply because of their gender or marital status, violating the right to equality and the right to own property. Women are thus left unable to purchase private land or obtain loans to make purchases of private property if they are married or decide whether to dispose of personal assets. These constraints on women’s rights to property leave women at risk of becoming homeless and hinder their economic development. To fulfill its domestic and international obligations, Swaziland must ensure that women have the ability to own, access and control private property to the same extent as men.

By removing the statutory constraints on women’s rights to private land (commonly referred to as Title Deed Land) and assuring women access to government land (formerly known as Crown Land¹¹⁵), Parliament can begin to remedy violations of Swazi women’s rights to own, access and control these types of land. Parliament must require community property - property acquired jointly by the spouses during the marriage (see Chapter 20 of the attached draft bill for a definition of community property) - to be co-titled in the names of both spouses (or for existing polygamous unions, in the names of all co-spouses), which will require both spouses’ consent in the administration and disposition decisions of the property, and should also remove any spousal assistance requirements regarding out of community property. Parliament also has a responsibility to ensure that women are able to access government land through affirmative action laws. In addition, Parliament must ensure that married women are able to access loans for the purchase of private property, so that their rights to economic development can be fully realized.

In order to grant women full rights to personal property such as livestock and household items, Parliament must establish that women do not need to consult anyone before making decisions related to their individually owned property, and that spouses must both consent to decisions related to any property that they jointly own, including consenting to the use of any joint property as collateral for loans. Without this change, women will continue to be powerless to use and dispose of their own assets, and they will not reach their full economic potential. The government has a responsibility under the Constitution and the international treaties it has ratified to ensure that women are not denied full ownership and access to private property, because such practice is discriminatory on its face and has a devastating impact on the well-being of women.

the land. (“Where circumstances absolutely require that one of the spouses leave their common abode, the court shall ... take into consideration the interest of children and the condition of the spouse who may be more affected by leaving their common abode.”).

114. S. AFR. CONST. 1996 s. 26.

115. Crown Lands (Conditions) Act 2 of 1968 s. 2 (Swaz.).

WOMEN'S EQUAL PROPERTY AND LAND RIGHTS

A. Private Property Laws Deny Married Women Independent Control and Access to Her Own Property

A married woman cannot have property registered in her name even if she funds it. Even if every month the deduction comes from her salary.

—Mr. Vulindlela David Msibi, Member of Parliament¹¹⁶

In order to cure violations of women's rights to equality and property, the government must require that community property be co-titled in both spouses' names and jointly administered by mutual consent, and allow sole, independent administration of separate property by the spouse in whose name it is registered. The provisions of section 16 of the Deeds Registry Act, which apply only to women, severely restrict the rights of married women in owning and controlling private property, including "immovable property [including privately held land and government land], bonds, [and] other real rights."¹¹⁷ Under section 16(3), a woman married in community of property cannot register land in her name, unless it has been bequeathed or donated to her explicitly and thus excluded from the community property.¹¹⁸ Even if a woman is married out of community, the law prevents her from independently managing her property by requiring her husband's assistance in the execution of the requisite deeds or documents, unless the marital power has been excluded or the Registrar deems such assistance unnecessary.¹¹⁹ These two exceptions, however, are rarely used. For example, due to the stigma attached to antenuptial contracts¹²⁰ or ignorance as to their availability,¹²¹ very few people are married out of community of property without the marital power. Dur-

116. Interview with Mr. Vulindlela David Msibi, Member of Parliament, in Ezulwini, Swaziland (Mar. 7, 2007).

117. Deeds Registry Act 37 of 1968 s. 16 (Swaz.).

118. *Id.* at s. 16(3) ("Immovable property, bonds or other real rights shall not be transferred or ceded to, or registered in the name of, a woman married in community of property, save where such property, bonds or real rights are by law or by a condition of a bequest or donation excluded from the community.")

119. *Id.* at s. 16(2) ("**A woman married out of community of property... shall be assisted by her husband** in executing any deed or other document required or permitted to be registered in the Deeds Registry or required or permitted to be produced in connection with any such deed or document, unless the marital power has been excluded or unless the assistance of the husband is on other grounds deemed by the Registrar to be unnecessary.")

120. See Interview with female official, Ministry of Justice, in Mbabane, Swaziland (Mar. 7, 2007) ("There is this element [about] this out of community property thing ... because someone once told me it is sinful. There is a problem if people associate it with sin ... [P]eople think that if I marry out of community I don't really love you. In order for me to show you that I love you, I must marry in community of property."); Interview with a Catholic priest, in Manzini, Swaziland (Mar. 9, 2007) ("The stigma attached to [marrying] out of community [is that] it sounds selfish in a Christian sense.")

121. See Interview with Ms. Nondumiso, Kunene Housing and Property Manager at the SwaziBank Headquarters, in Mbabane, Swaziland (Mar. 6, 2007) ("The scales are more tipped towards in community. The reason has got something to do with lack of knowledge. When you are young ... when you get married.")

ing the Clinic's Spring 2007 fact-finding mission, of the 22 interviewees who were married under civil rites, 21 were married in community of property, and only one was married out of community. Many people interviewed did not even know that antenuptial contracts could be used to opt out of the marital power. Additionally, according to the 2006-07 Performance Report for the Ministry of Justice and Constitutional Affairs, only eighteen antenuptial contracts were registered with the Deeds Registry Office during the eight-month span of April through December.¹²² As these findings suggest, marriages that are out of community of property and which exclude the husband's marital power are rare in Swaziland.

1. The Deeds Registry Act Imposes Restrictions on Wives but not Husbands

Requiring mutual consent for jointly owned property would fulfill Swaziland's legal obligations of equality and also provide further protection for the marital estate because both spouses would need the consent of the other to perform any action that affects the community property. Section 16(3) of the Deeds Registry Act is a clear example of unequal treatment of people in equal positions, simply on the basis of gender: under the statute, a man married in community of property can register private property in his own name, but a woman married in community of property cannot. As a result and as a female official at the Ministry of Justice lamented, the practical effect of these restrictions is that a husband has the unilateral power to manage or dispose of the marital property without his wife's consent, while she needs his consent for the same: "I hate [these restrictions on Title Deed Land]. I can't buy my own land if I'm married. I have to go and get my husband's consent. Why? And then my husband can go and sell the land without even telling me, the land is his basically."¹²³ Ms. Thandi Khumalo, a highly successful businesswoman married in community of property, experienced firsthand the consequences of Swaziland's property laws. She had built a house for herself and for her husband, the largest structure in her neighbourhood at the time, using profits from her real estate business. Returning from a trip abroad, she found that her husband had sold the house to pay off his gambling debts, a legally sanctioned act under the Deeds Registry Act. According to her niece Cynthia Khumalo, "My aunt loved that house. She died of heart failure a short time later."¹²⁴

Removing the spousal assistance requirement for women married out of community of property would also enable Swaziland to meet its obligations to ensure equal rights to own, administer, and dispose of one's own property regardless of gender. A woman who is married out of community of property needs the "assistance" of her husband to register private property,¹²⁵ while a man married out of community of property does not require any assistance to perform the same ac-

122. Ministry of Justice & Constitutional Affairs, *Performance Report for 3/4 of the Financial Year 2006/07* (2007) at 29.

123. Interview with female official, Ministry of Justice, in Mbabane, Swaziland (Mar. 7, 2007).

124. *Women and Gender: Lack of Legal Status Hinders the Progress of Women*, INTEGRATED REGIONAL INFORMATION NETWORKS FOR THE UN OFFICE FOR THE COORDINATION OF HUMANITARIAN AFFAIRS, Aug. 18, 2005, available at <http://www.reliefweb.int/rw/RWB.NSF/db900SID/KKEE-6FDMYF?OpenDocument>.

125. Deeds Registry Act 37 of 1968 s. 16(2) (Swaz.).

tion. Apart from the insult inherent in a woman requiring such “assistance” where a man does not, this requirement unjustly empowers a husband to prevent his spouse from administering her own private property, or even from registering the land in her name to begin with, simply by refusing to provide his assistance when she attempts to file the requisite documents with the Deeds Registry Office. Additionally, this assistance requirement increases the level of a husband’s knowledge, leverage, and power within the marriage: a husband will always be informed of property that his wife owns, but she in turn can be left totally unaware of property he owns should he choose to keep it a secret from her. This scenario has severe implications for a woman; for example, a woman may feel compelled to contribute more than her share toward the homestead and other parts of the marital estate if her husband leads her to believe he holds less property than he actually owns.

The abolition of the marital power and removing women’s status as legal minors that cannot litigate or contract would grant them equal access to resources and render them equal economic actors relative to men; this is particularly true under the Deeds Registry Act, which provides disincentives to businesses to include women in various economic transactions. Sections 25(3)(d) and 56(4)(c) of the Act require women to renounce their special legal exceptions (i.e., their inability to be sued or held liable for debt due to their legal minor status under the marital power) in dealing with registered mortgage bonds.¹²⁶ Thus, the companies or businesses with which the woman conducts such transactions are subjected to additional procedural hurdles which would be nonexistent if they were dealing with a man. Additionally, such companies would be less inclined to conduct business with a woman to begin with because of the possibility that she did not properly renounce her legal exceptions and would thus be protected from debt liability. The presence of special legal exceptions, along with requirements to renounce them, all create additional hurdles for a woman just to be an equal economic player and to be able to access the resources she wants, obstacles which a man does not have to endure.

These provisions of the Deeds Registry Act that apply to married women fail to respect their rights to equality in relation to married men under the law, as guaranteed by the Constitution under section 20, which states that “[a]ll persons are equal before and under the law... in every... respect and shall enjoy equal protection of the law... [and that a] person shall not be discriminated against on the grounds of gender”¹²⁷ and defines discrimination as giving “different treatment to different persons attributable only or mainly to their respective descriptions by gender.”¹²⁸ Additionally, international instruments that are binding on Swaziland mandate that the government grant women rights that are equal to those of men.

126. *Id.* at ss. 25(3)(d), 56(4)(c).

127. Section 20 guarantees equality to all persons “before and under the law” and prohibits discrimination based on gender. SWAZ. CONST. 2005 s. 20. Section 28(1) affirms that women are entitled to equal treatment and opportunities as men in the political, economic and social fields. SWAZ. CONST. 2005 s. 28(1). Section 38(a) ensures that notwithstanding any language in the Constitution, there shall not be any derogation of the right to equality before the law, demonstrating how important and inviolable the Swazi government and drafters of the Constitution consider this right to be. SWAZ. CONST. 2005 s. 38(a).

128. SWAZ. CONST. 2005 s. 20(3).

For example, CEDAW requires in Article 15 that “States Parties... give women equal rights to conclude contracts and to administer property”¹²⁹ and in Article 2(f) declares that “States Parties condemn discrimination against women in all its forms ... and, to this end, undertake to take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women.”¹³⁰

Swaziland’s specific obligations with regard to married women as enunciated in the Constitution,¹³¹ CEDAW,¹³² and the ICCPR¹³³ further underscore the importance of remedying the inequalities which women face in the ownership and registration of private property. For example, Article 16(1)(h) of CEDAW requires that state parties “ensure, on a basis of equality of men and women, the same rights for both spouses in respect of the ownership, acquisition, management, administration, enjoyment and disposition of property.”¹³⁴ Similarly, the ICCPR requires that “States Parties ... take appropriate steps to ensure equality of rights and responsibilities of spouses ... during marriage.”¹³⁵ Additionally, the HRC, in its General Comment 19, explicitly interprets this right to equality within marriage to...extend to all matters arising from their relationship, such as ... [the] administration of assets.”¹³⁶ Removing the registration and administration restrictions that the Deeds Registry Act places only on women and not on men who are civilly married would grant spouses equal private property rights within their marriages.

The Deeds Registry Act also violates a married woman’s individual right to own property because it effectively allows her husband to control decisions regarding her own or jointly owned private property. Section 16(3) prevents a woman married

129. CEDAW, *supra* note 41, at art. 15(1).

130. CEDAW, *supra* note 41, at art. 2(f); African Charter, *supra* note 40, at art. 18(3) (“The State shall ensure the elimination of every discrimination against women.”); ICCPR, *supra* note 42, at art. 26 (“All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such...sex.”); ICESCR, *supra* note 43, at art. 3 (“The States Parties to the present Covenant undertake to ensure the equal right of men and women to the enjoyment of all economic, social and cultural rights set forth in the present Covenant.”); *see also* Women’s Protocol to the African Charter, *supra* note 89, at art. 8 (“Women and men are equal before the law and shall have the right to equal protection and benefit of the law.”).

131. Section 34(2) requires that Parliament enact legislation that regulates spousal property rights “as soon as practicable after the commencement of this Constitution.” SWAZ. CONST. 2005 s. 34(2).

132. CEDAW, *supra* note 41, at art. 16(1).

133. ICCPR, *supra* note 42, at art. 23(4) (“States Parties to the present Covenant shall take appropriate steps to ensure equality of rights and responsibilities of spouses as to marriage, during marriage and at its dissolution.”); General Comment No. 19, Human Rights Committee, Protection of the Family, the Right to Marriage and Equality of the Spouses, 39th Sess., U.N. Doc. A/47/38, para. 8 (1990), available at <http://www.ohchr.org/english/bodies/hrc/comments.htm> [hereinafter HRC General Comment 19] (“This equality extends to all matters arising from their relationship, such as...administration of assets.”).

134. CEDAW, *supra* note 41, at art. 16(1).

135. ICCPR, *supra* note 42, at art. 23(4).

136. HRC General Comment 19, *supra* note 133, at para. 8.

in community from registering private property in her name, which is an essential ingredient to ownership, and section 16(2)'s requirement that a woman married out of community of property obtain her husband's assistance in executing deeds and other documents filed with the Deeds Registry Office severely limits her control over private property to which she has sole ownership rights. These provisions therefore violate women's constitutionally guaranteed "right to own property,"¹³⁷ as well as her right to land generally, as guaranteed by CEDAW,¹³⁸ the ICCPR,¹³⁹ and the ICESCR.¹⁴⁰ Parliament has an added obligation to act with respect to married women's rights to property, since section 34(2) of the Constitution requires it to "as soon as practicable ... enact legislation regulating the property rights of spouses."

2. Women But Not Men Lose Their Full and Equal Rights to Private Property When They Marry

The Deeds Registry Act also discriminates on the basis of marital status because the discriminatory provisions of section 16 apply only to married women but not single women. The Deeds Registry Act grants a woman land and property rights that are completely equal to those of a man, provided that she is unmarried. Thus, a woman can register property in her own name, can administer it independently, and is treated as a man's full equal; that is, until she enters into marriage. That married women are subject to restrictions on the registration and administration of

137. SWAZ. CONST. 2005 s. 19(1).

138. CEDAW, *supra* note 41, at art. 15(2) ("States Parties shall accord to women, in civil matters, a legal capacity identical to that of men and the same opportunities to exercise that capacity. In particular, they shall give women equal rights to conclude contracts and to administer property and shall treat them equally in all stages of procedure in courts and tribunals."); Committee on the Elimination of Discrimination against Women, *General Recommendation No. 21, Equality in Marriage and Family Relations*, (13th Sess., 1994), U.N. Doc. A/49/38 at 1 (1994), para. 26, available at <http://www.un.org/womenwatch/daw/cedaw/recommendations/recomm.htm#recom21> [hereinafter CEDAW General Recommendation 21] ("The right to own, manage, enjoy and dispose of property is central to a woman's right to enjoy financial independence.").

139. ICCPR, *supra* note 42, at art. 16 ("Everyone shall have the right to recognition everywhere as a person before the law"); Human Rights Committee, *General Comment 28, Equality of Rights Between Men and Women (article 3)*, (44th Sess., 2000), para. 19, U.N. Doc. CCPR/C/21/Rev.1/Add.10 (2000), available at <http://www.ohchr.org/english/bodies/hrc.comments.htm> [hereinafter HRC General Comment 28] ("The right of everyone under article 16 to be recognized everywhere as a person before the law is particularly pertinent for women, who often see it curtailed by reason of sex or marital status. This right implies that the capacity of women to own property, to enter into a contract or to exercise other civil rights may not be restricted on the basis of marital status or any other discriminatory ground.").

140. Committee on Economic, Social and Cultural Rights, *General Comment 16, The Equal Right of Men and Women to the Enjoyment of All Economic, Social and Cultural Rights*, (34th Sess., 2005), para. 28, U.N. Doc. E/C.12/2005/4 (2005), available at <http://www.ohchr.org/english/bodies/cescr/comments.htm> ("Implementing article 3, in relation to article 11, paragraph 1, requires that women have a right to own, use or otherwise control housing, land and property on an equal basis with men, and to access necessary resources to do so."); *see also* Women's Protocol to the African Charter, *supra* note 89, at art. 19(c) ("Women shall have the right to fully enjoy their right to sustainable development. In this connection, the States Parties shall take all appropriate measures to promote women's access to and control over productive resources such as land and guarantee their right to property.").

private property while single women are not violates women's right to equality under the Constitution and international law¹⁴¹ because men do not lose any property rights upon marriage. In fact, they obtain even more rights because the private property that his wife earns will either be registered in his name or be subject to his ultimate control. This situation also violates Swaziland's international¹⁴² obligations to treat all people equally regardless of their marital status. CEDAW, for example, defines "discrimination against women" [as] any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights, and fundamental freedoms in the political, economic, social, cultural, civil or any other field."¹⁴³ Under the Deeds Registry Act, a woman can have all the rights that men have in registering and controlling private property, but once she is married, i.e., once her marital status changes, she loses these rights. It is unfortunate that in a society that is organized around and seeks to preserve the traditional family unit, the laws governing private property effectively dissuade women from entering into marriages simply to preserve their rights.

3. Women are Forced to Bypass Private Property Laws Just to be Treated As Equals

Married women are often forced to resort to legal loopholes and even illegal acts simply to circumvent the law's restrictions and to have equal rights to private property. Some women choose to marry under Swazi law and custom in order to bypass the limitations of the Deeds Registry Act, which does not govern customary marriages. As the Registrar of Deeds stated, "If you are married in accordance with Swazi law and custom, the wife can register property in her name."¹⁴⁴ Senator Winnie Magagula utilized this loophole and noted that "most women, maybe the educated ones, the career women, the ones that are independent financially, they'd rather go for the Swazi law and custom marriage because the Deed's Registry Act doesn't recognize that ... and they are manipulating the legislation to get to register their own property."¹⁴⁵ Though women may choose this type of marriage for purposes of private property registration, in most other respects it is less favorable to women: Swazi law and custom grants husbands even broader marital powers, permits polygyny, and as the Deeds Registrar himself has recognized, its "[proprietary] consequences ... are variable,"¹⁴⁶ unclear, and unpredictable. Other women

141. See *supra* Part III.A.1.

142. See African Charter, *supra* note 40, at art. 3(1) ("Every individual shall be equal before the law."); *id.* at art. 3(2) ("Every individual shall be entitled to equal protection of the law."); ICCPR, *supra* note 42, at art. 26 ("All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status [such as marital status].").

143. CEDAW, *supra* note 41, at art.1.

144. Interview with Juba Dlamini, Deeds Registrar, in Mbabane, Swaziland (Mar. 6, 2007).

145. Interview with Senator Winnie Magagula, in Ezulwini, Swaziland (Mar. 8, 2007).

146. Interview with Juba Dlamini Deeds Registrar, in Mbabane, Swaziland (Mar. 6, 2007).

conceal their marital status, contrary to the law's requirements that women (and not men) disclose this fact.¹⁴⁷ Mr. Albert Lukhele, Secretary of the Land Control Board, which oversees applications for private land,¹⁴⁸ noted that women who are civilly married are only able independently to purchase and register private land by using "their own personal maiden names."¹⁴⁹ However, because pretending to be single would violate the legal requirement of fully disclosing one's marital status, these women could be subject to punitive consequences. A problem with these loopholes is that not all women are educated or knowledgeable about them; and even if they are, they should not have to bypass their country's laws just to be recognized as equal or to exercise rights that both the Constitution and international law guarantee them. The government should remove these legal obstacles and grant all Swazis, regardless of gender, marital status, or regime, completely equal rights in private property.

B. Women's Historic Exclusion from Land and Property Regimes Effectively Limits Their Access to Government Land

Parliament should recognize women's historic denial of access to property in Swaziland and change the country's laws and policies governing applications for government land to correct the societal and economic inequalities in favor of women. The presence of the marital power, the country's discriminatory laws, customary practices, and gender biases have contributed towards women's alienation from the country's economic life, effectively limiting their ability to acquire government land, which the designated minister disposes of "by grant, sale, lease or otherwise in such manner and on such conditions as he may deem advisable"¹⁵⁰ and the registration of which is governed by the Deeds Registry Act.¹⁵¹ Eliminating discriminatory property laws would be insufficient to overcome women's long-standing exclusion from owning and controlling property. Because women historically have been disadvantaged financially and cannot afford private Title Deed Land, the government should preference women in sales of government land,

147. Deeds Registry Act 37 of 1968 s. 16(1) (Swaz.) ("All deeds executed or attested by the Registrar, or attested by a notary public and required to be registered in the Deeds Registry, and made by or on behalf of or in favour of women, shall in each case disclose the full name and status of the woman concerned, whether unmarried, married, widowed, or divorced as the case may be. If the woman is married the full name of her husband shall also be disclosed. If the marriage is governed by the law in force in Swaziland it shall be stated whether the marriage was contracted with or without community of property, and if the parties to a marriage are Africans whether the consequences of such marriage are governed by Swazi law and custom as provided in the Marriage Act, No. 47 of 1964. If the marriage is governed by the law of any other country it shall be stated that the marriage is governed by the law of that country.").

148. Interview with Albert Lukhele, Secretary, Land Speculation Control Board, in Mbabane, Swaziland (Mar. 9, 2007). Among its duties, the Land Control Speculation Board oversees applications for private property.

149. *Id.*

150. Crown Lands Disposal Act 13 of 1911 s. 3 (Swaz.). The act refers to a minister "responsible for Crown lands." *Id.*

151. *Id.* at s. 7.

which is “normally cheaper than [title deed] land”¹⁵² and can be utilized for various residential, commercial, or development purposes, such as housing projects.¹⁵³ As the land-allocating body of government land, the Ministry of Natural Resources has a special responsibility to increase the accessibility of such property to women, through such mechanisms as quotas or preferential pricing.

Women’s inability to acquire government land, while not mandated by law, is a result of a legal regime that keeps women at an inferior socio-economic level and violates women’s rights to equality, an adequate standard of living, and the protection of the family. Moreover, persistent lack of transparency and clear guidelines about the development and sale of Crown Land has further excluded women from accessing such lands. This disparate impact violates women’s right to equality because comparatively, men have not been as injured by the country’s land and property laws. Women’s inability to take advantage of the gender-neutral allocation policies of Crown Land due to their lower economic status is a violation of their rights to an adequate standard of living¹⁵⁴ and to protection of the family¹⁵⁵ because women may find themselves landless, and left without any means with which to care for themselves or their families. Reforming the government’s policies with regard to Crown Land is crucial to curing these violations of women’s rights.

By requiring that a certain percentage of Crown Land allocations go to women or offering them preferential prices, the government will not only remedy violations of women’s rights but also act consistently with its duty under section 28(2) to provide “facilities and opportunities necessary to enhance the welfare of women to enable them to realise their full potential and advancement”¹⁵⁶ and its prerogative under section 20(5) of the Constitution to “redress ... social, economic ... or other imbalances in society.”¹⁵⁷ The Directive Principles of the Constitution¹⁵⁸ and international

152. Telephone Interview with Ms. Thabisile Lange, Legislative Drafter, Office of the Attorney General, in Washington, D.C. (May 10, 2007).

153. Interview with Albert Lukhele, Secretary, Land Speculation Control Board, in Mbabane, Swaziland (Mar. 9, 2007).

154. See ICESCR, *supra* note 43, at art. 11(1) (“The States Parties to the present Covenant recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions.”); African Women’s Rights Protocol, *supra* note 89, at art. 16 (“Women shall have the right to equal access to housing and to acceptable living conditions in a healthy environment.”).

155. See SWAZ. CONST. 2005 s. 14(1)(f) (“The fundamental human rights and freedoms of the individual enshrined in this Chapter are hereby declared and guaranteed, namely ... respect for rights of the family [and] children.”); African Charter, *supra* note 40, at art. 18(1) (“The family shall be the natural unit and basis of society. It shall be protected by the State which shall take care of its physical health ...”); HRC General Comment 19, *supra* note 108, at para. 2 (“[T]he Committee emphasizes that, when a group of persons is regarded as a family under the legislation and practice of a State, it must be given the protection referred to in article 23.”).

156. SWAZ. CONST. 2005 s. 28(2).

157. *Id.* at s. 20(5).

158. *Id.* at s. 59(5) (“The State shall take all necessary steps so as to ensure the full integration of women into the mainstream of economic development.”); *Id.* at s. 60(3) (“The State shall give the highest priority to the enactment of legislation for economic empowerment of citizens.”).

WOMEN'S EQUAL PROPERTY AND LAND RIGHTS

law¹⁵⁹ also emphasize the need for Swaziland to affirmatively facilitate women's access to government land. For example, the Human Rights Committee in its General Comment No. 18 states that "[t]he principle of equality sometimes requires States parties to take affirmative action in order to diminish or eliminate conditions which cause or help to perpetuate discrimination prohibited by the Covenant."¹⁶⁰

To fulfill such constitutional and international duties and prerogatives, Swaziland should follow the steps that have been taken by its neighbors and other countries around the world who sought to correct for historic gender injustices in access to land and property.¹⁶¹ In 2000, the Zimbabwean government set aside a quota of 20 percent land allocation to single women in its Land Reform and Resettlement Implementation Plan (also known as the "fast track" program).¹⁶² By ministerial decree, Egypt set a 20 percent quota for all World Food Programme-assisted land settlement schemes "for the settlement of female-headed households who face special hardship."¹⁶³ The Kazakhstan Ministry of Agriculture made a similar recommendation to local land-distributing bodies to allocate plots of land on a priority basis to mothers with large families and to single mothers.¹⁶⁴ Such policies and actions demonstrate a recognition by governments that despite equal, non-discriminatory laws, women's historic exclusion from land and property as well as their socially and culturally maintained status of inferiority necessitate affirmative action to restore them to the status of full equals in society and the economy.

159. HRC General Comment 28, *supra* 139, at para. 31 ("States parties should review their legislation and practices and take the lead in implementing all measures necessary to eliminate discrimination against women in all fields, for example...in areas such as...the provision of accommodation, goods and services."); CEDAW, *supra* note 41, at art. 4(1) ("Adoption by States Parties of temporary special measures aimed at accelerating de facto equality between men and women shall not be considered discrimination as defined in the present Convention").

160. Human Rights Committee, *General Comment No. 18, Non-discrimination*, (37th Sess., 1989), para. 8, U.N. Doc. HRI/GEN/1/Rev.1 (1989), available at <http://www.ohchr.org/english/bodies/hrc/comments.htm>.

161. In Zambia, where all land is state-owned, the government through the draft Land Policy has committed 30 percent of land ownership to women and other disadvantaged groups, noting that although the "current laws do not discriminate against anyone on the basis of gender, [t]he Government has ... recognized that women still lack access to land in comparison to their male counterparts. The reason for this lies in customary practices. The Lands Act ... recognises customary laws and it is recognised that this may further perpetuate the discriminatory practices. In this regard, thirty percent (30%) of the land, which is to be demarcated and allocated, is to be set aside for women and other vulnerable groups." Draft Land Policy of 1999 s. 3.6 (Zambia).

162. The government-owned *Daily News* quoted Minister of Local Government Ignatius Chombo saying that single women would be allocated 20 percent of land acquired by the government for resettlement and that there would be joint ownership of land by spouses, in accordance with official policy statements. See *Resettled Farmers Need Assistance*, INTEGRATED REGIONAL INFORMATION NETWORKS FOR THE UN OFFICE FOR THE COORDINATION OF HUMANITARIAN AFFAIRS, October 29, 2000, available at <http://www.irinnews.org/report.aspx?reportid=52624>.

163. The Secretary General, *Report of the Secretary-General submitted in accordance with Commission resolution 2001/34*, ¶ 54, delivered to the Economic and Social Council and the Commission on Human Rights, U.N. Doc. E/CN.4/2002/53 (Jan. 15, 2002), available at <http://www.unhchr.ch/Huridocda/Huridocda.nsf/TestFrame/dbc76479922d0282c1256b990053c4b2?Opendocument>.

164. Kazakhstan, *CEDAW Concluding Observations*, U.N. Doc. No. A/56/38 (2001), available at http://www.bayefsky.com/html/kazakhstan_t4_cedaw.php.

Parliament should follow suit by reforming its land and property laws to set aside a certain percentage of government land allocation to women and go even further than other countries by ensuring that the Ministry of Natural Resources informs women of such provisions once the legislation is in place.¹⁶⁵

C. Backed by Customary Law, Husbands and In-Laws Deny Women Access to and Control Over Their Personal Property

I had a daughter before marriage... I can't give my daughter any money. I have to hide it. My husband says, "That money belongs to me."

Woman from Lavumisa Region, March 8, 2007

Women in Swaziland are powerless to control or use their own property, because their husbands, in-laws and parents have the authority to dictate how their property should be used. Women married under customary law or civil rites with the marital power cannot make decisions related to property without the consent of their husbands, even if the women have purchased the property with their own income. Single women must seek the permission of their parents to dispose of their personal property. Due to this control, women are unable to experience full ownership of their own property. Even women in successful careers are constantly under the threat of their husbands or families disposing of their property and dictating how they should use their assets.

1. The Marital Power Allows the Husband to Control His Wife's Property-Related Decisions

Practices regarding personal property are discriminatory because married women cannot make decisions on how to use their own livestock, household effects, or income without having to consult their husbands, whereas men are able to make such decisions alone. In effect, a man can decide how his wife's hard earned income or property should be used, and may even use her assets without her consultation or consent. Unfortunately, this role of adult women as minors has been accepted: "[O]ur society has normalized the fact that a woman has to assume a subordinate position."¹⁶⁶ A married woman stated that women have no choice but to listen to their husbands: "[Y]ou can negotiate with your husband and ask him nicely, but if he refuses there is nothing you can do, especially if the family is on his side."¹⁶⁷

In a country where cattle is an extremely important resource and provides status, sustenance and livelihood, a denial of the right to use or sell this resource is debilitating. Women may own cattle by being allocated a cow upon their marriage and upon

165. Often, people are unaware when government land is available. They usually find out about it "by word of mouth because [the Ministry does] not advertise it anywhere." Telephone Interview with Ms. Thabisile Lange, Legislative Drafter, Office of the Attorney General, in Washington, D.C. (May 10, 2007).

166. FAMILY IN TRANSITION, *supra* note 3, at 109-110.

167. Interview with Dumsile Nhleko, married woman, in Lubombo, Swaziland (Mar. 7, 2007).

WOMEN'S EQUAL PROPERTY AND LAND RIGHTS

the marriage of their daughters;¹⁶⁸ however, women are unable to control the few cattle they own because they must seek the approval of their husbands before selling or using any livestock.¹⁶⁹ One woman interviewed in the Lavumisa region stated that even though she has income and owns some of the family cows, “when I want to sell a cow [my husband] won’t let me.”¹⁷⁰ She is unable to provide for her daughter who she had with another man because her husband controls the family property. Thus, for men owning cattle means complete and unlimited access and decision making power, while for women ownership simply means acquiring the cow with no decision making power over it.¹⁷¹ Women even need consent of husbands to sell their smaller animals. A woman married under customary law stated that she had limited control over her chickens: “If I sold one or two, then I won’t need [permission] but if I would sell all of them, then I would need my husband’s permission.”¹⁷²

The extent of the control over women’s property goes as far as the very household items a woman owns. Though women generally have more control over household items, their rights to this property are also not fully realized. To dispose of household items, women still need the consent of their husbands. A rural woman stated that she needed her husband’s consent to sell furniture, while he did not need her consent:

Q: If you wanted to sell [the furniture] would you need anyone’s permission to sell it?

A: Yes, my husband’s.

Q: Does your husband need your permission to sell the furniture?

A: No, he doesn’t.¹⁷³

Husbands even dictate how a woman can use her income, while husbands spend their money any way they see fit. A female government official stated that when women are paid, husbands ask the wives to bring them the money so that they can decide how to use it.¹⁷⁴ Other times husbands do not fulfill their responsibilities, such as buying food or paying for school, so the woman must provide all these things herself.¹⁷⁵ A married woman stated that she used her income to buy

168. MVUDUDU, *supra* note 81, at 104.

169. Women and Law in Southern Africa Research and Educational Trust, *Women’s Legal Rights Initiative: Southern Africa* (August 2004), available at womensnet.org.za/WLRI/documents/livestockinheritance.doc (citing Women and Law in Southern Africa Research and Educational Trust, *Conference on Women’s Access to and Control over Resources Within the Family in Kadoma 84* (Zimbabwe, 1996)) (“Mainly women and children have limited access to resources if at all. Even though women may own cattle, both access and control is with men as husbands and fathers.”). In addition, the cow has to be registered under the man’s name and is kept in a man’s kraal. Women and Law in Southern Africa Research Trust, *Multi-Dimensional Approach to Gender Equality in Swaziland: Swazi Culture and Traditions* 63-64.

170. Interview with woman married under customary law, in Lavumisa, Swaziland (Mar. 8, 2007).

171. FAMILY IN TRANSITION, *supra* note 3, at 110.

172. Interview with Thabsile Dlamini, a woman in a customary marriage, in Swaziland (Mar. 7, 2007).

173. *Id.*

174. Interview with Nonhlanhla Zanele Dlamini, Ministry of Home Affairs, Gender Co-ordinator, in Mbabane, Swaziland (Mar. 5, 2007).

175. FAMILY IN TRANSITION, *supra* note 3, at 114.

household necessities and gave money to her husband whenever he asked for it, but that he used his pay check as he pleased without consulting her.¹⁷⁶

This inequality violates the general right to equality, and more specifically the right to equality within marriage. In its own constitution, Swaziland recognizes the equality of men and women.¹⁷⁷ All of the major international agreements Swaziland has ratified also recognize the right to equality and prohibit discrimination based on gender.¹⁷⁸ CEDAW, the ICESCR and the ICCPR specifically recognize that rights to property must be equal within marriage and the home. CEDAW requires states parties to take “all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations.”¹⁷⁹ Spouses must have the same rights “of the ownership, acquisition, management, administration, enjoyment and disposition of property.”¹⁸⁰ The CDESCR also has stated that in order to implement the right of men and women to equally experience an adequate standard of living, women must have a right to “own, use or otherwise control housing, land and property on an equal basis with men, and to access necessary resources to do so,”¹⁸¹ and the HRC recognizes that for full equality during marriage, women must have an equal right with regards to “administration of assets.”¹⁸² Clearly a man’s control over a woman’s property with no reciprocal need for a man to obtain permission from his wife to use his property violates the right to equality within the marriage.

3. A Woman’s Inability to Control her Livestock, Household Items, and Income Violates Her Rights to Property and Prohibits Her from Reaching Her Full Development and Potential

Women do not experience full ownership of their property and are stripped of their right to economic development because they cannot control the use of their

176. Interview with Dumsile Nhleko, married woman, in Lubombo, Swaziland (Mar. 7, 2007).

177. SWAZ. CONST. 2005 s. 20 (recognizes right to equality “before and under the law” and prohibits discrimination based on gender); SWAZ. CONST. s. 28(1) (specifically recognizes equality of women).

178. CEDAW, *supra* note 41, at art. 15(1); African Charter, *supra* note 40, at art. 18(3) (“The State shall ensure the elimination of every discrimination against women.”); ICCPR, *supra* note 42, at art. 26 (“All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such ... sex.”).

179. CEDAW, *supra* note 41, at art. 16(1).

180. *Id.* at 16(1)(h), G.A.; see also Women’s Protocol to the African Charter, *supra* note 89, at art. 6(j) (“States Parties shall ensure that women and men enjoy equal rights and are regarded as equal partners in marriage... during her marriage, a woman shall have the right to acquire her own property and to administer and manage it freely.”).

181. Committee on Economic, Social and Cultural Rights, *General Comment No. 16, The Equal Right of Men and Women to the Enjoyment of All Economic, Social and Cultural Rights*, (34th Sess., 2005), para. 11, U.N. Doc. E/C.12/2005/4 (2005), available at <http://www.ohchr.org/english/bodies/cescr/docs/CESCR-GC16-2005.pdf> [hereinafter CESCR General Comment 16].

182. HRC General Comment 19, *supra* note 108, at para. 8, available at <http://www.ohchr.org/english/bodies/hrc/comments.htm> (“States Parties to the present Covenant shall take appropriate steps to ensure equality of rights and responsibilities of spouses as to marriage, during marriage and at its dissolution.”).

income and cannot decide when to use or dispose of their property. Aside from the control they experience by their husbands when they are married, women may be stripped of their income by their families, who demand that women turn over their hard earned money to them. A widow's in-laws demanded that she give them money to pay expenses and she felt she has no choice but to oblige: "[M]y in-laws came to me to claim money. I went to the bank to withdraw some money and gave it to them because they were really demanding money... It was my account."¹⁸³ Even if a single woman has acquired livestock herself, her family may dispose of the cattle without consulting her.¹⁸⁴ This lack of full ownership is especially highlighted when a woman is forced or chooses to leave her home and she leaves behind her personal belongings that she may have even purchased. A woman married under Swazi law and custom who left her husband said that upon leaving she "couldn't take anything"¹⁸⁵ even though she had paid for the furniture.

Because women do not have full control over these items, they do not have full property rights. The Constitution guarantees the right to property to all persons regardless of gender.¹⁸⁶ International treaties that Swaziland is a party to also recognize the right of all persons to own property.¹⁸⁷ These international treaties recognize that full property ownership requires full control over property. The CEDAW Committee has explained that the requirements of property rights include the right to make unilateral property decisions: "When a woman cannot enter into a contract at all ... or can do so only with her husband's or a male relative's concurrence or guarantee, she is denied legal autonomy. Any such restriction prevents her from holding property as the sole owner and precludes her from the legal management of her own business or from entering into any other form of contract."¹⁸⁸ Furthermore, the committee has stated that when there is no requirement that a woman be consulted when property is sold or disposed of, this "limits the woman's ability to control disposition of the property or the income derived from it."¹⁸⁹ Thus CEDAW specifically explains that when a woman is unable to make decisions related to property without consent, she is denied her full property rights.

These violations of property rights also violate a woman's right to realize her full development and potential. Under the new Constitution, citizens have a duty to "respect the rights, freedoms and legitimate interests of others, and generally refrain from doing acts detrimental to the welfare of other persons."¹⁹⁰ Furthermore, the government has committed itself to enhance the welfare of women to "realize

183. Interview with widow, in Mbabane, Swaziland (Mar. 6, 2007).

184. FAMILY IN TRANSITION, *supra* note 3, at III.

185. Interview with woman separated under customary law, in Lavumisa, Swaziland (Mar. 8, 2007).

186. SWAZ. CONST. 2005 s. 19(1), 20(1).

187. CEDAW, *supra* note 41, at arts. 1, 15(1), 16(c); ICESCR, *supra* note 43; ICCPR, *supra* note 42, at arts. 2(1), 16, 26; African Charter, *supra* note 40, at arts. 2, 3, 18(3), 19.

188. CEDAW General Recommendation 21, *supra* note 138, at para. 7.

189. *Id.* at para. 31.

190. SWAZ. CONST. 2005 s. 63(d).

their full potential and development”¹⁹¹ and recognizes that it must afford equal opportunity to all citizens, in particular taking steps to “ensure the full integration of women into the mainstream of economic development.”¹⁹² CEDAW also recognizes the important right of women to reach their “full development,”¹⁹³ and Swaziland has signed the African Women’s Rights Protocol, which states that “[w]omen shall have the right to fully enjoy their right to sustainable development. In this connection, the States Parties shall take all appropriate measures to . . . guarantee their right to property.”¹⁹⁴ When men take the income of their wives, they are leaving women in a position where they cannot use income to advance their welfare, perhaps by opening a business, seeking education, or providing for their children and dependants.¹⁹⁵ In addition, when women cannot sell their assets, they are prohibited from using money for their development. Swaziland must ensure that women can fully control their assets so that they can reach their full economic potential.

D. Swazi Laws and Customary Practices Require Married Women but not Married Men to Obtain Spousal Consent for Accessing Personal Credit and Loans

Because Married Swazi women are treated as legal minors or are subject to their husband’s legally-sanctioned marital power, banks refuse women access to loans or credit on joint marital property or the use of their own bank accounts without their husband’s consent. Yet, bank officers do not require husbands to obtain their wives’ consent to mortgage joint marital property or access their joint or personal bank account.¹⁹⁶ This discriminatory treatment of husbands and wives violates wives’ right to economic equality¹⁹⁷ and equal protection under the law

191. *Id.* at s. 28(2) (“Subject to the availability of resources, the Government shall provide facilities and opportunities necessary to enhance the welfare of women to enable them to realise their full potential and advancement.”).

192. *Id.* at s. 59(5).

193. CEDAW, *supra* note 41, at art. 3 (“States Parties shall take in all fields, in particular in the political, social, economic and cultural fields, all appropriate measures, including legislation, to ensure the full development and advancement of women for the purpose of guaranteeing them the exercise and enjoyment of human rights and fundamental freedoms on a basis of equality with men.”).

194. Women’s Protocol to the African Charter, *supra* note 89, at art. 19c.

195. A women from the Lavumisa region stated that her husband did not allow her to use her income to provide for a daughter she had before marriage. Interview with married women, in Lavumisa, Swaziland (Mar. 8, 2007). Women and Law in Southern Africa Research and Educational Trust, *Women’s Legal Rights Initiative: Southern Africa* (August 2004), available at womensnet.org.za/WLRI/documents/livestockinheritance.doc (citing Manzini Nomcebo, *Women in Development: Restrictions and Realities with Particular reference to Swaziland- National Workshop on Population and Development* 51 (1991)) (“Culture is also pointed out as a restriction in that mostly for rural women they have to bring back their earnings to their husbands and thus lose control of these and their development potential.”).

196. U.S. Dept. of State, Bureau of Democracy, Human Rights, and Labor, *Country Reports on Human Rights Practices - Swaziland* (Mar. 8, 2006), available at <http://www.state.gov/g/drl/rls/hr-rpt/2005/61595.htm>; Swaz. Dept. of State, *Country Reports on Human Rights Practices 2005* (Mar. 8, 2006); Nhlapo, *The Legal Situation of Women*, *supra* note 6, at 130; Interview with Ms. Nondumiso Kunene Housing and Property Manager at the SwaziBank Headquarters, in Mbabane, Swaziland (Mar. 6, 2007).

197. CEDAW, *supra* note 41, at art. 13(b) (“States Parties shall take all appropriate measures to elimi-

in all spheres of political, economic and social life under the Constitution and international law.¹⁹⁸ While some women get around the consent laws by using their maiden names to apply for loans, this practice is potentially illegal and does not provide a secure route for women's economic development.¹⁹⁹ The bank's discriminatory consent policies prevent women from exercising the same rights as men to bank loans and other forms of financial credit therefore preventing women from realizing their full potential as members of Swazi society whereas men have no financial obstacles in their way.²⁰⁰

Countries in Africa and around the world have enacted laws protecting women's rights to access loans, credit and bank accounts regardless of their marital status;²⁰¹ accordingly, the Parliament should enact similar legislation setting clear non-discrimination guidelines for banks regarding when spousal consent is required for access to loans, credit and use of bank accounts.²⁰² The Constitution promises to provide women the opportunities necessary to "enable their full potential and advancement," and this can only happen if women and men have the same economic rights and protections.²⁰³ One women's rights expert explained

nate discrimination against women in other areas of economic and social life in order to ensure, on a basis of equality of men and women, the same rights, in particular: (b) The right to bank loans, mortgages and other forms of financial credit.").

198. SWAZ. CONST. 2005 s. 20(1); African Charter, *supra* note 40, at art. 22; CEDAW, *supra* note 41, at art. 13(b).

199. See Interview with Sibonelo Mdluli, Legal Officer, WLSA, Ezulwini, Swaziland (Mar. 5, 2007).

200. SWAZ. CONST. 2005 s. 28(2).

201. See Bhutan, State Report, CEDAW/C/BTN/1-6 (2003); Jamaica, Fifth periodic report of States Parties, U.N. Doc CEDAW/C/JAM/5 (2005), available at <http://www.un.org/womenwatch/daw/cedaw/reports.htm> (under Jamaica); Jordan, Second periodic report of States Parties, U.N. Doc CEDAW/C/JOR/2 (1999), available at <http://www.un.org/womenwatch/daw/cedaw/reports.htm> (under Jordan); Kenya, Third and fourth periodic reports of States parties to the Committee on the Elimination of Discrimination Against Women, at para. 35, U.N. Doc. CEDAW/C/KEN/3-4 (Feb. 14, 2000), available at <http://www.un.org/womenwatch/daw/cedaw/reports.htm> (under Kenya); Lao People's Democratic Republic, Combined initial, second, third, fourth and fifth periodic reports of States parties to the Committee on the Elimination of Discrimination Against Women, (32nd Sess., 2005), at 11-12, U.N. Doc. CEDAW/C/LAO/1-5 (Aug. 18, 2003), available at <http://www.un.org/womenwatch/daw/cedaw/reports.htm> (under Lao People's Democratic Republic); Libyan Arab Jamahiriya, Second periodic report of States parties to the Committee on the Elimination of Discrimination Against Women, at 45, U.N. Doc. CEDAW/C/LBY/2 (Mar. 15, 1999), available at <http://www.un.org/womenwatch/daw/cedaw/reports.htm> (under Libyan Arab Jamahiriya); Madagascar, Initial report of States parties to the Committee on the Elimination of Discrimination Against Women, (13th Sess., 1994), at 31, U.N. Doc. CEDAW/C/5/Add.65/Rev.2 (Nov. 11, 1993), available at <http://www.un.org/womenwatch/daw/cedaw/reports.htm> (under Madagascar); Namibia, Combined second and third periodic reports of States parties to the Committee on the Elimination of Discrimination Against Women, at 68, U.N. Doc. No. CEDAW/C/NAM/2-3 (Sept. 2, 2005), available at <http://www.un.org/womenwatch/daw/cedaw/reports.htm> (under Namibia).

202. Interview with Cyril Maphanga, Lawyer and President of the Swazi Law Society, in Mbabane, Swaziland (Mar. 7, 2007); Interview with Sicakele Hlatshwayo, Gender Projects Director, CAN-GO, in Mbabane, Swaziland (Mar. 9, 2007).

203. SWAZ. CONST. 2005 s. 28(2). Both interviewees suggested that banks needed clear directives on consent policies in order for them to change their discriminatory practices.

how discriminatory loan practices prevent the constitutional right to reach one's full potential from being realized. "You are married and you have the money, you have the financial power. You have a husband who doesn't believe in what you want to do. And you want to get a loan ... you want to set up a business ... He must agree."²⁰⁴ The husband however does not need to get his wife's consent to mortgage the marital home for a loan.

Rural women, who live primarily on Swazi Nation Land, face a double hurdle to economic development through loans because Swazi Nation Land is not allocated in their names and cannot be mortgaged²⁰⁵ violating their rights to an adequate standard of living through agricultural loans under the ICESCR²⁰⁶ and CEDAW.²⁰⁷ Banks want to extend loans to such women because they have shown dedication to maintaining a home for their family. One banking officer explained "[women] can go to hell and back in order to acquire a home. They can forego a lot of things ... [and] once they acquire this home, they hold it personally in their hearts. As a result ... they wouldn't want to lose it, let me say that. So they hold on."²⁰⁸ But banks are limited in what they can offer women who have no collateral beyond their annual crops.²⁰⁹

To correct the exclusion from access to loans that rural women face, special loan programs must be developed by the government that focus on rural women's access to loans. Swaziland Development Finance Corporation's (FINCORP) loan program should be expanded to include more small business loans for rural women. Tinkhundla loans for agricultural cooperatives and small businesses should give special preference to women's cooperatives. Additionally, Swazi Nation Land should be allocated to women or cooperatives of women especially for commercial purposes with the possibility of mortgaging the land as collateral for loans and credit.

IV. PROPERTY AND LAND LAWS AND CUSTOMS TREAT WOMEN AS NON-ENTITIES OR CHATTEL AND SUBJECT THEM TO ENDEMIC ECONOMIC AND PHYSICAL ABUSE

Civil and customary property laws subject women to "inhuman or degrading treatment or punishment,"²¹⁰ in violation of section 18 of the Constitution and international law, because they treat women as less than full persons and increase their vulnerability to economic and physical abuse. Parliament must enact proper-

204. Interview with Sicakele Hlatshwayo, Gender Projects Director, CANGO, in Mbabane, Swaziland (Mar. 9, 2007).

205. Interview with Ms. Nondumiso Kunene, Housing and Property Manager at the SwaziBank Headquarters, in Mbabane, Swaziland (Mar. 6, 2007).

206. ICESCR, *supra* note 43, at art. 11(i) ("The States Parties to the present Covenant recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions.").

207. CEDAW, *supra* note 41, at art. 14(2)(g) (ensuring the right to "have access to agricultural credit and loans, marketing facilities, appropriate technology and equal treatment in land and agrarian reform as well as in land resettlement schemes").

208. *Id.* at arts. 17-18.

209. *Id.* at art. 4.

210. SWAZ. CONST. 2005 s. 18(2).

ty and land laws that respect women's fundamental rights to dignity and freedom from violence.

A. Property Laws and Practices Treat Women as Lacking Full Legal Personhood

Women suffer affronts to their dignity when their status as full human beings is not respected by property and land laws, when they alone are forced to endure the shame and disgrace associated with evictions, and when lobola is used as a justification to treat women as property. Parliament must bring these laws and practices into compliance with the Constitution, which protects "the dignity of every person [as] inviolable,"²¹¹ and with international law, which recognizes the fundamental dignity and respect to be accorded every person.²¹² CEDAW, for example, states that "discrimination against women violates the principles ... respect for human dignity."²¹³ By eliminating discriminatory treatment of women in property and land contexts, Parliament will bring Swaziland into compliance with its fundamental, constitutional, and international obligations to treat women with dignity.

i. Women Suffer Affronts to Their Dignity When the Property Laws Fail to Respect Their Status as Fully Competent Human Beings.

"I'm Swazi... there's nothing that makes me half Swazi."

—Ms. Marjorie Mavuso, UNFPA Assistant Representative²¹⁴

A married woman needs the consent of her husband to use private and personal property, even though she is a fully competent adult. Even if a woman married out of community of property had the initiative and forethought to enter into an antenuptial contract that separates her property from that of her husband and even though she worked for and earned the property herself, or received it on her own, the Deeds Registry Act requires her to obtain her husband's assistance in executing the requisite deeds and documents associated with that property.²¹⁵

211. *Id.* at s. 18(1).

212. CEDAW, *supra* note 41, at Preamble ("Recalling that discrimination against women violates the principles of equality of rights and respect for human dignity."); ICCPR, *supra* note 42, at art. 16 ("Everyone shall have the right to recognition everywhere as a person before the law"); HRC General Comment 28, *supra* 139, at para. 19 ("States must provide information on laws or practices that prevent women from being treated or from functioning as full legal persons and the measures taken to eradicate laws or practices that allow such treatment."); African Charter, *supra* note 40, at Preamble ("Considering the Charter of the Organization of African Unity, which stipulates that 'freedom, equality, justice and dignity are essential objectives for the achievement of the legitimate aspirations of the African peoples.'"); *see also* Women's Protocol to the African Charter, *supra* note 89, at art. 3(1) ("Every woman shall have the right to dignity inherent in a human being and to the recognition and protection of her human and legal rights."); *id.* at art. 3(4) ("States Parties shall adopt and implement appropriate measures to ensure the protection of every woman's right to respect for her dignity.").

213. CEDAW, *supra* note 41, at Preamble.

214. Interview with Ms. Marjorie B. Mavuso, Assistant Representative, United Nations Population Fund in Mbabane, Swaziland (Mar. 5, 2007).

215. This is so unless the marital power has been excluded or the Registrar of Deeds deems such as-

Thus, a husband could prevent his wife from administering her property simply by withholding his signature from documents that must be filed with the Registrar. To avoid these problems, some women conceal their marital status on deeds and other documents.²¹⁶ Though a married woman may have the capacity to manage her property, the law does not allow her to do so on her own. Similarly, under Swazi law and custom, a woman cannot make decisions about her own personal property, which includes her income and movable property, without obtaining the consent of her husband. As a result, many women hide their personal property just to be able to use it as they see fit: “Every profit I make from the business my husband demands. I use the money for all [our] expenses. We don’t use the money he makes. I secretly put money in the bank.”²¹⁷ The women of Swaziland deserve more than having to obtain consent to utilize property that is rightfully theirs, a situation so egregious that many feel compelled to hide their money and assets or lie about their marital status just to have full use and control of their property.

Though it is often stated that women are minors²¹⁸ in Swaziland, in many important respects, the property and land laws grant women even fewer rights than children. Under the Deeds Registry Act, for instance, unmarried minors, male or female, have the unfettered right to register deeds in their own name, a right that is denied to women married in community of property.²¹⁹ Thus, a baby can own private property in his or her name, but a married woman cannot. Additionally, because Swazi Nation Land may only be allocated to women through male relatives, including their sons, Swazi law and custom grants women lower legal status than male children. Senator Winnie Magagula explained the indignity inherent in this custom: “Surprisingly, the chief would allocate [a woman] land but they would allocate [through the] six month old baby boy. A six month old baby boy has got more status in the chieftom than you, the mother of that baby.”²²⁰ The customary practice of land allocation to male children also prevents women from controlling the land they live and work on, making them vulnerable to the whims of their children. The son’s rights to the land would allow him to control his mother’s land and even take it from her when he grows older. Thus, not only is a woman prohibited from allocations of Swazi Nation Land, but when she does obtain it through her son, she is faced with the further indignity of lacking any real control over it.

The reasons often put forth for withholding full property rights from women fail to justify the law’s infringement on women’s dignity. One rationale, for example, is that women have “very weak brains [and] are so easily ... deceived,”²²¹ and there-

sistance unnecessary. Deeds Registry Act 37 of 1968 s. 16(2). However, these two exceptions are rarely utilized. See *supra* section III.A.

216. See *supra* Part III.A.3.

217. Interview with woman in customary marriage, in Lavumisa, Swaziland (Mar. 8, 2007).

218. See, e.g., Interview with Ms. Nonhlanhla Zanele Dlamini, Ministry of Home Affairs, Gender Coordinator, in Mbabane, Swaziland (Mar. 5, 2007).

219. Deeds Registry Act 37 of 1968 ss. 16(2), 16(3).

220. Interview with Senator Winnie Magagula, in Ezulwini, Swaziland (Mar. 8, 2007).

221. Interview with Mr. Charles Mavuso, Judicial Commissioner, in Mbabane, Swaziland (Mar. 5, 2007).

fore lack the ability to properly manage their own land and property. An affront to woman's dignity itself, the argument is contradicted by the fact that in other contexts under Swaziland's property and land laws, women are treated as full persons. For example, under the Deeds Registry Act, a single woman has completely equal rights as men in private property but loses them upon marriage.²²² The marital power under both customary and civil law similarly violates a woman's right to dignity by treating her as a minor, when, before marriage, she was treated as a competent adult in her own right. The laws themselves therefore recognize women's individual autonomy and personhood but allow women to lose them under certain circumstances such as marriage. It is therefore understandable why some women in Swaziland, such as Ms. Dumsile Nhleko, "wouldn't choose to be married at all."²²³ Ms. Celiwe Seyama, a UNICEF employee in Swaziland, stated that she would not want to get married precisely because of these restrictions on her rights.²²⁴

The idea that a woman does not carry enough merit as a person under the law to enjoy property rights in these different contexts is either based on insulting stereotypes about women's mental capacities, on a desire for men to have ultimate control of property within a marriage,²²⁵ or both, and make the need for reform and the harm to the dignity of women even more salient.²²⁶ As Comfort Mabuza, the National Director of the Media Institute of Southern Africa, stated, "[Women] must be given a right to be truly human ... without being reminded that you are a daughter of so and so, a wife of so and so. They should be seen as a complete entity. Women are able to stand. They are thinking. They are sensible ... Why must they be given a second grade?"²²⁷ Swaziland must accord adult women the dignity that they deserve, recognize them as fully equal, independent, competent adults, and treat them as such through the laws governing land and property.

2. Under Swazi Law and Custom, Only Women Are Subjected to the Shame and Indignity Accompanying Evictions from Swazi Nation Land.

Evictions from Swazi Nation Land also violate a woman's right to dignity because they treat a woman as less deserving of the marital home and of her family than a man and subsequently subject her to great stigma and shame. When a woman is found guilty of adultery or witchcraft under Swazi law and custom, she is forced to leave her marital home and her family. But if a man has commit-

222. Deeds Registry Act 37 of 1968 ss. 16(2), 16(3).

223. Interview with Dumsile Nhleko, married woman, in Lubombo, Swaziland (Mar. 7, 2007).

224. Interview with Ms. Celiwe Seyama, UNICEF employee, in Mbabane, Swaziland (Mar. 6, 2007).

225. See Interview with Ms. Thabsile Mavimbela, former Senator, in Ezulwini, Swaziland (Mar. 8, 2007) ("And why are the laws so biased? It comes back to saying that men are there, they are in power, they've made all these biased laws ... No one said the laws must be this biased - but somebody was there, it was men.").

226. See Interview with Ms. Thabsile Mavimbela, former Senator, in Ezulwini, Swaziland (Mar. 8, 2007) ("It's time now we try to correct these mistakes.").

227. Interview with Mr. Comfort Mabuza, National Director, Media Institute of Southern Africa (MISA), in Mbabane, Swaziland (Mar. 9, 2007).

ted the same actions, he is either able to stay on the land²²⁸ or if evicted is always able to stay with his family.²²⁹ These practices treat women as less than a full human being because they demonstrate the belief that a woman is less worthy of the marital property and less deserving of remaining with her family. Such violations of a woman's dignity are exacerbated by the fact that "[r]eturnees are not accepted wholeheartedly."²³⁰ Accordingly, once evicted women return to their natal home, they suffer great stigma and shame, while men, who are rarely evicted to begin with, are not stigmatized to the same degree when they are evicted. Women who must return to their natal homes are expected to build their homes at the back of their natal family's homestead facing the opposite direction of the other homes.²³¹ Thus, after having suffered the indignity of eviction and separation from her family, a woman suffers further harm to her dignity by being ostracised and marked as an evicted woman within her community.

3. Under Customary Law, Lobola Represents the Purchase of the Wife's Progeny and Labor, and Can be Used by a Husband as Justification to Control his Wife's Property and Earnings, in Violation of Her Right to Dignity

The Swazi law and custom that lobola²³² represents the union of the two families²³³ and is payment for the wife's future children and her labor,²³⁴ has been abused by husbands as justification to control his wife's body, property, earnings, and behavior during marriage, in violation of a woman's right to dignity.²³⁵ Husbands

228. This is because a man cannot be found guilty of adultery. See *infra* Part II.B.1.

229. This is because if a man is found guilty of witchcraft, he must leave the land with his entire family. See *id.*

230. MVUDUDU AND MCFADDEN, RECONCEPTUALISING THE FAMILY, *supra* note 81, at 89.

231. *Id.*

232. Scholars as well as legislators sometimes use the terms *lobola*, *lobolo*, *emalobolo*, dowry, brideprice, and bridewealth interchangeably. The terms, however, sometimes refer to payments made by the groom or the family of the groom to the bride or the family of the bride, and other times refer to the opposite transaction. Here, *lobola* is used to refer to the former. Furthermore, when this report cites to comparative law, international instruments, and secondary sources that use terms other than *lobola*, the transaction that is being discussed is always from the male side of the family to the female side of the family.

233. See, e.g., Marriage Bill of 2004 s. 2 (Swaz.) (“‘Lobola’ means the gift given by the groom and his family to the bridegroom’s family in the process of building a relationship between the two families. According to Swazi law and custom this gift can pass at anytime after the families have negotiated and agreed on the material issues pertaining to the marriage.”); Women and Law in Southern Africa Research Trust, *Multi-Dimensional Approach to Gender Equality in Swaziland: Swazi Culture and Traditions* 35 (“As an exchange in strengthening relations between two families, this is good. This is more so because even the bride does the same when she gives *umhlambiso*.”); MULTIPLE JEOPARDY, *supra* note 92, at 82 (“Khoza (1973) contends that *emalobola* should not be regarded as a purchase price, but rather as a symbol of gratitude, cementing the relationship between the two families.”).

234. See *infra* notes 240-241 and accompanying text.

235. See Alice Armstrong et al., *Uncovering Reality: Excavating Women's Rights in African Family Law*, 17 INT'L J. OF LAW & FAM. 314, 340 (1993) (“In some modern societies, men have interpreted the payment of the payment of bridewealth as giving them ownership of their wives. This attitude has been thought to encourage wife beating.”).

use lobola to subjugate and humiliate their wives, by treating them as non-persons and degrading women's self-worth and dignity. Swazi law and custom dictates that the groom or the father of the groom pay lobola, traditionally cattle,²³⁶ to the father of the bride as a prerequisite to marriage.²³⁷ Swazi courts have held that an agreement to pay lobola is a legal requirement for customary marriages,²³⁸ and Swazis pay or at least agree to pay lobola in customary marriages as well as some civil marriages.²³⁹ As a result, almost all married women in Swaziland are affected by the customary payment of lobola. In exchange for lobola, the husband and his father receive the promise of future children to propagate the family name.²⁴⁰ The payer of lobola is not purchasing the woman per se, rather he is buying the woman's reproductive functions.²⁴¹ The woman is dehumanized and transformed into a piece of property,²⁴² and husbands use the payment of lobola as justification

-
236. See NHLAPO, MARRIAGE AND DIVORCE *supra* note 22, at 50 (observing that ideally *lobola* should be paid in cattle, but that the process has been monetized, with King Sobhuza II in the 1970s fixing the value at 20 Rand to prevent greedy fathers from making a profit); see also T. W. BENNETT, A SOURCEBOOK OF AFRICAN CUSTOMARY LAW FOR SOUTHERN AFRICA 207-11 (1991) (describing the composition and amount of bridewealth within southern Africa).
237. See NHLAPO, MARRIAGE AND DIVORCE *supra* note 22, at 48 ("The making of a marriage payment is the second most important feature of the Swazi marriage: some would say the first."); Malambe and Another v. Khoza, 1970-1976 SLR 375, 375 (1975) (High Ct.) (Swaz.) (stating that the respondent husband paid *lobola* "consisting of twelve head of cattle to the father of second appellant").
238. See R. v. Fakudze and Another, 1970-1976 SLR 422 (1976) (High Ct.) (Swaz.) (holding that a couple was married under customary law when *lobola* was paid and the couple held themselves out to be married, even if there was no smearing of the red ochre); Nhlapo, *The Legal Situation of Women*, *supra* note 6, at 113 ("[After the red ochre ceremony,] the marriage is valid even if no *lobola* has changed hands. *Lobola*, however, must be negotiated and guarantees about mode of payment must be given.").
239. See Malambe and Another v. Khoza, 1970-1976 SLR 375, 375 (1975) (High Ct.) (Swaz.) (noting that the respondent was married by civil rites in community of property but that he had nonetheless paid *lobola*).
240. See NHLAPO, MARRIAGE AND DIVORCE, *supra* note 22, at 101 ("The wife-seekers pay *lobola* cattle in order to lay claim to the children; the wife-givers take *lobola* in order to enhance their ability to acquire wives to bear children for them."); Christopher A.B. Zigira, *The Role of NGOs in Economic Empowerment of Women: A Case Study of Umtapo Wa Bomake (Women's Resource Centre) in Swaziland* 77 (June 1998) ("[I]n traditional marriages the payment of *lobola* (bridewealth) has meant buying children, rights over women and custody of children."); Interview with Reverend Pius Magagula, Catholic Priest, in Manzini, Swaziland (Mar. 9, 2007) ("According to the details Swazi custom, *lobola* is the purchasing of the kids, that would be the offspring of the wife, but not the wife.").
241. See NHLAPO, MARRIAGE AND DIVORCE, *supra* note 22, at 48 ("[A]n important rationale in the minds of those who practice the custom is that the cattle transferred to the woman's family compensate them for the loss of their daughter and her reproductive capacities."). A survey of 788 people in Swaziland conducted by Physicians for Human Rights indicates that 59% of Swazi men and 48% of Swazi women surveyed believe that "A woman is expected to have children if a man paid a bride price to marry her." See Karen Leiter, Senior Research Associate Physicians for Human Rights, Epidemic of Inequality in Botswana and Swaziland: Evidence of the Effects of Gender Inequity, Stigma and Discrimination and Implications for US Policy, Presentation at Global Health Council (May 2, 2007) (presentation slides on file with author).
242. See MULTIPLE JEOPARDY, *supra* note 92, at 80 ("The interviewees felt that payment of *emalobolo* renders the woman the property of her husband.").

to control the earnings, property, and sexual functions of their wives.²⁴³ In addition, some Swazi women, like a female attorney who was interviewed during the Georgetown University International Women's Human Rights Clinic fact-finding mission to Swaziland in Spring 2007, measure their own worth based on the number of cattle paid by their fathers: "honestly there is [this] thing when you have your friends say 'Oh, they paid seventeen cows, oh wow,' and then you say 'Oh, he only paid ten'... you feel more content."²⁴⁴ Lobola perverts a woman's sense of self and society's perception of women as alienable objects, in violation of her right to dignity. Parliament must enact legislation defining lobola as the union of the two families, and making lobola optional and non-returnable. Such legislation would codify the positive aspects of Swazi law and custom, and would prevent the husband from using lobola as justification to control his wife because he will be unable to threaten to require its return or argue that by having paid it he purchased his wife's labor and reproductive capacities. Other African countries have declared that lobola is symbolic,²⁴⁵ have vested sole property interests in the person who receives the gift,²⁴⁶ or have prohibited its use entirely.²⁴⁷ Liberia, for example, has

-
243. See Women and Law in Southern Africa Research Trust, *Multi-Dimensional Approach to Gender Equality in Swaziland: Swazi Culture and Traditions*, 35 ("The payment of *emalobolo* is often used as justification for men's marital power. This entails their sole right to administer marital property and to confiscate their wives' property or wages."); MULTIPLE JEOPARDY, *supra* note 92, at 81 (2001) (explaining that women have an "entrenched latent understanding that 'I was paid for'" and that this objectification makes women the target for spousal abuse). In 2004, the Supreme Court of Appeal of South Africa sentenced a man to prison for kidnapping and raping his customary wife four years after the marriage broke up. At trial, the defendant argued that the marriage was still intact and that he had a right to conjugal benefits because his wife had not returned the *lobola*. See *S v. Mvamvu* (350/2003) [2004] ZASCA 90, available at <http://www.saflii.org/za/cases/ZASCA/2004/90.html>.
244. See Interview with a female attorney, in Mbabane, Swaziland (Mar. 7, 2007).
245. See, e.g., **Persons and Family Code 2002-07 of 2002 s. 142 (Benin)** ("La dot a un caractère symbolique") [Dowry has a symbolic character].
246. Senegal, for example, has allowed the customary practice of *lobola* to continue, but has enacted statutes declaring that *lobola* is the sole property of the woman, and that she may dispose of it without the consent of her husband. See CENTER FOR REPRODUCTIVE LAW AND POLICY, WOMEN OF THE WORLD: LAWS AND POLICIES AFFECTING THEIR REPRODUCTIVE LIVES, SENEGAL 167 (2003), available at <http://www.reproductiverights.org/pdf/senegal.pdf> (citing Family Code article 132).
247. Burkina Faso, Côte d'Ivoire, Cameroon, and Tanzania for example, enacted legislation prohibiting the payment of *lobola*, and Burkina Faso and Côte d'Ivoire sanction offenders by imposing prison sentences and fines. See CENTER FOR REPRODUCTIVE LAW AND POLICY, WOMEN OF THE WORLD: LAWS AND POLICIES AFFECTING THEIR REPRODUCTIVE LIVES, BURKINA FASO 57 (2003), available at <http://www.reproductiverights.org/pdf/burkinafaso.pdf> (citing Code of Persons and the Family, Title II, Chapter I, article 244; and Penal Code articles 378-79); CENTER FOR REPRODUCTIVE LAW AND POLICY, WOMEN OF THE WORLD: LAWS AND POLICIES AFFECTING THEIR REPRODUCTIVE LIVES, COTE D'IVOIRE 124 (2003), available at <http://www.reproductiverights.org/pdf/cotedivoire.pdf> (citing article 20 of the Transitional Clauses of the Marriage Act); CENTER FOR REPRODUCTIVE LAW AND POLICY, WOMEN OF THE WORLD: LAWS AND POLICIES AFFECTING THEIR REPRODUCTIVE LIVES, REGIONAL TRENDS IN REPRODUCTIVE RIGHTS 191 (2003), available at <http://www.reproductiverights.org/pdf/regionaltrends.pdf> (observing that Burkina Faso, Côte d'Ivoire, and Cameroon have abolished bride-price); CENTER FOR REPRODUCTIVE LAW AND POLICY, WOMEN OF THE WORLD: LAWS AND POLICIES AFFECTING THEIR REPRODUCTIVE LIVES, TANZANIA 116 (2003) available at <http://www.reproductiverights.org/pdf/WOWAA07.pdf> (citing the Local Customary Laws Declaration Order No.4 which applies to 80% of communities in Tanzania).

declared that any husband who collects or attempts to collect the return of dowry by force or threat of force, is guilty of a felony in the first degree, and must pay a fine and restitution.²⁴⁸ Cameroon even prevents courts from hearing disputes arising out of the existence, payment, or payment terms of lobola.²⁴⁹ The Parliament of Swaziland should follow the lead of other African countries and protect women's right to dignity, by enacting legislation that makes lobola optional and non-returnable, and removes the jurisdiction of courts to hear cases related to the payment or return of lobola.

B. Stripped of their Resources by Law, Women Suffer Violent Physical and Economic Abuse

When a woman's property rights are violated by her inability to control her property, the consequence is not simply that she loses her assets; women are also subject to debilitating violence in the form of physical and economic abuse. Women experience physical and economic abuse because they are not allocated Swazi Nation Land, can be arbitrarily evicted from Swazi Nation Land, and cannot fully own or control private and personal property.

Women are subject to physical abuse when they are not able to control their own property and are removed from their own homes because husbands and family members feel entitled to harm women in order to obtain the women's property. A female government official stated that women allow their husbands to control their pay checks because they fear "it will come to physical violence"²⁵⁰ if they do not let husbands control their property. A widow interviewed said that she gave her in-laws money when they demanded it because she feared they would harm her: "I gave them the money because at the end of the day, I really feared for my life and I really thought they wanted to kill me and I think they would have killed me."²⁵¹ Women and Law in Southern Africa has confirmed that lack of access to resources leaves women susceptible to violence: "[T]he lack of control over resources by women generates a culture of economic dependence on men and further pushes women into positions where they are vulnerable to abuse."²⁵² Additional studies in Swaziland have found that victims of spousal abuse are "normally dependent on their husbands economically"²⁵³ and that "power relations between men and

248. See Liberia Equal Rights of the Customary Marriage Law of 1998 s. 2.2 (Liber.) ("The recovery of dowry (token) from the wife or her parents by the husband is hereby prohibited.")

249. See CENTER FOR REPRODUCTIVE LAW AND POLICY, WOMEN OF THE WORLD: LAWS AND POLICIES AFFECTING THEIR REPRODUCTIVE LIVES, FRANCOPHONE AFRICA: CAMEROON 83 (1999), available at <http://www.reproductiverights.org/pdf/cameroon.pdf> (citing Order No. 81-02 of June 29, 1981, articles 61, 64, and 70).

250. Interview with Nonhlanhla Zanele Dlamini, Ministry of Home Affairs, Gender Co-ordinator, in Mbabane, Swaziland (Mar. 5, 2007).

251. Interview with widow, in Mbabane, Swaziland (Mar. 6, 2007).

252. MULTIPLE JEOPARDY, *supra* note 92, at 36. Sibongile Dlamini, a WLSA attorney, stated that women may feel forced to do what a man wants because of her lack of resources: "women tend to lack the power, the resources. They will agree on what the man has to say. Even if the man would actually say, let's have unprotected sex. They will say okay. This man feeds me; I've got no other alternative." Interview with Sibongile Dlamini, in Ezulwini, Swaziland (Mar. 4, 2007).

253. SWAGAA, *Spousal Abuse: A Critical Appraisal of Responses to Spousal Abuse in Swaziland* 18 (2003).

women” are to blame for violence against women.²⁵⁴ In addition, the Committee on Economic and Social Rights has found that women are especially vulnerable to violence and sexual abuse because of the discrimination they receive in terms of property rights and “rights of access to property.”²⁵⁵ Women in South Asia found that ownership and control over property led to less experience with violence and that “owning property protected them from potential violence due mainly to income generation, livelihood security, greater respect and decision-making autonomy in marital family.”²⁵⁶ Women need to be empowered economically so that they do not feel compelled to stay in abusive relationships that increase the risk of contracting HIV/AIDS, since women will feel coerced to engage in risky sexual behavior if she feels she will not have access to her property without doing what the man wants.

Physical violence is also associated with a woman’s inability to be allocated or have secure tenure on Swazi Nation Land, because if a woman does not move off the land herself when told to do so by a chief, husband, or family member, she may be physically forced to move. As an example, a woman from the Lavumisa region stated that her mother-in-law and sister-in-law beat her in front of her children when she would not leave the land she had inherited.²⁵⁷ Once a woman is off the land and left with nowhere to live, she also may be subject to being hurt or abused since she is unable to be allocated land as a woman. A UNICEF worker stated that since women do not have rights to Swazi Nation Land “girls are more vulnerable to abuse—sexual abuse.”²⁵⁸ A WLSA attorney stated that she is “seeing more and more women coming in”²⁵⁹ to the WLSA offices with cases where they have contracted HIV/AIDS because of their lack of property rights. Swaziland itself has recognized that violence against women exists and has already indicated a commitment to eradicate this problem. In 2005, Prime Minister Themba Dlamini informed Amnesty International of his strong condemnation of violence against women in Swaziland and that he had instructed the Minister of Justice and Constitutional Affairs to prepare a Bill for Parliament to protect women and children against sexual abuse.²⁶⁰ Swaziland’s own Constitution states that the government will protect citizens from violence²⁶¹ and international law, which Swaziland is a

254. *Id.* at 53.

255. Committee on Economic, Social and Cultural Rights, *General Comment 7, The right to adequate housing (art. 11.1 of the Covenant): forced evictions* (16th Sess., 1997), para. 10, U.N. Doc. E/1998/22, annex IV, available at [http://www.unhchr.ch/tbs/doc.nsf/\(symbol\)/CESCR+General+Comment+7.En?OpenDocument](http://www.unhchr.ch/tbs/doc.nsf/(symbol)/CESCR+General+Comment+7.En?OpenDocument).

256. International Center for Research on Women, *Property Ownership and Inheritance Rights of Women for Social Protection: The South Asia Experience* 40 (2006).

257. Interview with Fikile Emily Maziya, widow, in Mbabane, Swaziland (Mar. 5, 2007).

258. Interview with Ms. Celiwe Seyama, UNICEF employee, in Mbabane, Swaziland (Mar. 6, 2007).

259. Interview with WLSA Legal Officer, in Ezulwini, Swaziland (Mar. 4, 2007).

260. Amnesty International, International Secretariat London, *Memorandum to the Government of Swaziland on the Sexual Offences and Domestic Violence Bill* (February 2006), available at <http://web.amnesty.org/library/Index/ENGAFR550032006?open&of=ENG-347>.

261. SWAZ. CONST. 2005 s. 38(a) (recognizing the right of security of the person and stating: “Notwithstanding anything in this Constitution, there shall be no derogation from the enjoyment of the

WOMEN'S EQUAL PROPERTY AND LAND RIGHTS

party to, entitle all persons with the right to the “highest attainable standard of physical and mental health.”²⁶² Based on its domestic and international commitments, Swaziland should act to end physical violence against women.

Denial of property rights also subjects women to economic violence, which is increasingly being recognized under regional and international standards as a form of domestic violence. Women in Swaziland are being subjected to economic abuse because they are deprived of the full use of their income and assets and are denied access to the same resources as men. Many international organizations and African countries have started a movement towards the recognition of economic abuse as a violation of fundamental rights. The South African Development Community Declaration, to which Swaziland is a party, includes economic abuse, defined as economic deprivation within the family, in its definition of violence against women, and condemns actions which deprive women of their economic resources.²⁶³ The President of the Senate in her opening remarks just this year recognized the commitment of the government to comply with SADC.²⁶⁴ The Committee on the Elimination of Discrimination against Women has interpreted CEDAW such that any acts that inflict mental harm or suffering, coercion and other deprivations of liberty, including economic abuse, are considered violations of the prohibition on discrimination against women²⁶⁵ The UN General Assembly has also spoken out against customary practices, such as the marital power, which curtail the “economic independence of women.”²⁶⁶ Finally the African Women’s Protocol, which

following rights and freedoms- life, equality before the law and security of person.”); s. 18(2) (“A person shall not be subjected to torture or to inhuman or degrading treatment or punishment.”).

262. ICESCR, *supra* note 43, at art. 12(1); *see also* CESCR General Comment 16, *supra* note 181, at para. 27 (state parties must “take appropriate measures to eliminate violence against men and women”).
263. Southern Africa Development Community, Gender and Development: A Declaration by Heads of State or Government of SADC (1999).
264. Remarks by the President of the Senate at the State Opening of the 8th Parliament on the 9th February 2007 (“Your Majesty, we would like to thank you Hlanga Lwezwe for being committed towards the SADC Declaration on Gender”), *available at* <http://www.gov.sz/home.asp?pid=5083>. In fact, “Women Empowerment” was mentioned as one of only five points that the President of the Senate raised in her opening speech.
265. CEDAW, *General Recommendation No. 19, Violence Against Women* (11th sess., 1992), paras. 6, 23 (“Lack of economic independence forces many women to stay in violent relationships... These forms of violence put women’s health at risk and impair their ability to participate in family life and public life on a basis of equality.”), *available at* <http://www.un.org/womenwatch/daw/cedaw/recommendations/recomm.htm#recom19>; *see also*, CEDAW, *General Recommendation No. 24, Women and Health* (20th sess., 1999), para. 12(b) (“unequal power relationships between women and men in the home and workplace may negatively affect women’s nutrition and health”), *available at* <http://www.un.org/womenwatch/daw/cedaw/recommendations/recomm.htm#recom19>.
266. The resolution vows that parties should take: “all necessary measures to empower women and strengthen their economic independence and protect and promote the full enjoyment of all human rights and fundamental freedoms in order to allow women and girls better to protect themselves from, inter alia, traditional or customary practices affecting the health of women and girls.” G.A. Res. 56/128, *Traditional or Customary Practices Affecting the Health of Women and Girls* (Jan. 2002), *available at* <http://www.unhcr.ch/Huridocda/Huridoca.nsf/TestFrame/97e2c3baf3b4185c1256b72004572be?Opendocument>.

Swaziland has signed, recognizes “violence against women” to include acts which cause or could cause economic harm, including the threat to take such acts.²⁶⁷

Swaziland’s neighbor, South Africa, has progressively recognized economic abuse as a form of domestic violence, and has defined economic abuse as “unreasonable deprivation of economic or financial resources to which a complainant is entitled under law or which the complainant requires out of necessity, including household necessities ... or the unreasonable disposal of household effects or other property in which the complainant has an interest.”²⁶⁸ Swaziland has begun the process of recognizing economic violence by including a right to freedom from economic abuse in its Draft Sexual Offenses Bill, which is modeled after the South African law. The Sexual Offenses Bill recognizes that economic abuse is a form of domestic violence and should be punished and defines economic abuse to include “unreasonable deprivation of economic and financial resources,” “unreasonable disposal of household effects or other moveable property,” and “unreasonably disposing of movable or immovable property in which the complainant [has] an interest or a reasonable expectation of use.”²⁶⁹ In its response to the 2000 review of the Beijing World Conference on Women’s Platform for Action, Swaziland recognized that “equitable access and control over economic resources is crucial to the attainment of sustainable economic development” and that women are discriminated against in control and ownership of livestock and other assets.²⁷⁰ The people of Swaziland also are recognizing economic violence to be a form of domestic violence. Interviews conducted in Swaziland by the Swaziland Action Group Against Abuse (SWAGAA) indicated that evictions of women from their marital home were identified as a form of spousal abuse.²⁷¹ The interviewees also indicated that men committed domestic abuse when they took resources from women while not contributing to the home themselves.²⁷²

These broad definitions of economic abuse indicate that all the land and property violations women in Swaziland are subjected to are violations of the right to be free from the economic form of domestic violence. Denial of Swazi Nation Land and denial of full property rights to women violate the right to be free from economic violence because they involve taking resources from the woman that she needs to survive. She is forced to leave her land, leave behind her home, which she often has helped build, and leave behind her personal belongings. Thus based on international and regional law and its own recognition of the poor treatment of

267. Women’s Protocol to the African Charter, *supra* note 89, at art. 1.

268. DOMESTIC VIOLENCE ACT 116 of 1998 (S. Afr.). See also International Center for Research on Women, *Property Ownership and Inheritance Rights of Women for Social Protection: The South Asia Experience* 40 (2006) (defining economic violence as primarily the denial of resources by husband to meet basic economic needs of the household and the women’s needs).

269. Draft Sexual Offenses Bill, part 2, s. 1 (definitions).

270. *Swaziland Country Report: Sub-Regional Review on Implementation of the Beijing Platform for Action (1995) and the Outcome of the Twenty-Third Special Session of the General Assembly (2000)* (2004), available at <http://www.un.org/womenwatch/daw/Review/responses/SWAZILAND-English.pdf>.

271. Ingungu Yematsemba, *Spousal Abuse: A Critical Appraisal of Responses to Spousal Abuse in Swaziland* 18 (2003).

272. *Id.*

women in relation to personal property, Swaziland should grant women full right to Swazi Nation Land and private property.

V. CUSTOMARY AND CIVIL LAWS STRIP WOMEN OF PROPERTY AT THE BREAK UP OF MARRIAGE

Whether married under Swazi law and custom or under the civil law, a woman is deprived of all or nearly all of the property to which she has contributed when her marriage breaks up, in violation of her international and constitutional rights to property, equal treatment, and dignity.²⁷³ A woman is deprived of property at the break up of marriage because: 1) discriminatory customary and civil laws prevent her from owning the land, home, and other property of value, and only allows her to own personal household items such as her clothes and kitchen utensils; 2) her husband can unilaterally dispose of property due to his vast legal control over his wife; and 3) the traditional authorities and civil courts that oversee property division upon the break up of marriage unfairly divide the marital estate because they do not consider the wife's contributions to build the home, cultivate the fields, care for the children, and otherwise maintain the estate. A woman's survival depends on men,²⁷⁴ and women are left with nothing when they are forced to leave their marriages. In addition, the woman's family is required under Swazi law and custom to return the lobola at the break up of marriage, contributing to the economic penalty that a woman must suffer if she leaves her husband. Because a woman is likely to be left destitute after the break up of her customary or civil rites marriage, she may have no other choice but to remain with her abusive husband or in a relationship to which she is opposed.

The Parliament of Swaziland must enact legislation providing civil courts with guidelines on how to divide property equitably and justly upon the break up customary marriages and divorce in civil rites marriages. Judges should divide community property equally (50-50), and assign separate property to each spouse such that each spouse keeps what is exclusively his or hers, unless one or both of the spouses show that such a division would be unfair. The legislation must enumerate financial and non-financial factors that courts may consider when deviating from the standard division of community property and separate property, like childcare responsibilities, maintenance of the home, and other contributions to the household. Such legislation would ensure that women receive property to which they have contributed at the break up of marriage.

273. The grounds for divorce of a civil rites marriage, dissolution of a common law marriage, and the break up of a customary marriage, as well as the related administrative or judicial procedures, are outside of the scope of this human rights report and proposed legislation. This report and proposed legislation govern only the division of property once the marriage has been dissolved. For comparative law on how other African countries have established procedures for and registered divorces of customary marriages, see, e.g., Ghana, Customary Marriage and Divorce (Registration) Law of 1985 s. 6-8 (Ghana); South Africa, Recognition of Customary Marriages Act of 1998 s. 8 (S. Afr.); Madagascar, Marriage Ordinance 62-089 of 1962 arts. 94-108 (Madag.).

274. See, e.g., Women and Law in Southern Africa Research and Educational Trust, *Charting the Maze: Women in Pursuit of Justice in Swaziland* 30 (2000) (internal citation omitted) (“[T]he legal position of women among the Swazi is one of perpetual guardianship.”); MULTIPLE JEOPARDY, *supra* note 92, at 36 (“For women to produce food in rural areas (where customary land is the only land available), they need to be attached to men.”).

A. Because Married Women Can Not Own Property, They Receive Nothing of Value at the Break Up of Marriage

Whether married under Swazi law and custom or under civil rites, a woman does not receive the land, house, cattle, and other valuable articles at the break up of her marriage, while her husband retains all of the property, in violation of her rights to property and equal treatment. Women, however, make significant financial and non-financial contributions to the marital property during the marriage, by maintaining the home, cultivating the fields, and caring for the children. A woman is unjustly deprived of property to which she has contributed because she is either by law or Swazi custom not allowed to own property during the marriage, her husband can unilaterally dispose of property, and the customary and civil procedures to divide the marital estate favour the husband over the wife. Thus, because a married man owns no property, her husband may unilaterally dispose of marital property, and family councils and civil courts unfairly divide the marital estate, she tends to be left with nothing of value at the dissolution of the marriage.

First, a married woman receives very little property at the break up of marriage because women cannot own property of value under customary and civil laws that are based on out-dated stereotypes of the inferiority of women.²⁷⁵ Reverend Pius Magagula observed that in customary marriages, property rights are vested in the man and that “according to the details of Swazi law and custom, [the] woman is not supposed to own anything.”²⁷⁶ Men rather than women, for example, have rights to Swazi Nation Land, and as a result women have no security of tenure.²⁷⁷ As a woman in a rural community explained, even those women who have the means to purchase private property still do not own that property: “I cannot say that it is really hers or that it belongs to her in the sense that if you buy something, in practice it belongs to the husband.”²⁷⁸ Similarly, former High Court Judge Mbutfo Mamba explained that the woman at the break up of a civil rites marriage or a customary marriage will have no right to the home if it is on Swazi Nation Land, where approximately two-thirds of Swazis reside,²⁷⁹ because

275. See, e.g., Alice Kavanaugh Armstrong and R.T. Nhlapo, LAW AND THE OTHER SEX: THE LEGAL POSITION OF WOMEN IN SWAZILAND 41 (1986) (noting that under a customary marriage, “Cooking utensils, personal clothing and even the modest profits from a roadside handicrafts or vegetable stall may belong to ch wife, to control and use without interference. But controversy may well arise in the case of a thriving high-turnover business run by the wife, or a high salary brought in by a professional spouse.”); Charting the Maze, *supra* note 274, at 31 (“Married women, particularly those married in community of property, are not entitled to own property . . .”).

276. See Interview with Reverend Pius Magagula, Catholic Priest, in Manzini, Swaziland (Mar. 8, 2007).

277. See *supra* Part II.

278. See Interview with Swazi woman in polygamous marriage, in Sthobela, Manzi Region, Swaziland (Mar. 7, 2007).

279. See THE SWAZILAND BIODIVERSITY STRATEGY AND ACTION PLAN ch. 1 (Ministry of Tourism, Environment and Communications 2000), available at <http://www.ecs.co.sz/bsap/chapter1.htm> (stating that 69% of the population lives on SNL); Encyclopaedia of the Nations, Swaziland, available at <http://www.nationsencyclopedia.com/Africa/Swaziland-AGRICULTURE.html> (last visited Mar. 21, 2007) (stating that 70% of the population live on SNL); SWAZILAND: Urban Cleanup Response to Unplanned Settlements, INTEGRATED REGIONAL INFORMATION NETWORKS, Jan. 31,

WOMEN'S EQUAL PROPERTY AND LAND RIGHTS

“In terms of Swazi law and custom... the home belongs to the man.”²⁸⁰ Trends in the registration of homes on Swazi Nation Land and Title Deed Land also reflect male dominance, with Qubile Simelane, the director of the Women’s Resource Centre, estimating that 99% of homes in Swaziland are registered in the husband’s name²⁸¹ because civil and customary law restrict women from registering property in their own names.²⁸² The current practice is that when property is distributed at the break up of marriage, the husband retains possession of the valuable property because he has ownership rights under Swazi law and custom, or has the property registered in his name.

Second, a woman is deprived of property at the break up of her customary or civil rites marriage because her husband can exercise his marital power²⁸³ to dispose of the property, so that there is nothing left to distribute to his wife. While a woman who unilaterally disposes of property risks being put in jail by her husband,²⁸⁴ a married man may dispose of property without the consent of his wife.²⁸⁵ Member of Parliament Vulindlela David Msibi asserted that husbands married under customary law or civil rites sometimes sell property of significant worth without the consent of their wives: “I worked for a housing corporation. There were many instances where men sold property without the woman knowing.”²⁸⁶ Similarly, divorce attorney Lindiwe Khumalo Matse recalled one of her recent civil divorce cases where the husband received the divorce summons, and immediately disposed of the property and home to prevent his wife from receiving anything through court proceedings or settlement discussions.²⁸⁷ Because the husband has the ability to

2006, available at <http://www.irinnews.org/report.aspx?reportid=57988> (“Eighty percent of Swazis live on communal Swazi Nation Land, and 20 percent are urban residents.”); Nhlapo, *The Legal Situation of Women*, *supra* note 6, at 102 (stating that in 1980 70% of the population lived on SNL).

280. See Interview with Mr. Mbutfo Mamba, former High Court Judge, in Mbabane, Swaziland (Mar. 8, 2007).

281. See Interview with Ms. Qubile Simelane, Director, Women’s Resource Centre, in Ezulwini, Swaziland (Mar. 6, 2007).

282. See *supra* Part I.A & Part III.A (explaining that a woman married under civil rites in community of property cannot register property in her name, that a woman married out of community of property needs the assistance of her husband to register property in her name, and that a woman married under Swazi law and custom will have difficulty registering property in her name because of her husband’s vast marital power).

283. See *supra* Part I.A & I.B (describing the marital power the husband has over his wife).

284. See Interview with Ms. Agnes Mndzebele, Widow, in Ezulwini, Swaziland (Mar. 8, 2007).

285. See Armstrong & Nhlapo, *LAW AND THE OTHER SEX*, *supra* note 275, at 35 (“Because of the marital power the husband is the ‘administrator of the joint estate’ and has control over the property of the marriage. This gives him the right to deal with the property (i.e., to sell, mortgage, lend or give it away) without his wife’s permission.”); Interview with an official at the Ministry of Justice, in Mbabane, Swaziland (Mar. 7, 2007) (“And then my husband can go and sell the land without even telling me, the land is his basically.”).

286. See Interview with Mr. Vulindlela David Msibi, Member of Parliament, in Ezulwini, Swaziland (Mar. 7, 2007).

287. See Interview with Lindiwe Khumalo Matse, Divorce Attorney, in Manzini, Swaziland (Mar. 9, 2007).

unilaterally dispose of property, he can sell the assets prior to the break up of the marriage and thereby deprive his wife of property to which she has contributed.

Third, the *lusenvo* (family council) for customary marriages and the civil courts for civil rites marriages fail to distribute property to the wife at the break up of marriage in a fair, just, and non-discriminatory manner because these bodies do not consider financial and non-financial contributions that the wife makes to the marriage. Because there is technically no divorce under Swazi law and custom,²⁸⁸ the family council rather than the courts determine how property is divided at the break up of a customary marriage.²⁸⁹ The family has enormous discretion on how to distribute the property because Swazi law and custom is not codified and differs within the country,²⁹⁰ and the husband and wife have little influence over the negotiations.²⁹¹ Typically, the family council will grant the wife the nominal household items (her “pots and pans”), but will give the husband the home and the land, which constitute 90% of the value of the estate.²⁹² Furthermore, the wife does not have the right to appeal, because the family council, not the spouses, have the authority to ask the *libandlamani* (community council) to review the decision.²⁹³ Similarly, a woman married under civil rites is also deprived of property to which

288. See Armstrong & Nhlapo, *LAW AND THE OTHER SEX*, *supra* note 275, at 52 (“Under custom it is widely acknowledge that ‘divorce is extremely difficult to obtain among the Swazi.’ There is even a pool of thought which holds that a Swazi customary marriage cannot be dissolved at all though this view appears not to be supported by authority. It seems fairly settled now that a customary marriage can be dissolved”); NHLAPO, *MARRIAGE AND DIVORCE* *supra* note 22, at 100 (“A review of the rules relating to the dissolution of a Swazi marriage shows that Swazi culture sets great store by the ideal of permanence in marital arrangements Nevertheless, we have found that Swazi marriages are capable of termination.”).

289. See Telephone Interview with Ms. Lindiwe Khumalo Matse, Divorce Attorney, in Washington, D.C. (Mar. 24, 2007).

290. See, e.g., Interview with Lomcebo Dlamini, WLSA Director, in Ezulwini, Swaziland (Mar. 4, 2007) (“And custom has been abused all over the country because in the North, some people will be doing one thing, the South, the East, the whatever. And what I may be able to do in the South and in a particular chiefdom, in another chiefdom in the South, I may be vilified for doing that very same thing.”).

291. See Telephone Interview with Ms. Lindiwe Khumalo Matse, Divorce Attorney, in Washington, D.C. (Mar. 24, 2007) (“It’s the family, the extended family, the family of the parents, the two families that negotiate. It’s not so much the spouses themselves, it’s the families.”).

292. See Telephone Interview with Ms. Lindiwe Khumalo Matse, Divorce Attorney, in Washington, D.C. (Mar. 24, 2007) (“The household items, I do know, they would allow her to take those items because it’s not considered good cultural governance so to speak for a certain wife or another woman to use the cooking utensils of a previous wife or the linen or the furnishings of the house of another woman.”). The discriminatory distribution of property at the break up of customary marriages is a problem across the whole of Southern Africa, not just Swaziland. See T. W. BENNETT, *A SOURCEBOOK OF AFRICAN CUSTOMARY LAW FOR SOUTHERN AFRICA 207-11* (1991) (“[O]n divorce the wife leaves home empty-handed. Certain specific objects, whose distinct character was denoted by mystical sanctions and associations with a wife’s child-bearing functions, are deemed to be the woman’s. But these isolated instances do not amount to a matrimonial property system that affords the wife meaningful protection when her marriage ends.”) (internal citations omitted).

293. See Telephone Interview with Ms. Lindiwe Khumalo Matse, Divorce Attorney, in Washington, D.C. (Mar. 24, 2007).

she has contributed at divorce. A woman married out of community of property is likely to receive only the basic household items such as her clothes and her cooking utensils because the man owns outright the house, land, and other valuable property.²⁹⁴ A woman married in community of property, on the other hand, receives half of the community property, unless the civil court finds fault and allocates a greater share to one of the spouses.²⁹⁵ Under common law, however, civil courts do not take into consideration the wife's financial and non-financial contributions to community property.²⁹⁶ Civil courts and the customary family councils therefore discriminate against women on the basis of gender because men often receive a greater share of the estate, despite the contributions that women make to, for example, homemaking, childrearing, and developing the land.

A woman married under customary law or civil law is thus left destitute after the break up of marriage, and must struggle to survive. Because she has no rights to the land or the house, she is forced to leave the marital home while the husband remains.²⁹⁷ A woman who tries to make it on her own will not have access to Swazi Nation Land because she is an unmarried woman,²⁹⁸ and she will not have sufficient resources to purchase or rent Title Deed Land because she received no property of value at the break up of her marriage.²⁹⁹ She will have no other option but to return to her natal family, where she is considered a temporary resident³⁰⁰ and is prevented from obtaining land because of her transient status.³⁰¹ Without land, property from her marriage, and a social support structure, a woman who separates from her husband must struggle to make ends meet.

Swazi law and custom and civil laws that give women inadequate property at the break up of marriage and leave her destitute, discriminate on the basis of gender and violate a woman's right to property. Section 19(1)³⁰² of the Constitution

294. See *supra* text accompanying notes 275-282.

295. See Telephone Interview with Ms. Lindiwe Khumalo Matse, Divorce Attorney, in Washington, D.C. (Mar. 24, 2007) ("To deviate from a half share, you'd really have to prove fault, negligence, recklessness for a court to make that determination. The percentage of occasions when that happens, probably not more than 15% of the time when the courts are even asked to do that kind of thing.").

296. See *id.*

297. See MULTIPLE JEOPARDY, *supra* note 92, at 36 ("Since Swaziland is a patrilineal and patriarchal society, it is the norm for a woman to move to her husband's home upon marriage This migration or patrilocality transforms the woman into an 'outsider' in her matrimonial home.").

298. See *supra* Part II.A (describing how chiefs allocate Swazi Nation Land according to Swazi law and custom).

299. See generally *supra* Part V.A (explaining why women receive no property of value at the break up of marriage).

300. See MVUDUDU, *supra* note 81, at 88 (noting that under customary law, the husband is expected to go to his wife's natal home and take her back).

301. See *id.* at 88-89.

302. See SWAZ. CONST. 2005 s. 19(1) ("A person has a right to own property either alone or in association with others.").

guarantees all persons the “right to own property,” and section 20(1)³⁰³ accords this right equally to women and men “in all spheres of political, economic, social and cultural life.”³⁰⁴ The equal right to property under the Constitution is thus violated when men are given all of the valuable property at the break up of marriage, and women receive only a nominal share even though women make significant non-financial contributions to the marriage. International treaties ratified by Swaziland also guarantee the equal right to property,³⁰⁵ and provide guidance on how the Parliament of Swaziland should interpret these constitutional provisions at the break up of a customary marriage. The HRC in General Comment 28, for example, requires states parties to ensure equality in “decisions with regard to property distribution” at the dissolution of marriage.³⁰⁶ Swazi law and custom does not currently treat women equally with men because the husband retains property at the break up of a customary marriage while the woman receives nothing. Furthermore, the Committee on the Elimination of Discrimination against Women in General Recommendation 21 asserts

[A]ny law or custom that grants men a right to a greater share of property at the end of a marriage or de facto relationship, or on the death of a relative, is discriminatory and will have a serious impact on a woman’s practical ability to divorce her husband, to support herself or her family and to live in dignity as an independent person.³⁰⁷

The Parliament of Swaziland must enact legislation guaranteeing that women receive property to which they have contributed at the break up of marriage.

B. Because of Their Legally-enforced Economic Dependency, Women Must Remain in Abusive Relationships

Under Swazi law and custom a woman may be forced to stay with an abusive husband in violation of her right to health and her right to be free from violence because if she leaves the marriage she receives no property and must shamefully return to her natal home in poverty, and because her father may be required to return the lobola. Her father may refuse or be unable to return the lobola, thereby putting her in an untenable situation by preventing her from leaving her abusive husband. The government of Swaziland must enact legislation to protect a wom-

303. See SWAZ. CONST. 2005 s. 20(1) (“All persons are equal before and under the law in all spheres of political, economic, social and cultural life and in every respect and shall enjoy equal protection of the law.”); *id.* at s. 20(2) (“For the avoidance of any doubt, a person shall not be discriminated against on the grounds of gender, race, colour, ethnic origin, tribe, birth, creed or religion, or social or economic standing, political opinion, age or disability.”).

304. See *id.* at s. 20(1).

305. See CEDAW, *supra* note 41, at arts. 1, 15(1), 16(1)(h); ICESCR, *supra* note 43, at art. 2(2); ICCPR, *supra* note 42, at arts. 2(1), 16, 26; African Charter, *supra* note 40, at arts. 2, 3(1&2), 18(3), 19.

306. See HRC General Comment 28, *supra* note 139, at para. 26. The African Women’s protocol contains similar language. See Women’s Protocol to the African Charter, *supra* note 89, at art. 7(d) (“[I]n case of separation, divorce or annulment of marriage, women and men shall have the right to an equitable sharing of the joint property deriving from the marriage.”).

307. See CEDAW General Recommendation 21, *supra* note 138, at para. 28.

an's constitutional and international rights to health and to be free from violence, by ensuring that the woman receives a fair share of property at the break up of marriage, and by making the payment of lobola optional and non-returnable.

A husband or his parents have a right under Swazi law and custom to demand the return of the lobola at the break up of a customary or civil rites marriage.³⁰⁸ Under customary law, the number of cattle owed to the husband or his parents depends on the number of children borne by the wife.³⁰⁹ Senator Winnie Magula explained that after she went through the rare process of officially annulling her customary marriage through the courts, her parents could keep the lobola because “[w]hen you have children, it balances out.”³¹⁰ Moreover, under customary law, if the parents of the wife fail to return the lobola after the marriage breaks up, future children of the woman will belong to the estranged husband and his family.³¹¹ A woman thus faces a significant penalty if she leaves a marriage and her parents cannot return the lobola, because she must give up her children. Because under Swazi law and custom the family of a woman who leaves a marriage is indebted to the family of the groom, the amount of debt determined by the number of children in the marriage, a woman will be pressured to stay in an abusive relationship in violation of her right to be free from violence.³¹²

308. See NHLAPO, MARRIAGE AND DIVORCE *supra* note 22, at 89 (“A divorce [under customary law] can be arranged if the differences between the spouses are irreconcilable and refund of the *lobola* is proposed and accepted.”); Malambe and Another v. Khoza 1970-1976 SLR 375, 378 (1975) (High Ct.) (Swaz.), (citing a compilation made by the Swazi (Central) Law Panel, stating that “it is an essential element of the marriage that *lobola* be paid at some time, and it may be returned in whole or in part upon dissolution of the marriage.”) (emphasis in original). Anthropologists have also noted that husbands in southern Africa have used the payment of *lobola* as an excuse not to pay maintenance. See T. W. BENNETT, A SOURCEBOOK OF AFRICAN CUSTOMARY LAW FOR SOUTHERN AFRICA 207-11 (1991) (“[I]t gives people a plausible excuse for satisfying their immediate economic needs and justifies the husband’s refusal to pay maintenance for his wife and children on breakup of the marriage.”).

309. See Malambe and Another v. Khoza 1970-1976 SLR 375, 378 (1975) (High Ct.) (Swaz.) (citing a compilation made by the Swazi (Central) Law Panel, stating that the father is entitled to the return of the *lobola*, less one head for each male child and two heads for each female child born to the couple). Similarly, if a woman is barren but remains with her husband, he is also entitled to either a surrogate woman to bear children for him, or the return of the *lobola*. See NHLAPO, MARRIAGE AND DIVORCE, *supra* note 22, at 83; see also Interview with Reverend Pius Magagula, Catholic Priest, in Manzini, Swaziland (Mar. 8, 2007); Interview with Swazi woman in polygamous marriage, in Sthobela, Manzi Region, Swaziland (Mar. 7, 2007).

310. See Interview with Senator Winnie Magagula, in Ezulwini, Swaziland (Mar. 8, 2007). *C.f.* Interview with Swazi woman in polygamous marriage, in Sthobela, Manzi Region, Swaziland (Mar. 7, 2007) (explaining that if her marriage were to break up, her in-laws could not ask for the return of the *lobola* because she had children); Interview with Ms. Lildiwe Mngomezulu, in Manzini, Swaziland (Mar. 5, 2007) (asserting that because she had two girls and a boy with her late husband, her in-laws could not get the *lobola* back when her husband died).

311. See Nhlapo, *The Legal Situation of Women*, *supra* note 6, at 110 (“[I]t is settled law that she continues to be married to the first man and, if *lobola* had passed, the children she bears in the second union belong to the first man.”). The new man, however, has the opportunity to “break the stomach” of the woman by paying the estranged husband the value of the *lobola*. See Nhlapo, *The Legal Situation of Women*, *supra* note 6, at 118.

312. See MULTIPLE JEOPARDY, *supra* note 92, at 176 (“An interviewee indicated that her parents would not let her leave her marital home because they were still expecting the payment of *emalobola*.”). A

Because lobola is a substantial expense for the average person in Swaziland,³¹³ the parents of the wife are less likely to have the ability or the willingness to return the payment if the parents of the husband demand it. Twelve cows, for example,³¹⁴ cost on average of 18,000 emalangeneni,³¹⁵ while two-thirds of the population survives on less than eighty emalangeneni a month.³¹⁶ Sixty-nine percent of the population lives below the poverty line, and forty percent of Swazis are unemployed.³¹⁷ Furthermore, several years may pass between the payment of lobola and the demand for its return. The Court of Appeal in *Khoza v. Malambe and Another*, for example, noted that “all the original lobola cattle had died, which is not surprising in view of the lapse of well over twenty years between their being handed over to the [family of the bride] and the institution of proceedings by the [husband] for their return.”³¹⁸ Even if the cattle have not died, the parents of the wife may have immediately used the lobola at the time of the wedding to pay for gifts carried by their daughter to her in-laws³¹⁹ or used the cattle to pay lobola for the marriage of one of their sons.³²⁰ As an attorney with WLSA observed, “it’s really impossible to return such things at the end.”³²¹

Women who are abused by their husbands cannot seek redress from law enforcement, and therefore must make the impossible choice of staying in an abusive relationship, or leaving the marital home, returning the lobola, and becoming destitute.³²² Statistics revealing the high incidence rate of violence against women in

woman may also stay in a relationship that she is opposed because she fears “being castigated by her family for brining dishonor to them.” See Alice Armstrong et al., *Uncovering Reality: Excavating Women’s Rights in African Family Law*, 17 INT’L J. OF LAW & FAM. 314, 340 (1993).

313. See Interview with Ms. Thabsile Mavimbela, former Senator, in Ezulwini, Swaziland (Mar. 8, 2007) (“Yet even in our days [*lobola*] is so expensive.”). In twenty percent of the households in neighboring Lesotho, a country that shares many of Swaziland’s customary practices, *lobola* constituted one third of the of the median household income. See T. W. BENNETT, A SOURCEBOOK OF AFRICAN CUSTOMARY LAW FOR SOUTHERN AFRICA 207-11 (1991).
314. According to R. T. Nhlapo, there is a consensus that for the ordinary woman *lobola* should consist of ten cows, in addition to the two *lugge* and *insulamnyembeti* beasts. See NHLAPO, MARRIAGE AND DIVORCE, *supra* note 22, at 49.
315. See Interview with a Swazi woman, in Mbabane, Swaziland (Mar. 5, 2007) (stating that a cow is worth 1,500 emalangeneni).
316. See Michael Wines, *Swaziland: For His Subjects, 5,227 Years’ Wages*, N.Y. TIMES, Dec. 14, 2004, available at <http://query.nytimes.com/gst/fullpage.html?res=990CE5DB1630F937A25751C1A9629C8B63> (stating that two thirds of the population has an average income of less than \$11 a month).
317. See CIA, *The World Factbook: Swaziland* (2007), <https://www.cia.gov/library/publications/the-world-factbook/geos/wz.html> (last visited May 14, 2007).
318. *Malambe and Another v. Khoza* 1970-1976 SLR 375, 383 (1975) (High Ct.) (Swaz.).
319. See Interview with Ms. Thabsile Mavimbela, former Senator, in Ezulwini, Swaziland (Mar. 8, 2007); Interview with Sibongile Dlamini, WLSA Attorney, in Ezulwini, Swaziland (Mar. 4, 2007).
320. See NHLAPO, MARRIAGE AND DIVORCE, *supra* note 22, at 48 (“These cattle are then used to ‘marry’ a bride for one of her brothers, thus bring in another ‘reproductive unit’ and keeping the groups in a state of equilibrium.”).
321. See Interview with Sibongile Dlamini, in Ezulwini, Swaziland (Mar. 4, 2007).
322. See MULTIPLE JEOPARDY, *supra* note 92, at 175 (“Women interviewees in this research felt that they risked finding themselves homeless if they chose to report their abusive husbands. Married wom-

Swaziland indicate that domestic abuse is a real problem, and that many women likely stay in abusive relationships rather than face poverty and shame. SWAGAA asserts that spousal abuse is “prevalent” in Swaziland, observing that the number of women who have used the organization’s counselling services increased from 511 in 1998 to 2,359 in 2001, and that the number of police reports involving violence against women has also increased.³²³ Under Swazi law and custom, domestic abuse is treated as a family issue to be resolved by the family council, and when the judiciary has reluctantly intervened, relief has been inadequate.³²⁴ As an example, a Magistrate Judge admitted that the peace-binding order³²⁵ requiring a person accused of spousal abuse to deposit fifty emalangenji with the court is ineffective: “The order is hardly a deterrent to the abuser, moreover the E50 is way too little. This encourages the abuser to keep beating up the woman sometimes for having sought the order in the first place. This leads to the same people coming now and again for the same order.”³²⁶ Because women cannot seek redress within the courts or the family council, they must make the impossible choice of staying in an abusive relationship or leave the marital home and become destitute.

By perpetuating the Swazi law and custom that permits the husband’s parents to demand the return of lobola and endanger the health and welfare of the woman, the government of Swaziland is not meeting its obligations under the Constitution and international treaties. To come into compliance with the Constitution and international treaties, and to follow the lead of other African countries,³²⁷ the Parliament of Swaziland must enact legislation making lobola an optional and non-returnable gift, and must remove the jurisdiction of courts to hear cases related to the payment or return of lobola. Such legislation would be consistent with section 38(a) of the Constitution which recognizes the right to security of person,³²⁸ and section 28(2) which requires the state to “enhance the welfare of women to

en, thus, could not leave their marital homes even in the midst of serious conflict and violence partly due to their insecurity arising from the country’s land tenure policies.”).

323. See SWAGAA, SPOUSAL ABUSE: A CRITICAL APPRAISAL OF RESPONSES TO SPOUSAL ABUSE IN SWAZILAND 44 (2003); see also U.S. Dep’t of State, Bureau of Democracy, Human Rights, and Labor, *Swaziland Country Reports on Human Rights Practices*, Mar. 8, 2005, available at <http://www.state.gov/g/drl/rls/hrrpt/2005/61595.htm>.

324. See Country Reports on Human Rights Practices, *supra* note 323 (stating that courts have been “unsympathetic to ‘unruly’ or ‘disobedient’ women,” noting that in 2005, a “high judge sentenced a man who had killed his girlfriend to seven years’ imprisonment but suspended five years of the sentence.”).

325. See Criminal Procedure and Evidence Act 67 of 1938, s. 341; see also **Woman and the Law in Southern Africa**, *Report of Seminar on Violence as a Public Health Issue* (Sept. 1997), at 21 (explaining that a woman seeking a peace binding order must swear under oath that a person has acted violently toward her or threatened to injure her or her property, and that the person behaved in a way that will break the peace).

326. See SWAGAA, SPOUSAL ABUSE: A CRITICAL APPRAISAL OF RESPONSES TO SPOUSAL ABUSE IN SWAZILAND 39 (2003).

327. See *supra* notes 245-249 (providing examples of comparative African laws that regulate the payment of lobola).

328. See SWAZ. CONST. 2005 s. 38(a).

enable them to realise their full potential and advancement.”³²⁹ The government of Swaziland is currently violating these constitutional provisions by allowing a custom that forces women to stay in abusive relationships to continue. In addition, Swaziland along with fellow SADC member states, has “strongly condemn[ed] violence against women,” and has committed itself to take legislative and administrative measures to prevent and eradicate domestic violence.³³⁰ Similarly, under international treaties like the ICESCR,³³¹ Swaziland has an obligation to eradicate violence perpetrated by both private and public actors, and therefore must modify those aspects of lobola that cause women to stay in abusive relationships.³³² Swaziland must enact legislation making lobola an optional³³³ and non-returnable gift to protect women and respect their fundamental right to be free from violence.

C. Courts Must Consider Both Financial and Non-Financial Factors To Justly Divide Property Between Spouses at the Break-Up of Marriage

The Parliament of Swaziland must expand the jurisdiction of civil courts to divide property at the break up of all marriages including common-law husband and wife, as well as provide non-discriminatory factors that the courts must consider when distributing community property and separate property. The Parliament has the authority to expand the jurisdiction of civil courts and has done so in the past,³³⁴ and the Constitution calls upon the Parliament to “as soon as practicable after the commencement of this Constitution, enact legislation regulating the property rights of spouses including common-law husband and wife.”³³⁵ Such legislation

329. See *id.* at s. 28(2).

330. See The Prevention and Eradication of Violence Against Women and Children (An addendum to the 1997 Declaration on Gender Development by SADC Heads of State of Government), Sept. 14, 1998, available at http://www.sardc.net/widsaa/sgm/1999/sgm_eradviol.html; see also Women’s Protocol to the African Charter, *supra* note 89, at art. 14(i)(d) (demanding that states parties ensure “the right to self protection and to be protected against sexually transmitted infections, including HIV/AIDS.”).

331. See ICESCR, *supra* note 43, at art. 12(1) (recognizing “the right of everyone to the enjoyment of the highest attainable standard of physical and mental health”); see also Human Rights Committee, *General Recommendation No. 19, Protection of the family, the right to marriage and equality of the spouses*, (39th sess., 1990), para. 8, U.N. HRI\GEN\1\Rev.1 at 28 (1994), available at <http://www.ohchr.org/english/bodies/hrc/comments.htm>.

332. The Committee on Economic, Social and Cultural Rights has mandated that state parties “take appropriate measures to eliminate violence against men and women and act with due diligence to prevent, investigate, mediate, punish and redress acts of violence against them by private actors.” CESCR General Comment 16, *supra* note 181, at para. 27.

333. The South Africa Law Reform Commission (formerly the South Africa Law Commission), the body responsible for harmonizing common law and customary law in South Africa, noted the optional nature of lobola under South African law in a 1997 discussion paper: “[P]ayment of bridewealth would be optional, analogous to the solemnization of marriages by religious rites. This approach to bridewealth is already implicit in the courts’ judgments; it is endorsed both by the KwaZulu and Natal Codes and a general reluctance in customary law to call the status of a union into doubt when payment is not forthcoming.” See South Africa Law Commission, *Discussion Paper 74: Customary Marriages* (Aug. 1997), at 65.

334. See, e.g., Magistrate Courts (Increase of Jurisdiction) Notice 66 of 1988 s. 2 (Swaz.).

335. See SWAZ. CONST. 2005 s. 34(2). South Africa also grants property rights at the break up of com-

must treat all couples equally, whether they are married under civil rights or Swazi law and custom, thereby providing transparency and consistency in application of the law. This would remedy the current problem where spouses married under customary law have no say in the family council on how their property is to be distributed. Expanding the jurisdiction of the civil courts would also resolve the issue that spouses married under civil rites currently have their property rights governed by Swazi law and custom because of the Marriage Act sections 24 and 25.³³⁶

To rectify the current discriminatory division of property at the break up of marriage, the legislation should require judges to follow specific rules in dividing property, starting with a standard 50-50 split of community property,³³⁷ and assigning separate property to the spouse who had exclusive ownership of that property,³³⁸ thereby codifying the current practice under the common law of Swaziland. The legislation must also clearly define what constitutes community property and what is separate property, so as to avoid arbitrary designations by the court and disputes between the spouses.³³⁹ Guided by principles of justice and equity, judges may deviate from these standard divisions by considering specific financial and non-financial factors to compensate women who have contributed to the marital estate. These factors should include, for example, whether one of the spouses had primary childrearing responsibilities during marriage, maintained the separate or community property, or unjustifiably wasted community property to the detriment of the other spouse. Consideration of non-financial factors as well as financial factors is consistent with CEDAW General Recommendation 21:

In some countries, on division of marital property, greater emphasis is placed on financial contributions to property acquired during a marriage, and other contribu-

mon law marriages. See JUNE D. SINCLAIR, *THE LAW OF MARRIAGE* 278-81 (1996) (describing the notion of universal partnerships where there is an implied contract between a couple who live together but are not officially married); see also *Ally v. Dinath* 1984 (2) SA 451 (T) (S. Afr.) (holding that the woman was entitled to half of the property because she had lived with a man for fifteen years and met the requirements of a universal partnership).

336. See The Marriage Act 47 of 1964 ss. 24-25 (Swaz.).

337. See Armstrong & Nhlapo, *LAW AND THE OTHER SEX*, *supra* note 279 at 35. The equal division of community property is standard practice throughout Africa and the world. See, e.g., South Africa, Divorce Act 70 of 1979 s. 20(1) (S. Afr.); Ethiopia, Revised Family Code 165 of 2000 s. 90 (Eth.); CENTER FOR REPRODUCTIVE LAW AND POLICY, *WOMEN OF THE WORLD: LAWS AND POLICIES AFFECTING THEIR REPRODUCTIVE LIVES*, CHAD 103 (2003) available at <http://www.reproductiverights.org/pdf/chad.pdf>; see also Legal Assistance Centre, *Proposals for Divorce Reform in Namibia*, 2000, at 100-04, <http://www.lac.org.na/grap/Pdf/divlawref.pdf> (last visited May 4, 2007) (summarizing the Romano-Germanic model, the Nordic model, and the Anglo-American model to property division at divorce).

338. See Armstrong & Nhlapo, *LAW AND THE OTHER SEX*, *supra* note 279 at 38-40. For examples of other countries that assign separate property to the spouses upon divorce see South Africa, Madagascar, Ethiopia, and New Zealand. See H. R. HAHLO, *THE SOUTH AFRICAN LAW OF HUSBAND AND WIFE* 425-27 (1963) (describing how property is divided at the dissolution of an out of community of property marriage); Madagascar, *Loi 67-0303 Relative aux Régime Matrimoniaux et à la Forme des Testaments* 20 of 1966 art. 57 (Madag.); Ethiopia, *Civil Code Proclamation No. 165 of 1960 art. 692(2)* (Eth.); New Zealand, *Property (Relationships) Act 1976 s. 15A* (N.Z.).

339. See Armstrong & Nhlapo, *LAW AND THE OTHER SEX*, *supra* note 279 at 35 (defining community property under the common law in Swaziland).

tions, such as raising children, caring for elderly relatives and discharging household duties are diminished. Often, such contributions of a non-financial nature by the wife enable the husband to earn an income and increase the assets. Financial and non-financial contributions should be accorded the same weight.³⁴⁰

Countries in Africa and across the world, such as neighbouring South Africa,³⁴¹ Zimbabwe,³⁴² Madagascar,³⁴³ and Ethiopia,³⁴⁴ as well as Commonwealth members Tanzania,³⁴⁵ England,³⁴⁶ New Zealand,³⁴⁷ and Australia,³⁴⁸ require courts to consider financial and non-financial factors when dividing property at divorce. In addition, if part of the estate consists of Swazi Nation Land, the legislation must require the court to consider which spouse wants to keep the land, the location of the plot,³⁴⁹ and other practical implications. The party who is awarded the Swazi Nation Land would compensate the other spouse for any improvements that that spouse made to the land before leaving. Legislation providing guidelines on how civil courts must distribute property at the break up of marriage will protect the equal property rights of women and men, guaranteed under the Constitution and international treaties.

VI. TO ENSURE THAT WOMEN'S RIGHTS ARE FULLY REALIZED, BOTH EFFECTIVE TRAINING INITIATIVES MUST BE IMPLEMENTED, AND MAGISTRATE COURTS MUST HAVE JURISDICTION OVER CLAIMS

Even if women are granted property rights, they will not fully enjoy these rights unless traditional authorities, bank officers, and women themselves are made aware of these rights and women are given effective court remedies for rights violations. The new bodies called village land boards to be created to allocate land should be trained to use non-discriminatory criteria for land allocation and evictions. In addition, banking officers and the general public should be made aware of women's rights. If a woman's property has been unjustly taken from her, she should have

340. See CEDAW General Recommendation 21, *supra* note 138, at para. 32.

341. See Divorce Act 70 of 1979 s. 20(1) (S. Afr.).

342. See Matrimonial Causes Act 33 of 1985 s. 7(4) (Zimb.).

343. See Loi 67-0303 Relative aux Régime Matrimoniaux et à la Forme des Testaments 20 of 1966 art. 57 (Madag.).

344. See Civil Code Proclamation No. 165 of 1960 art. 692(1) (Eth.).

345. See Law of Marriage Act 5 of 1971 art. 114(2)(b) (Tanz.).

346. See Matrimonial Causes Act, 1973, s. 25(f) (Eng.).

347. See Property (Relationships) Act 1976 s. 18 (N.Z.).

348. See Family Law Act, 1975, c. 4 (Austl.).

349. For example, a woman may find it untenable to stay in the marital home after the break up of the marriage if the land is located on the homestead of her in-laws. See Interview with Reverend Pius Magagula, Catholic Priest, in Manzini, Swaziland (Mar. 9, 2007) (explaining that it would not be feasible for a woman to stay on her marital property surrounded by her in-laws after a marriage falls apart, because "she would lead a miserable life"); Telephone Interview with Ms. Lindiwe Khumalo Matse, Divorce Attorney, in Washington, D.C. (Mar. 24, 2007) ("[Y]ou are no longer a member of the family. You'll be living with people who are no longer your relations Once things sour up, and there's a lot of animosity, clearly I suppose you'd want to move away.").

WOMEN'S EQUAL PROPERTY AND LAND RIGHTS

easy access to a court decision in her favor from the Magistrate Courts, which are easily accessible and do not discriminate against women.

A. Training and Education are Necessary to Stop Discrimination Against Women in Land Allocations

Members of the village land board, banking officers, and the general public must be educated so that women's land and property rights are not violated once they are enacted into law. Studies in other countries have found that even after progressive land and property laws are passed, women do not experience the full realization of these rights unless they and interested actors are made aware of the changes in the law. A study in Ghana investigated why even after land rights were implemented by law,³⁵⁰ women still suffered evictions.³⁵¹ The study found the reason to be a lack of knowledge about the law's existence, contents, or claims to rights, especially in rural areas.³⁵² In Nigeria, the government recognized that often women are unable to enforce property rights in a court of law due to ignorance of such rights, lack of financial security and the fear of antagonizing their in-laws.³⁵³ Thus, education and training are fundamental to ensure, for example, that chiefs and husbands do not try to evict women from land or that women know that their rights have been violated when they are not in full control of their property. The government should be receptive to training and education, as one of the five issues the President of the Senate spoke of at the Opening of the Parliament was "Women Empowerment" and a commitment to advancing women in government.³⁵⁴ In addition, the government has implemented gender sensitisation training programs before and can use a similar training framework for any new program.³⁵⁵ For previous workshops, the government increased the budget for gender and development, which shows a commitment to providing funds for such training.

Chiefs and the newly formed village land boards need to be educated on women's ability to access land to fulfill the requirements of the Constitution and international law, which obligate the government to take measures to ensure that women's rights to land are realized. The Constitution states that the Government shall provide opportunities "necessary to enhance the welfare of women to enable them

350. Intestate Succession Law Amendment 264 of 1991 (Ghana).

351. Study by German Development Cooperation (GTZ), available at http://www.fig.net/pub/accra/papers/tso1/tso1_02_ruenger.pdf. The COHRE contact, Sheila Minkah-Premo, was GTZ coordinator.

352. Study by German Development Cooperation (GTZ), available at http://www.fig.net/pub/accra/papers/tso1/tso1_02_ruenger.pdf; see also BEATRICE AKUA DUNCAN, WOMEN IN AGRICULTURE IN GHANA 48 (2004) ("statutory laws were seldom applied to the benefit of communities in the Region, as men and women have little knowledge of existing laws").

353. Married Women's Property Act of 1882 (Nig.).

354. Remarks by the President of the Senate at the State Opening of Parliament of the 8th Parliament on the 9th February 2007, available at <http://www.gov.sz/home.asp?pid=5083>.

355. The Ministry of Home Affairs conducted gender sensitization workshops in 1999 for 28 policy makers, 31 personnel, and 45 panellists. *Replies to Questionnaire on the Implementation of the Beijing Platform for Action*, available at <http://www.un.org/womenwatch/daw/followup/responses/Swaziland.pdf>.

to realise their full potential and advancement.”³⁵⁶ In addition CEDAW obligates States Parties to “take all appropriate measures to eliminate discrimination against women in rural areas in order to ensure, on a basis of equality of men and women, that they participate in and benefit from rural development.”³⁵⁷ The Land Management Board, created by the 2005 Constitution, can oversee the training for chiefs and the village land board.³⁵⁸ Training for chiefs and the village land board can be implemented with funding from the fees for registration forms, which are required in the proposed legislation, and NGOs can be charged with implementing training programs with this funding. The government has worked with NGOs in the past and can easily do so again.³⁵⁹ In addition to educating the village land board, the Land Management Board should be tasked with ensuring that the clerks of the courts are educated on the jurisdiction of the Magistrate Courts and their ability to hear claims related to Swazi Nation Land.³⁶⁰

Training measures for banking officers in the private sector should be implemented with funding by the Ministry of Finance and the Central Bank to ensure that women are not denied loans by banking officers who are unaware of their rights to obtain credit. The Ministry of Finance is charged with “effectively participating in the allocation of financial resources,” and thus would have an interest in loan allocation.³⁶¹ The Central Bank is charged with promoting Swaziland’s economic development, which would include ensuring that women are granted loans to pursue their own development.³⁶² To ensure that banking officials give loans to women, the Ministry of Finance could either fund training programs given by NGOs or create detailed regulations on the principles of non discrimination in distribution of loans in consultation with NGOs. Such regulations could include, for example, that women should obtain a brochure specifying their rights or applications for loans should include a provision specifying that the bank has a non-discrimination policy on grounds of gender, marital status, or marital regime.

356. SWAZ. CONST. 2005 s. 28(2).

357. CEDAW, *supra* note 41, at art. 14(2); *see also* Women’s Protocol to the African Charter, *supra* note 89, at art. 12(i) (“States Parties shall take all appropriate measures to eliminate all forms of discrimination against women and guarantee equal opportunity and access in the sphere of education and training.”).

358. **The new Constitution creates a Land Management Board which would be charged with overseeing land allocation under the proposed legislation.** SWAZ. CONST. 2005 s. 217.

359. *Replies to Questionnaire on the Implementation of the Beijing Platform for Action*, available at <http://www.un.org/womenwatch/daw/followup/responses/Swaziland.pdf>. NGOs and the Ministry of Home Affairs conducted gender sensitization workshops at the “policy making level and grassroots level.” Specifically, the government worked with UNFPA to train policy makers on women’s access to education.

360. Magistrate’s Court Act 66 of 1938 s. 16 (since the clerk of the court can send matters to Swazi court, he or she should know not to send matters related to Swazi Nation Land to Swazi courts and allow such matters to remain in the Magistrate Courts).

361. Swaziland Review 75 (Swazi Review of Commerce and Industry (Pty) Ltd, pub.) (2007).

362. Central Bank of Swaziland official homepage, available at <http://www.centralbank.org.sz/mission.php>.

WOMEN'S EQUAL PROPERTY AND LAND RIGHTS

All people of Swaziland must be educated about women's rights so that women know how to appeal violations of their rights and men know not to violate these rights.³⁶³ The Ministry of Home Affairs, which has funded past training programs, could once again fund a program that could be implemented with help from NGOs.³⁶⁴ Women especially need to be educated on their rights so they know to go to the courts and complain if their rights have been violated. In interviews conducted in Swaziland, many people noted that training is necessary because currently people do not know about the Constitution, and would likely not know about new land and property rights. A WLSA lawyer interviewed stated that "[t]he people are ignorant" as to their rights.³⁶⁵ Another NGO worker stated that "we still need a lot of education ... to empower the women so they know they can use those rights and those laws."³⁶⁶ The benefits of public education are evident from the Swaziland Action Group against Abuse's trainings. People at trainings acknowledged that they learned about their rights and had become sensitive about the rights of others.³⁶⁷

The government is obligated to put forth training education and training initiatives under its Constitution and international law. The Directive Principles of the Constitution state that the government shall "cultivate among all people of Swaziland through various measures including civic education respect for fundamental human rights and freedoms and the dignity of the human person."³⁶⁸ The African Charter includes a provision on the duties of the state to "educate and promote" the rights of charter, which requires that States parties "promote and ensure through teaching, education and publication, the respect of the rights and freedoms contained in the present Charter and to see to it that these freedoms and rights as well as corresponding obligations and duties are understood."³⁶⁹ To ensure that the people of Swaziland understand and respect new women's rights implemented with respect to land and property, the government must implement training and education.

B. Magistrate Courts Should Have Jurisdiction to Hear Claims Regarding Land and Property Violations to Ensure Accessible Justice

Women must have an effective remedy for violations of the rights given to them in legislation, and this includes an effective right of action to the courts when property and land rights are violated. The Magistrate Courts are the appropriate place for this right of action, because they are easily accessible, Parliament is authorized

363. Centre on Housing Rights and Evictions, *A Place to Live: Women's Inheritance Rights in Africa*, available at <http://www.cohre.org/store/attachments/COHRE%20WHRP%20A%20Place%20To%20Live.pdf>.

364. *Replies to Questionnaire on the Implementation of the Beijing Platform for Action*, available at <http://www.un.org/womenwatch/daw/followup/responses/Swaziland.pdf>.

365. Interview with WLSA Legal Officer, in Ezulwini, Swaziland (Mar. 4, 2007).

366. Interview with Ms. Qubile Simelane, Director, Women's Resource Centre, in Ezulwini, Swaziland (Mar. 6, 2007).

367. SWAGAA, Annual Report 19 (2003/2004).

368. SWAZ. CONST. 2005 s. 58(3).

369. African Charter, *supra* note 40, at art. 25.

by the Constitution to increase the jurisdiction of these courts, and the Magistrate Courts are not biased towards women as the traditional courts are.

Magistrate Courts already have jurisdiction over certain civil and criminal matters,³⁷⁰ and the Parliament can expand their jurisdiction to specify that claims regarding Swazi Nation Land, private land, and private property can be heard by Magistrates Courts (according to the Constitution s. 139(1)(b) the judiciary would consist of “such specialised, subordinate ... courts exercising a judicial function as Parliament may by law establish.”) Under the Magistrate Courts Act, the courts’ jurisdiction can be increased.³⁷¹ In fact, under the new Constitution, Parliament is both required to pass laws relating to the property rights of spouses³⁷² and possess authority to pass a law delegating responsibility over land and property rights violations to the Magistrate courts. The Senate—as opposed to the House of Assembly—will specifically have to pass any laws related to Swazi law and custom, however that is the only restriction on the competence of Parliament to regulate custom.³⁷³ The Magistrate Courts are also an appropriate place for adjudication of violations of Swazi Nation Land because they have had jurisdiction over Swazi Nation Land issues in the past.³⁷⁴ Magistrate Courts are more competent than customary courts to deal with women’s rights violations because they are civil bodies created to uphold civil laws and the Constitution. As traditional institutions, customary courts are much less favorable towards women because of the status of women as minors under customary law and because most of the time men preside over matters. Research on customary courts found that “most cases and disputes are arbitrarily determined with hardly any detailed court records to provide precedent for future references.”³⁷⁵ A widow interviewed from a rural area stated that when her in-laws tried to evict her from her land, she tried to go to the chief’s council, a customary body, but they did not help her: “I had problems when I approached the inner council for relief and they didn’t listen to me – maybe because I’m a woman.”³⁷⁶ The allocation of Swazi Nation Land will still be under the jurisdiction of chiefs, in line with tradition and the law;³⁷⁷ however as the allocation and use of Swazi Nation Land become more complex, civil courts should be involved. The issues are more complex than the small penalties and short prison sentences

370. Magistrate’s Court Act 66 of 1938 ss. 15 and 16.

371. The Swazi Courts Act lists specific bars to jurisdiction of Swazi Law and custom Courts but does not list Swazi Nation Land, private land, or moveable property. Swazi Courts Act 80 of 1950 ss. 4, 7, and 9; *see also* Increase Jurisdiction Ordinance 66 of 1988 (allowing Senior Magistrates to increase jurisdiction for criminal matters).

372. SWAZ. CONST. 2005 34(2).

373. *Id.* at s. 115 (Swazi Nation Land can be regulated, just has to go to Senate).

374. Swazi Settlement Act 2 of 1946 s. 6(2) (“Any person failing to leave the areas when required to do so, or coming on to the areas despite such prohibition, shall be guilty of an offence and may be summarily removed from the areas by any policeman acting under a warrant issued under the hand of any judicial officer of a Magistrate’s Court having jurisdiction within the area concerned.”).

375. Charting the Maze, *supra* note 274, at 148.

376. Interview with Fikile Emily Maziya, widow, in Mbabane, Swaziland (Mar. 5, 2007).

377. SWAZ. CONST. 2005 s. 233(8) (stating the powers and functions of chiefs).

WOMEN'S EQUAL PROPERTY AND LAND RIGHTS

that traditional courts can issue. In customary court, a man who is abusing his wife for example, may be forced to pay only a small fee and then can go on abusing his wife.³⁷⁸ In addition, women should have a way to get to the civil courts without going through the hierarchy of traditional court appeals, which require women to go through several levels of customary courts before finally reaching a civil court.³⁷⁹ Customary courts also do not allow parties to have legal counsel, which may be necessary for complex issues.³⁸⁰ Thus, because customary courts are biased against women and involve a complicated hierarchy, they are not the appropriate courts to vindicate their land and property rights.

VII. PROPOSED AMENDMENTS ENSURE JUST AND FAIR LAND AND PROPERTY RIGHTS IN LINE WITH THE SWAZI CONSTITUTION AND HUMAN RIGHTS LAW

A. Swazi's Recently Enacted Constitution Calls for Customary Property Practices to Conform with Non-Discrimination Guarantees

There is a mandate from the Swazi people to change existing customary land allocation practices so that they are harmonised with the equality rights set out in the Constitution. People believe the current land allocation system is unjust for women. A Swazi journalist said “I think there are a lot of women going up and down looking for land but they c[an't get] it because there has to be a man by their side. I think that's unfair.”³⁸¹ People believe Swazis need and should have the right to agricultural land in order to sustain themselves and their families. One Swazi woman believed allocation of Swazi Nation Land to women was “okay because whether they are single shouldn't matter. They have to live on something. So they would use the land to grow something and live”³⁸² Lastly, people believe denying women Swazi Nation Land hurts Swaziland economically. Mr. Albert Lukhele, Secretary of the Land Control Board said “[Swazi Nation Land] should be allocated to every Swazi who needs it and who uses it profitably to develop the country economically. I think every Swazi should be allocated ... Even single people.”³⁸³

A majority of people interviewed believe that discriminatory customary practices should be changed. Ninety-two percent of those interviewed believe that the marital power a husband has over the person and property of his wife in a customary marriage should be abolished. Ninety-four percent of Swazis who were asked

378. Interview with Charles Mavuso, Judicial Commissioner, in Swaziland (Mar. 5, 2007).

379. Nhlapo, *The Legal Situation of Women*, *supra* note 6, at 115; Interview with Charles Mavuso, Judicial Commissioner, in Swaziland (Mar. 5, 2007) (“You need to go straight through the line of the Swazi courts, which is from the court of first instance, Appeal Court, Higher Court of Appeal, and then straight to High Court of Swaziland, that's a civil dispute.”).

380. U.S. Dep't of State, Bureau of Democracy, Human Rights, and Labor, *Country Reports on Human Rights Practices: Swaziland* (Mar. 8, 2005), available at <http://www.state.gov/g/drl/rls/hr-rpt/2005/61595.htm>; Charting the Maze, *supra* note 274, at 147.

381. Interview with Journalist, in Mbabane, Swaziland (Mar. 5, 2007).

382. Interview with Swazi woman in polygamous marriage, in Sthobela, Manzi Region, Swaziland (Mar. 7, 2007).

383. Interview with Albert Lukhele, Secretary, Land Speculation Control Board, in Mbabane, Swaziland (Mar. 9, 2007).

whether women should be allocated Swazi Nation Land believed women should have that right to be allocated land in their own name. And eighty-three percent of people believed that a Village Land Board made up of fifty-percent women should make decisions about Swazi Nation Land allocation rather than allowing one chief full discretion in allocation decisions.³⁸⁴

The customary arguments given to maintain the current discriminatory land allocation system are often based on negative stereotypes and ideas of women's inferiority to men in violation of the Constitution and international law. The Judicial Commissioner, an expert in Swazi law and custom believes that women should not have access to Swazi Nation Land in their own right because they are mentally inferior and weaker than men.³⁸⁵ The Constitution section 19(1) and 211(2) read in conjunction with 20(1-3) condemns discriminatory rationales such as the Commissioner's and protects women's equal right to property by granting all people equality under the law and freedom from discrimination based on gender.³⁸⁶ Moreover, Swaziland's international obligations under CEDAW, discussed further in Part VII.B, require Swaziland to "modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women."³⁸⁷

B. Discriminatory and Harmful Customary Laws Cannot Justify Harming Women and Violating their Core Rights

The government of Swaziland must meet its obligations under the Constitution and international treaties by eliminating Swazi law and custom that violates the fundamental rights of women. As an example, Swazi law and custom currently excludes women from land and property ownership, causing women to be dependent on men for their survival, in violation of women's rights to property, dignity, and equal protection under the law. Under the Constitution and international law, the Parliament must enact legislation eradicating these harmful customary laws and practices. Furthermore, Swaziland cannot use tradition, custom, and cultural practices to justify violating women's basic human rights, like the right to property, dignity, health, and equality under the law.

The Parliament of Swaziland must bring Swazi law and custom into compliance with the rights and protections guaranteed by the Constitution, by reinforcing positive customary laws and eliminating customary laws that discriminate

384. See statistics from Spring 2007 Swaziland interviews on file with the Georgetown International Women's Human Rights Clinic.

385. Interview with Charles Mavuso, Judicial Commissioner, in Swaziland (Mar. 5, 2007) (When asked why women are not allocated Swazi Nation Land the Judicial Commissioner answered that "[W]omen at times are very weak in a way that a man will come and say that 'I love you.' She says 'oh, yes.' He doesn't love you, he wants your assets. She's a female. With very weak brains. They are easily ... they are so easily in fact deceived.").

386. SWAZ. CONST. 2005 s. 19(1) ("A person has a right to own property either alone or in association with others."); SWAZ. CONST. 2005 s. 211(2) ("[A] citizen of Swaziland, without regard to gender, shall have equal access to land for normal domestic purposes.").

387. CEDAW, *supra*, note 41, at art. 5(a).

against and harm women.³⁸⁸ The Constitution in section 252(2)³⁸⁹ incorporates as binding law Swazi law and custom, but section 2(1) declares that the Constitution is the supreme law of Swaziland, and that all laws inconsistent with constitutional provisions shall “to the extent of the inconsistency, be void.”³⁹⁰ As a result, the Constitution incorporates only positive customary laws that comply with constitutional provisions. Section 252(3) underscores that customs inconsistent with the Constitution or a statute are not incorporated into law, and goes on to state that customs “repugnant to natural justice or morality or general principles of humanity” are also unenforceable.³⁹¹ Similarly, under the Constitution chiefs may also only enforce a “custom, tradition, practice or usage which is just and not discriminatory.”³⁹² Furthermore, women are specifically accorded by the Constitution the right to refrain from participating in a custom “to which [they are] in conscience opposed.”³⁹³ This provision, however, only gives women the right to refrain from participating in customs, but does not give women the right to participate in customs which currently exclude them. For example, a woman may choose to not accept lobola when she gets married because she opposes the custom that lobola represents the purchase of her labor and children. On the other hand, a woman cannot refrain from participating in the allocation of Swazi Nation Land because she is already excluded from the allocation process on the basis of her gender. The Constitution does not identify specific conflicts between constitutional provisions and Swazi law and custom, giving the Parliament wide latitude and flexibility. Parliament must exercise its authority to regulate custom³⁹⁴ and make laws,³⁹⁵ and enact legislation that eliminates any and all customary laws and practices that harm and discriminate against women.³⁹⁶

388. See, e.g., *id.* at Preamble (noting that it is “necessary to blend the *good* institutions of traditional Law and custom with those of an open and democratic society”) (emphasis added). The Constitution of South Africa also incorporates customary law, so long the customary rules do not conflict with the Constitution. See, e.g., *Bhe and Others v. the Magistrate, Khayelitsha and Others*, 2005 (1) BCLR 1 (CC) at 54 para. 143 (S. Afr.) (eliminating customary rules of male primogeniture because they discriminated against women and illegitimate children, in violation of the rights to dignity, equality, and the rights of children guaranteed by the Constitution).

389. See SWAZ. CONST. 2005 s. 252(2) (“Subject to the provisions of this Constitution, the principles of Swazi customary law (Swazi law and custom) are hereby recognized and adopted and shall be applied and enforced as part of the law of Swaziland.”).

390. See *id.* at s. 2(1) (“This Constitution is the supreme law of Swaziland and if any other law is inconsistent with this Constitution that other law shall, to the extent of the inconsistency, be void.”).

391. See *id.* at s. 252(3).

392. See *id.* at s. 233(9).

393. See *id.* at s. 28(3).

394. See *id.* at s. 252(4) (“Parliament may... (b) regulate the manner in which or the purpose for which custom may be recognised, applied or enforced; and (c) provide for the resolution of conflicts of customs or conflicts of personal laws.”).

395. See SWAZ. CONST. 2005 s. 106 (“Subject to the provisions of this Constitution (a) the supreme legislative authority of Swaziland vests in the King-in-Parliament; (b) the King and Parliament may make laws for the peace, order and good government of Swaziland.”).

396. Legislation is preferable to case by case litigation, because it does not require litigants to bring a dispute to court, ensures consistency in the law, and involves democratic debate and consensus

Under binding international and regional treaties, Swaziland may not invoke Swazi law and custom to excuse domestic laws that violate the rights of women, and must instead eliminate these harmful customary laws and practices. CEDAW requires that Swaziland “take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women,”³⁹⁷ and Article 5(a) demands that states parties “modify the social and cultural patterns of conduct ... with a view to achieving the elimination of prejudices and customary [practices]... based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women.”³⁹⁸ The Parliament of Swaziland must therefore modify Swazi law and custom governing the allocation of Swazi Nation Land, for example, because the customary law violates CEDAW by making a woman inferior to an infant boy on the basis of gender.³⁹⁹ Similarly, Article 3⁴⁰⁰ of the ICESCR as interpreted in General Comment 16,⁴⁰¹ and Articles 1(3)⁴⁰² and 21⁴⁰³ of the CRC also require Swaziland to eliminate the discriminatory aspects of Swazi law and custom.⁴⁰⁴ Moreover, the HRC in General Comment 28 instructs that “[s]tates parties should ensure that traditional, historical, religious or cultural attitudes are not used to justify

building. *See, e.g.*, *Bhe and Others v. the Magistrate, Khayelitsha and Others*, 2005 (1) BCLR 1 (CC) at 54 para. 143 (S. Afr.) (observing that “the legislature is the best position to deal with the situation and to safeguard the rights that have been violated” and suggesting that lower courts would tend to follow the formal rules of customary law as established by precedent if a case by case approach were taken).

397. *See* CEDAW, *supra* note 41, at art. 2(f).

398. *See id.* at 5(a); CEDAW, *supra* note 41, at art. 5(a).

399. Customary law holds that women are inferior to men, thereby violating CEDAW, because a chief will allocate land to a woman with a male child, but not to a single woman with no children or with only female children. *See supra* Part IV.

400. *See* ICESCR, *supra* note 43, at art. 3 (“The States Parties to the present Covenant undertake to ensure the equal right of men and women to the enjoyment of all civil and political rights set forth in the present Covenant.”).

401. *See* CESCR General Comment 16, *supra* note 181, at para. 19 (“The obligation to protect requires States parties to take steps aimed directly at the elimination of prejudices, customary and all other practices that perpetuate the notion of inferiority or superiority of either of the sexes, and stereotyped roles for men and women.”).

402. *See* CRC, *supra* note 109, art. 1(3) (“Any custom, tradition, cultural or religious practice that is inconsistent with the rights, duties and obligations contained in the present Charter shall to the extent of such inconsistency be discouraged.”).

403. *See id.* at 21 (“States Parties to the present Charter shall take all appropriate measures to eliminate harmful social and cultural practices affecting the welfare, dignity, normal growth and development of the child and in particular: (b) those customs and practices discriminatory to the child on the grounds of sex or other status.”).

404. Similarly, as a member of the Southern African Development Community (SADC) which is comprised of neighboring states with similar cultural ties, Swaziland has committed itself in the SADC Declaration on Gender and Development to “repealing and reforming all laws, amending Constitutions and changing *social practices* which will still subject women to discrimination.” *See* SADC Declaration on Gender and Development s. (H)(iv) (1997), *available at* http://www.sardc.net/widsaa/sgm/1999/sgm_genderdec.html.

WOMEN'S EQUAL PROPERTY AND LAND RIGHTS

violations” of human rights guaranteed by the treaty.⁴⁰⁵ As a result, Swaziland must modify or eliminate customary laws and practice that govern the property rights of women and that violate the Constitution or binding international and regional treaties.

VIII. EQUAL LAND AND PROPERTY LAWS WILL PROTECT THE HEALTH AND ECONOMY OF THE NATION

Enhancing women's participation in development through non-discriminatory property and land laws is essential not only for compliance with Swaziland's constitutional and international obligations but also for reducing poverty and the spread of HIV/AIDS.

A. Laws and Practices Barring Women from Accessing Property Increase the Entire Country's Vulnerability to HIV

Women's lack of access and rights to property exacerbate the country's high HIV/AIDS rate by sustaining their economic dependence on men and by driving economically deprived women to have multiple sex partners. By threatening the lives of its people with increased risks of contracting HIV/AIDS, the property laws and practices of Swaziland violate their right to life as protected by the country's own Constitution,⁴⁰⁶ the African Charter,⁴⁰⁷ and the ICCPR,⁴⁰⁸ as well as their right to health as provided for in the African Charter⁴⁰⁹ and the ICESCR.⁴¹⁰ The

405. See HRC General Comment 28, *supra* 139, at para. 5; see also *id.* at para. 32 (“[C]ulture and religion do not authorize any State, group or person to violate the right to the equal enjoyment by women of any Covenant rights, including the right to equal protection of the law.”); Human Rights Committee, *General Comment No. 31, Nature of the General Legal Obligation Imposed on States Parties to the Covenant* (Eightieth session, 2004), U.N. Doc. CCPR/C/21/Rev.1/Add.13 at para. 14 (2004), available at [http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/CCPR.C.21.Rev.1.Add.13.En?Opendocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/CCPR.C.21.Rev.1.Add.13.En?Opendocument) (“A failure to comply with this obligation cannot be justified by reference to political, social, cultural or economic considerations within the State.”). The Vienna Convention on the Law of Treaties, which many non-signatory states consider to be binding customary international law, broadly declares that “[a] party may not invoke the provisions of its internal law as justification for its failure to perform a treaty.” See Vienna Convention on the Law of Treaties, May 23, 1969, at art. 27, available at http://untreaty.un.org/ilc/texts/instruments/english/conventions/1_1_1969.pdf.

406. SWAZ. CONST. 2005 ss. 14(1)(a), 15, 38(a).

407. African Charter, *supra* note 40, at art. 4 (“Human beings are inviolable. Every human being shall be entitled to respect for his life and the integrity of his person. No one may be arbitrarily deprived of this right.”).

408. ICCPR, *supra* note 42, at art. 6 (“Every human being has the inherent right to life. This right shall be protected by law.”).

409. African Charter, *supra* note 40, at art. 16 (“1. Every individual shall have the right to enjoy the best attainable state of physical and mental health. 2. States Parties to the present Charter shall take the necessary measures to protect the health of their people...”).

410. ICESCR, *supra* note 43, at art. 3 (“The States Parties to the present Covenant recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.”); see also Women's Protocol to the African Charter, *supra* note 89, at art. 14(1)(d) (“States Parties shall ensure that the right to health of women, including sexual and reproductive health is respected and promoted. This includes the right to self protection and to be protected against sexually transmitted infections, including HIV/AIDS.”).

endemic now poses the most menacing threat to the country's health; Swaziland has the world's highest adult prevalence of HIV/AIDS, with 33.4% of the adult population currently living with the virus.⁴¹¹ As a result, the average life expectancy of an adult Swazi has fallen from 50.8 years in 2000⁴¹² to 32.23 years in 2007.⁴¹³ Women are especially at risk; according to UNICEF, female teens are contracting the virus at three times the rate of young males.⁴¹⁴

Economic Dependence and Marital Power

The marital power, along with discriminatory and exclusionary property and land laws, renders women economically dependent on their husbands, thereby increasing the risk of contracting the HIV/AIDS virus. Because so many women can only hope for access to property through their husbands, even if a wife knows that her husband is HIV-positive, she may have very little power to refuse sex with him or to protect herself during sex. A 2000 World Bank study of Swaziland noted that “[g]iven their subordinate socio-economic and sexual status, many women find it difficult if not impossible to demand safer sex practices.”⁴¹⁵ Many women feel bound to their husbands, both economically and socially. According to one study, “in many of the southern African cultures, women are conditioned to be submissive to their male partners and give them sex when they demand it, regardless of whether a condom is used.”⁴¹⁶ As such, many married women cannot control the circumstances under which sex takes place and are often unable to negotiate condom use. In a study conducted by Physicians for Human Rights involving a sample size of 788 people, 34% of Swazi women, as opposed to only 4% of Swazi men, admitted to not using a condom because their partner refused.⁴¹⁷ Additionally, 40% of Swazi women said that their partner alone made the decision to have sex, while only 3% of the Swazi men stated the same.⁴¹⁸ As a WLSA attorney remarked, “They will agree on what the man has to say. Even if the man would actually say, let’s have unprotected sex, they will say okay. This man feeds me, I’ve got

411. United Nations Programme on HIV/AIDS, *2006 AIDS Epidemic Update: Sub-Saharan Africa* (Dec. 2006) at 13, available at http://data.unaids.org/pub/EpiReport/2006/04-Sub_Saharan_Africa_2006_EpiUpdate_eng.pdf (last visited May 3, 2007).

412. United Nations Development Programme, *Human Development Report 2002: Deepening democracy in a fragmented world* (2002) at 190, available at <http://hdr.undp.org/reports/global/2002/en/pdf/complete.pdf> (last visited May 14, 2007).

413. CIA, *The World Factbook: Swaziland* (2007), <https://www.cia.gov/library/publications/the-world-factbook/geos/wz.html> (last visited May 14, 2007).

414. UNICEF, Swaziland Statistics, http://www.unicef.org/infobycountry/swaziland_statistics.html#25 (last visited May 3, 2007).

415. Human Development Group, *supra* note 59, at 30.

416. Family Health International, Barriers to HIV Prevention (2007), available at <http://www.fhi.org/en/HIVAIDS/pub/guide/corrhope/corrbar.htm> (last visited May 3, 2007).

417. Karen Leiter, Senior Research Associate Physicians for Human Rights, Epidemic of Inequality in Botswana and Swaziland: Evidence of the Effects of Gender Inequality, Stigma and Discrimination and Implications for US Policy, Presentation at Global Health Council (May 2, 2007).

418. *Id.*

no other alternative, so I've got to do what he says."⁴¹⁹ More and more women in Swaziland and throughout southern Africa are contracting the HIV/AIDS virus during marriages to HIV-positive men.⁴²⁰

Economic Powerlessness and Multiple Sex Partners

Because Swaziland's laws and practices serve to severely curtail women's access to property, often a woman's only hope of supporting herself and her family is by engaging in relationships that involve multiple sex partners. Though such "multiple, concurrent sexual partnerships"⁴²¹ is the main factor behind the HIV/AIDS epidemic in Swaziland,⁴²² such practices are increasing in Swaziland. The practice of polygamy, for example, is prevalent in Swazi society and is exacerbated by the fact that many women can only obtain land through a husband. Even though, according to Ms. Dumsile Nhleko, "a majority of women"⁴²³ dislike the practice, societal and economic forces together pressure women into entering polygamous unions. As one woman stated to the Integrated Regional Information Networks, "Why do some girls marry into polygamy?... Some do it to get out of poverty, just to keep from starving."⁴²⁴ In this way, women's lack of property rights and economic self-sufficiency perpetuate the practice of polygamy, which in turn increases the HIV/AIDS rate in the country. Researchers, health workers and even the King's AIDS Council have all noted that "traditional practices—including ... polygamy... are fuelling the spread of HIV"⁴²⁵ and are intimately linked to the comparative powerlessness of women in Swazi culture.⁴²⁶

419. Interview with Albert Lukhele, Secretary, Land Speculation Control Board, in Mbabane, Swaziland (Mar. 9, 2007).

420. See Media Brief, Human Sciences Research Council, Gender and HIV/AIDS: Focus on Southern Africa (2004), available at http://www.hsrc.ac.za/Media_Release-216.phtml (last visited May 3, 2007) ("Gender inequality in socio-economic status is one of the most significant causes of the increasing rate of HIV infection. Among females the subordinate role accorded women in the family and in public life contributes to women's vulnerability. The marital power bestowed upon men in some societies makes it difficult for women to negotiate for safer sex.").

421. United States Agency for International Development and Centers for Disease Control and Prevention, US Government Rapid Appraisal for HIV/AIDS Program Expansion: Swaziland (Aug. 21-30, 2004) at 10, available at http://pdf.dec.org/pdf_docs/Pdacf094.pdf (last visited May 3, 2007).

422. *Id.*

423. Interview with Dumsile Nhleko, married woman, in Lubombo, Swaziland (Mar. 7, 2007). Ms. Nhleko went on to explain that the majority of women dislike polygamy because "children are not properly maintained, the wives are also not taken good care of, and the love, you know, you have to share. And you find that the husband does not spend time with you."

424. Integrated Regional Information Networks for the UN Office for the Coordination of Humanitarian Affairs, Swaziland: Facing the Culture Shock of Monogamy (Jul. 21, 2006), available at <http://www.irinnews.org/report.aspx?reportid=59716> (last visited May 3, 2007).

425. Michael M. Phillips, *Tradition's Toll: African Monarchy Sparks a Debate Over AIDS and Sex*, WALL ST. J., Dec. 20, 2006, at A1.

426. *Id.*; see Interview with Reverend Pius Magagula, Catholic Priest, in Manzini, Swaziland (Mar. 9, 2007).

The ban on Swazi Nation Land allocations to females⁴²⁷ and women's inability to purchase land due to legal and socio-economic factors (see *supra* sections II.A, II.B, and III.B) force many women to engage in transactional sex⁴²⁸ or commercial sex (i.e., prostitution).⁴²⁹ Because women have fewer economic options in the country due to their inferior status and their lack of property and land rights, women are forced to engage in transactional sex for food, school fees, a place to live, and other basic necessities.⁴³⁰

Commercial sex workers have one of the highest rates of HIV infection when compared to the general population and other high-risk populations.⁴³¹ According to the Gender Coordinator in the Ministry of Home Affairs, prostitution is "increasing in Swaziland... People just want to make a living. It's really increasing, so it exposes them to HIV/AIDS."⁴³² These women are thus forced to choose between living in abject poverty and resorting to prostitution. According to a World Bank study, "the 1997 PPA... found that during household economic crises, some women reported exchanging sex for food, increasing susceptibility to HIV infection."⁴³³ Because many women enter into polygamous marriages and engage in transactional or commercial sex in order to survive⁴³⁴ and to have a home, land, or property which the laws prevent them from obtaining independently, removing the legal barriers to women's economic development, the government would not only be promoting equality, but also the health of its people.

If given the option, many women would choose to own property or have Swazi Nation Land, on which they could both live and make a living for themselves and/or their families. One woman working as shop assistant and renting an apartment

427. This is a very significant factor, especially given that Swazi Nation Land makes up approximately 75% of Swaziland. THE SWAZILAND ENVIRONMENT ACTION PLAN ch. 33 (Ministry of Natural Resources), available at http://www.ecs.co.sz/seap/projects_seap_chapter33.htm (Statistics on land tenure types in Swaziland provided in the Plan are current as of 1994).

428. The term "transactional sex" refers to the exchanging of sex for basic necessities. UNAIDS, *Factsheet: Women and AIDS - A Growing Challenge* (Nov. 23, 2004), available at http://siteresources.worldbank.org/INTEAPREGTOPHIVAIDS/Resources/fs_women_en_pdf (last visited May 3, 2007). The Australian government defines transactional sex as becoming someone's partner to avoid poverty. Australian Aid, Jacqueline Gordon: Changing Attitudes to Abuse and Women's Rights (2005), available at <http://www.ausaid.gov.au/partner/vic.cfm> (last visited May 3, 2007).

429. Interview with Albert Lukhele, Secretary, Land Control Board, in Mbabane, Swaziland (Mar. 9, 2007).

430. Karen Leiter, Senior Research Associate Physicians for Human Rights, Epidemic of Inequality in Botswana and Swaziland: Evidence of the Effects of Gender Inequity, Stigma and Discrimination and Implications for US Policy, Presentation at Global Health Council (May 2, 2007) ("Data suggests that sexual risk-taking for women is often not chosen but compelled.").

431. Academy for Educational Development, *Women who Engage in Transactional Sex and Mobile Populations in Southern Africa, Literature Review* (Oct. 26, 2004).

432. Interview with Ms. Nonhlanhla Zanele Dlamini, Ministry of Home Affairs, Gender Coordinator, in Mbabane, Swaziland (Mar. 5, 2007).

433. Human Development Group, *supra* note 59, at 30.

434. One study showed that food insufficiency predicted sexual risk-taking for women in Swaziland. Physicians for Human Rights, Presentation on the Relation Between Gender Discriminatory Beliefs and Realities and HIV/AIDS in Swaziland and Botswana (May 2007) at slide 9.

WOMEN'S EQUAL PROPERTY AND LAND RIGHTS

in the city would prefer to make her living on Swazi Nation Land but is unable to, solely because she is a woman with only daughters, and Swazi Nation Land can only be allocated to males.⁴³⁵ If women were able to access Swazi Nation Land independently or had the resources and legal ability with which to access private property on their own, many women would feel less bound to the will of their husband on the issue of unprotected sex, be less likely to enter into polygamous marriages, and would not resort to transactional or commercial sex. It is now more urgent than ever for Parliament to take action and change its property and land laws regarding women, given the role that women's lack of property rights plays in increasing the country's HIV/AIDS rate.

B. Women's Lack of Land and Property Rights Undercuts Swaziland's Economic Development

Equalizing Swaziland's land and property laws and practices is critical to improving the country's economy, a fact made all the more urgent given that 69% of the population currently lives below the poverty line,⁴³⁶ that the number of female-headed households is on the rise,⁴³⁷ and that Swaziland is under an obligation to support its people's rights to development and to an adequate standard of living. Women need full access to land and property to contribute more to the economy as fully productive members and to better provide for their families as primary caregivers, thereby reducing overall poverty rates.

The Role of Women as Indispensable Productive Contributors

Swaziland must grant women equal access to land and property to enable them to reach their full potential in contributing productively to the economy. Because women who "do not own property are far less likely to take economic risks and realize their full economic potential ... guaranteeing women's property and inheritance rights must be part of any development agenda."⁴³⁸ Women already provide essential contributions to the economy. They produce 80 percent of the food in sub-Saharan Africa,⁴³⁹ bear most of the responsibility for household food security, make up much of the work force, and usually maintain the homestead.⁴⁴⁰ Yet, because of women's limited access to land, property, and other "resources and opportunities ... their productivity remains low relative to their potential."⁴⁴¹

435. Interview with Sihlengiwe Dlamini, law student, at Univ. of Swaziland, Swaziland (Mar. 6, 2007).

436. CIA, *The World Factbook: Swaziland* (2007), <https://www.cia.gov/library/publications/the-world-factbook/geos/wz.html> (last visited May 14, 2007).

437. Winnie S. Madonsela, *The Impact of Trade Liberalisation in the Agricultural Sector on African Women: Links with Food Security and Sustainable Livelihoods* (Gender and Trade Network in Africa, Sept. 2002) at 8, available at http://www.igtn.org/pdfs/65_Madonselago2.pdf (last visited May 14, 2007).

438. International Center for Research on Women, *Property Ownership for Women Enriches, Empowers and Protects: Toward Achieving the Third Millennium Development Goal to Promote Gender Equality and Empower Women* (2005) at 2.

439. Erwin Northoff, *Food: Women Farmers are Invisible Actors in Hunger Drama*, WORLD NEWS INTER PRESS SERVICE, Oct. 14, 1998, available at <http://www.sunsonline.org/trade/process/followup/1998/10140498.htm>.

440. U.N., 1999 WORLD SURVEY ON THE ROLE OF WOMEN IN DEVELOPMENT: GLOBALIZATION, GENDER AND WORK xii (1999).

441. The World Bank, *Why Do Gender Analysis?*, June 13, 2004, available at <http://web.worldbank>.

The government is aware that granting women equal land and property rights is essential in development; it must act upon this knowledge and change its discriminatory laws for the sake of the economy. As the Ministry of Home Affairs recognized, “the issue of equitable access and control over economic resources is crucial to the attainment of sustainable economic development ... Most crucial in this respect is the issue of control and ownership to land and capital particularly by ... women.”⁴⁴² The fact that women lack fundamental access and rights to property means that this entire segment of the Swazi population is unable to contribute meaningfully to the growth and development of Swaziland, as the Ministry of Economic Planning and Development has acknowledged:

Considering that women in Swaziland constitute 53% of the total population, it is unfortunate that practices inhibit them from participating in the development process, denying Swaziland the potential output of more than 50% of its human resource. Women have the potential to substantially contribute to national income if they have equal opportunities.⁴⁴³

The Ministry of Economic Planning and Development has further noted that women’s “minority status ... denies them access to assets and productive resources [and is one of the factors that] trap the poor in poverty and militate against recovery.”⁴⁴⁴

The laws of Swaziland must change to recognise the definite correlation between empowering women and increasing their access to property on one hand and improving the economy of Swaziland on the other. As UNFPA Assistant Representative Ms. Marjorie Mavuso stated, “[E]nsuring that women are empowered ... [would] improve the poverty situation ... It’s very important that [Swazi women] be part and parcel of this empowerment against poverty.”⁴⁴⁵ For example, denying women direct access to loans undermines the development of the country as a whole. As a bank loan officer stated, women “are actually the pillars of the economy... If you look at area level, home level, even at work level, for that matter, you see they put a lot of effort towards the upbringing of the country.”⁴⁴⁶

By eliminating the gender inequalities in its land and property laws, Swaziland will not only substantially improve its chances of economic improvement but

org/WBSITE/EXTERNAL/TOPICS/EXTGENDER/o,, contentMDK:20193047-pagePK:210058-piPK:210062-theSitePK:336868,oo.html.

442. Swaziland Country Report, Sub-Regional Review on Implementation of the Beijing Platform for Action (1995) and the Outcome of the Twenty-Third Special Session of the General Assembly (2000) (April 2004) at 6.

443. THE DRAFT POVERTY REDUCTION STRATEGY AND ACTION PLAN at 165 (Ministry of Economic Planning and Development Poverty Reduction Task Force, Mar. 2005).

444. *Id.*

445. Interview with Ms. Marjorie B. Mavuso, Assistant Representative, United Nations Population Fund in Mbabane, Swaziland (Mar. 5, 2007); see Interview with a U.N. staff member, in Mbabane, Swaziland (Mar. 5, 2007) (“If women are allowed to own property, that would ensure the development process.”).

446. Interview with Simon Masima, SwaziBank Housing Officer, in Mbabane, Swaziland (Mar. 6, 2007).

also come into compliance with its legal obligations and directives. Swaziland's constitutional Directive Principles of State Policy provide valuable guidance to Parliament⁴⁴⁷ in this area, directing the government to "take all necessary action to ensure that the national economy is managed in such a manner as to maximise the rate of economic development."⁴⁴⁸ The Directive Principle goes even further in recognizing as an economic objective "afford[ing] equality of economic opportunity to all citizens and, in particular...[taking] necessary steps so as to ensure the full integration of women into the mainstream of economic development."⁴⁴⁹ Swaziland's international obligations also require changing the laws to allow its women to participate in the development of the economy. For example, the African Charter guarantees "all peoples ... the right to their economic ... development."⁴⁵⁰ While CEDAW recognizes that "the full and complete development of a country... require[s] the maximum participation of women on equal terms with men in all fields,"⁴⁵¹ Swaziland will be taking a substantial step forward in guaranteeing all of its people's right to development by amending its property and land laws to eliminate gender inequalities and recognising women's immense potential to contribute more to the economy.

The Role of Women as Primary Caregivers

Because female-headed households are increasing in Swaziland, granting women equal property and land rights would allow them to better contribute to their own households, bring themselves out of poverty, and thereby reduce the poverty rate.⁴⁵² When the responsibility of caring for a family falls on an adult woman, the country's land and property laws acutely hamper her ability to do so. The Ministry of Home Affairs has acknowledged that "[l]ack of access and control over resources has, among other factors, culminated in a relatively high incidence of poverty in the country. The gender perspective in this respect depicts that women are more vulnerable than men resulting in 'feminisation of poverty.'"⁴⁵³ Because women have very limited access to property under Swaziland's legal regime, female-headed households find themselves disproportionately suffering economically, as opposed to households that include adult men, who have the most access and rights to land, property, and resources and thus possess the highest level of economic abilities. According to a World Bank study, *de facto* female-headed

447. SWAZ. CONST. 2005 s. 56(1) ("The Directive Principles of State Policy contained in this Chapter shall guide all organs and agencies of the State, citizens, organisations and other bodies and persons in applying or interpreting this Constitution or any other law and in taking and implementing any policy decisions, for the establishment of a just, free and democratic society.").

448. *Id.* at s. 59(1).

449. *Id.* at s. 59(5).

450. African Charter, *supra* note 40, at art. 22(1); *see also* African Charter, Preamble ("Convinced that it is henceforth essential to pay a particular attention to the right to development") (emphasis in original).

451. CEDAW, *supra* note 41, at Preamble.

452. THE DRAFT POVERTY REDUCTION STRATEGY AND ACTION PLAN at 165 (Ministry of Economic Planning and Development Poverty Reduction Task Force, Mar. 2005).

453. Swaziland Country Report, *Sub-Regional Review on Implementation of the Beijing Platform for Action (1995) and the Outcome of the Twenty-Third Special Session of the General Assembly (2000)* (April 2004) at 6.

households⁴⁵⁴ “have the highest core poverty and poverty levels of any household type. Furthermore, the share of de facto female-headed households among the core poor and poor is higher than their share of the population.”⁴⁵⁵

The economic harm that Swaziland’s land and property laws inflict is even more pronounced when the burden of caring for a family falls on a female child, who, by nature of her gender, has little access to or control of land, property, and other resources. An NGO staff member stated that when a household is headed by a child, the responsibility usually falls on girls: “I think it’s our culture—a girl is expected to cook, take care of the family... [M]aybe the girl is 5 and the boy child is 15, but the girl is expected to provide something so that they can eat.”⁴⁵⁶ Such a girl would have no direct access to land (though her brothers would) and could easily lose out on opportunities to advance herself through an education, and therefore find herself with even more limited prospects with regard to property and economic resources upon reaching adulthood. Parliament must follow through on its obligation under section 29(7)(d) of the Constitution to “enact laws necessary to ensure that children receive special protection against exposure to physical and moral hazards within and outside the family,”⁴⁵⁷ as well as its duty under CRC Article 3(2) “to ensure the child such protection and care as is necessary for his or her well-being,”⁴⁵⁸ and change its land and property laws to protect the welfare of children in female-headed households as well as the welfare of children who are supporting families themselves.

Swaziland’s unequal land and property laws also violate its people’s right to an adequate standard of living as enumerated in the Constitution,⁴⁵⁹ the ICESCR,⁴⁶⁰ CEDAW,⁴⁶¹ and the CRC,⁴⁶² and to the protection of their families as guaranteed

454. A *de facto* female-headed household is one where a male co-head is nonresident for large parts of the year. A *de jure* female-headed household is one where the female head is divorced, abandoned, widowed, or single. Human Development Group, *supra* note 59, at 29.

455. *Id.* at 29.

456. Interview with an Bathobile Khumalo, WLSA Attorney, in Ezulwini, Swaziland (Mar. 4, 2007).

457. SWAZ. CONST. 2005 s. 29(7)(d).

458. CRC, *supra* note 109, art. 3(2).

459. See SWAZ. CONST. 2005 s. 59(1) (“The State shall take all necessary action to...provide adequate means of livelihood...to the needy.”); SWAZ. CONST. 2005 s. 28(2) (“Subject to the availability of resources, the Government shall provide facilities and opportunities necessary to enhance the welfare of women to enable them to realise their full potential and advancement.”); SWAZ. CONST. 2005 s. 29(3) (“The child has the right to be properly cared for and brought up by parents or other lawful authority in place of parents.”).

460. ICESCR, *supra* note 43, at art. II(I) (“The States Parties to the present Covenant recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions.”).

461. CEDAW, *supra* note 41, at art. 3. (“States Parties shall take in all fields, in particular in the political, social, economic and cultural fields, all appropriate measures, including legislation, to ensure the full development and advancement of women, for the purpose of guaranteeing them the exercise and enjoyment of human rights and fundamental freedoms on a basis of equality with men.”).

462. CRC, *supra* note 109, art. 27(1) (“States Parties recognize the right of every child to a standard of living adequate for the child’s physical, mental, spiritual, moral and social development.”).

WOMEN'S EQUAL PROPERTY AND LAND RIGHTS

by the Constitution,⁴⁶³ African Charter,⁴⁶⁴ and the ICCPR,⁴⁶⁵ because they interfere in the ability of women who are primary caregivers to care for themselves or their children and dependents, as well as the nation's capacity to bring itself out of poverty. As HIV/AIDS continues to ravage the families and communities of Swaziland, the burden of caring for ill family members rests mainly with women and girls. Such women find themselves even worse off, losing the ability to provide their children and themselves with an adequate standard of living and plunging the nation even further into poverty.

X. CONCLUSION

Swaziland's outdated land and property laws are hurting its women, its children, and its people as a whole. Its government has the chance to improve the lives of all the people within its borders and must follow through on its promise to protect the Swazi nation. The women of Swaziland are strong and resourceful, despite all the obstacles placed before them. It is high time that Parliament remove these obstacles and allow women to become fully equal members of society and participants in the economy.

APPENDIX: ANNOTATED VERSION OF THE PROPERTY AND LAND EQUALITY BILL, 2009

PROPOSED PROPERTY AND LAND EQUALITY BILL, 2009

Date of commencement: [date]

Date of assent: [date]

An Act to grant women equal property and land rights.

Arrangement of chapters

Preamble

Part I – Interpretation

Chapter 1: Interpretation

Part II – Application

Chapter 2: Application of Act to all persons

Part III – Equal Property and Land Rights

Chapter 3: Equal rights to property and land

Chapter 4: Abolition of marital power

463. SWAZ. CONST. 2005 s. 27(3) (“The family is the natural and fundamental unit of society and is entitled to protection by the State.”); SWAZ. CONST. 2005 s. 60(5) (“The State shall make reasonable provision for the welfare and maintenance of the aged and shall protect the family and recognise the significant role of the family in society.”).

464. African Charter, *supra* note 40, at art. 18(1) (“The family shall be the natural unit and basis of society. It shall be protected by the State which shall take care of its physical health...”).

465. HRC General Comment 19, *supra* note 108, at para. 8 (“[T]he Committee emphasizes that, when a group of persons is regarded as a family under the legislation and practice of a State, it must be given the protection referred to in article 23.”).

Chapter 5: Equal property rights of spouses

Chapter 6: Lobola is an optional and non-returnable gift

Part IV – Swazi Nation Land

Chapter 7: Non-discrimination and equality

Chapter 8: Establishment of village land board

Chapter 9: Village land board functions

Chapter 10: Application procedure

Chapter 11: Allocation criteria

Chapter 12: Rights associated with Swazi Nation Land

Chapter 13: Renting Swazi Nation Land

Chapter 14: Cancellation of a right of occupancy

Chapter 15: Training and oversight responsibilities of the Land Management Board

Part V – Government Land

Chapter 16: Transparent and non-discriminatory sale and acquisition of government land

Chapter 17: Government land reform projects

Part VI – Loans, Credit, and Bank Accounts

Chapter 18: Equal rights to loans and credit

Chapter 19: Equal rights to accounts with financial institutions

Part VII – Designation of Community Property and Separate Property

Chapter 20: Definition of community property

Chapter 21: Definition of separate property

Part VIII – Division of Property at Divorce, Dissolution, and Break Up of Marriage

Chapter 22: Application of this part

Chapter 23: Customary marriages are in community of property

Chapter 24: Standard division of community property

Chapter 25: Standard division of separate property

Chapter 26: Deviation from the standard divisions of community and separate property

Chapter 27: Assignment or division of the marital home

Chapter 28: Assignment or division of Swazi Nation Land

Chapter 29: Liens

Part IX – Dispute Resolution and Oversight

Chapter 30: Dispute resolution

Chapter 31: Oversight of land

Chapter 32: Oversight of banking

Schedules

I – Form A – Application for Swazi Nation Land

II – Form B – Designation of Property Upon Registration of Marriage

III – Amendments and Repeals

IV – Table Summary of Amendments and Repeals

WOMEN'S EQUAL PROPERTY AND LAND RIGHTS

PREAMBLE

Noting that the Swaziland Constitution, binding regional law, and binding international law affirm the principle of equality in property and land rights and proclaim that all human beings are equal in dignity and rights and that every person is entitled to equal property and land rights without any distinction based on sex,

Based on the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), this provision provides a general, overarching statement emphasizing that Swaziland's binding domestic, regional, and international laws guarantee equal rights to property and land regardless of gender, and recognizing the fundamental rights to equality and dignity of all people. The Convention on the Elimination of All Forms of Discrimination Against Women, Preamble, G.A. res. 34/180, 34 U.N. GAOR, Supp. (No. 46), at 193, U.N. Doc. A/34/46, entered into force Sept. 3, 1981, ratified by Swaziland Mar. 26, 2004, *available at* <http://www.un.org/womenwatch/daw/cedaw/cedaw.htm> [hereinafter CEDAW].

Noting that the Government of Swaziland has the obligation to ensure the equal rights of men and women to enjoy all rights related to property and land,

This provision is based on the CEDAW Preamble section which outlines the government's general obligation to provide equal rights to women, with the addition of focusing the provision's emphasis on property and land rights. CEDAW, Preamble.

Concerned, however, that despite the protections of the Constitution and treaties to which Swaziland is a signatory, discrimination against women in access to and control over property and land continues to exist, and must be eliminated in the country's laws and practices to comply with constitutional and international legal protections,

This provision is modeled after one in the Preamble of CEDAW, with the addition that legislation and custom must also reflect the goal of non-discrimination against women. CEDAW, Preamble. The Constitution and binding regional and international instruments are not merely aspirational goals but rather mandatory norms that must be adhered to in both the laws and practices of the country. For example, financial institutions have expressed an understanding that the Swaziland Constitution removes the minority status of women, yet they continue to postpone changing their policies of treating women as minors, excusing this inaction by awaiting the enactment of new legislation. Interview with SwaziBank Officers, in Mbabane, Swaziland (Mar. 6, 2007). The protections granted by the Constitution and international law against discrimination are and as such must be seen as immediately binding on the laws and practices of a country without the aid of implementing legislation.

Noting that women have suffered from discrimination in the past and have historically been excluded from access to, ownership of, and control over property and land, and that the Government has a duty to redress these imbalances in order to achieve the objectives of equality of opportunity and treatment,

This provision is conceptually based on the notion of "affirmative action," as laid out in the Swaziland Constitution, in section 28(2), under which the government

has a duty “[s]ubject to the availability of resources...[to] provide facilities and opportunities necessary to enhance the welfare of women to enable them to realise their full potential and advancement.” Swaz. Const. 2005 s. 28(2), as well as section 20(5), under which the government has the prerogative to “redress...social, economic...or other imbalances in society.” Swaz. Const. 2005 s. 20(5). Binding international law also call for laws that seek to correct the imbalances that have resulted from historic discrimination against women. See e.g., CEDAW, art. 4 on “temporary special measures.” Under the Directive Principles outlined in the Constitution, Parliament must rely on these guidelines “in applying or interpreting this Constitution or any other law and in taking and implementing any policy decisions, for the establishment of a just, free and democratic society.” Swaz. Const. 2005 s. 56(1). Also, section 59(5) of the Directive Principles states that Swaziland “shall take all necessary steps so as to ensure the full integration of women into the mainstream of economic development.” Swaz. Const. 2005 s. 59(5). Additionally, Section 60(3) urges that “[t]he State shall give the highest priority to the enactment of legislation for economic empowerment of citizens.” Swaz. Const. 2005 s. 60(3).

International law also supports this concept of affirmatively eliminating women’s inequality. For example, the Human Rights Committee, which monitors compliance with the ICCPR, in its General Comment No. 18 states that “[t]he principle of equality sometimes requires States parties to take affirmative action in order to diminish or eliminate conditions which cause or help to perpetuate discrimination prohibited by the [ICCPR].” The Human Rights Committee in General Comment No. 28 also requires “States parties [to] review their legislation and practices and take the lead in implementing all measures necessary to eliminate discrimination against women in all fields...” Human Rights Committee, General Comment No. 28, Equality of rights between men and women (article 3) (68th Sess., 2000), para. 31, *available at* <http://www.ohchr.org/english/bodies/hrc/comments.htm> [hereinafter HRC General Comment 28]. The CEDAW Convention declares that “[a]doption by States Parties of temporary special measures aimed at accelerating de facto equality between men and women shall not be considered discrimination...” Convention on the Elimination of All Forms of Discrimination Against Women, art. 4(1), G.A. res. 34/180, 34 U.N. GAOR, Supp. (No. 46), at 193, U.N. Doc. A/34/46, entered into force Sept. 3, 1981, ratified by Swaziland Mar. 26, 2004, *available at* <http://www.un.org/womenwatch/daw/cedaw/cedaw.htm>.

Noting the considerable strides made within the international community towards promoting equality of rights of men and women in the realm of property and land,

Recalling that discrimination against women in property and land rights violates the principles of equality of rights and respect for human dignity, is an obstacle to the participation of women, on equal terms with men, in the political, social, economic, and cultural life of Swaziland, hampers the growth of the prosperity of society and the family and makes more difficult the full development of the potentialities of women in Swaziland,

Convinced that the full and complete development of a country and the welfare of the world require the maximum participation of women on equal terms with men in all fields,

WOMEN'S EQUAL PROPERTY AND LAND RIGHTS

These two provisions are based on the CEDAW Preamble and acknowledge that granting equal rights to women will have a direct, beneficial effect on the economic and social development of the nation as a whole. CEDAW, Preamble. When women enjoy completely equal rights, they will be better able to fulfill their potential as fully participating members of and contributors to the economy and to society as a whole. As Mr. Comfort Mabuza stated, "the Constitution should be seen as empowering them to be what they are." Interview with Mr. Comfort Mabuza, National Director of the Media Institute of Southern Africa, in Mbabane, Swaziland (Mar. 9, 2007).

Bearing in mind the great contribution of women to the welfare of the family and to the development of society and the importance of property and land rights to maximizing such contribution,

Recognizing that changes in the traditional role of men as well as the role of women in society and in the family have taken place and that the laws must reflect these changes accordingly and achieve full equality between men and women,

Traditional roles are changing throughout the world and in Swaziland. There are more women in the workforce (See Interview with Ms. Sibongile Dlamini, Attorney, Women and Law in Southern Africa, in Ezulwini, Swaziland (Mar. 4, 2007)), and the number of female-headed households has been increasing. Winnie S. Madonsela, The Impact of Trade Liberalization in the Agricultural Sector on African Women: Links with Food Security and Sustainable Livelihoods (Gender and Trade Network in Africa, September 2002) at 8, *available at* http://www.igtn.org/pdfs/65_Madonsela902.pdf (last visited May 14, 2007). Women are bearing the burden alone of providing for their families and contributing towards the economy, filling roles that were traditionally male, but doing so with fewer rights to access resources such as credit, property, and land. The laws of Swaziland must be amended as a practical necessity to allow women to fulfil their potential as economic participants and providers for their families.

Emphasizing that the current HIV/AIDS epidemic has rendered the need to cure women's lack of equal rights to land and property even more urgent, and that the Government has an obligation to protect and ensure the life, health, and welfare of its people,

Women's lack of equal property and land rights has exacerbated the HIV/AIDS epidemic in Swaziland, which in 2006 had the world's highest HIV/AIDS rates, with 33.4% of its adult population living with the virus. United Nations Programme on HIV/AIDS, 2006 AIDS Epidemic Update: Sub-Saharan Africa (Dec. 2006) at 13, *available at* http://data.unaids.org/pub/EpiReport/2006/04-Sub_Saharan_Africa_2006_EpiUpdate_eng.pdf (last visited May 3, 2007). Because women have limited to no access to, ownership of, and control over property and land, they often feel subordinated to their husbands, especially given the persistence of marital power of husband over his wife as a "minor." A 2000 World Bank study of Swaziland noted that "[g]iven their subordinate socio-economic and sexual status, many women find it difficult if not impossible to demand safer sex practices." The World Bank, Swaziland: Reducing Poverty through Shared Growth (Jan. 2000), at 30. As an attorney with the Women and Law in Southern Africa (WLSA) remarked, "They will agree on what the man has to say. Even if the man would actually say, let's have unprotected sex, they will say okay. This man feeds me, I've got no other

alternative, so I've got to do what he says." Interview with Ms. Sibongile Dlamini, Legal Aid Officer at Women and Law in Southern Africa (WLSA), in Ezulwini, Swaziland (Mar. 4, 2007).

Because Swazi laws and practices severely curtail women's access to property, often a woman's only hope of supporting herself and her family is by engaging in relationships that involve multiple sex partners and thus riskier sexual behaviour, be it in the form of polygyny or transactional or commercial sex. As one woman stated in a UN Integrated Regional Information Networks article, "Why do some girls marry into polygamy?... Some do it to get out of poverty, just to keep from starving." Integrated Regional Information Networks for the UN Office for the Coordination of Humanitarian Affairs, Swaziland: Facing the Culture Shock of Monogamy (Jul. 21, 2006), *available at* <http://www.irinnews.org/report.aspx?reportid=59716> (last visited May 3, 2007). Additionally, women engage in "transactional" sex in exchange for money, food, school fees, a place to live, and other basic necessities.

Whereas Swaziland desires to march forward under its own Constitution, its laws, and the positive institutions of traditional law and custom to guarantee the equality, dignity, happiness and welfare of ALL its people, regardless of gender, marital status, or other protected status;

This provision is modeled after the preamble in the Swazi Constitution. Swaz. Const. 2005, Preamble. It is meant to emphasize that Swaziland can use the institutions that are in place now to enact change that is beneficial for everyone in Swaziland, regardless of gender, marital status, or other protected status.

Part I - INTERPRETATION

Chapter 1: Interpretation

Interpretation:

"Alienate" means to transfer, mortgage or sublet.

"Administer" means to place easements on, rent out, and alienate property.

"Child" refers to any person less than eighteen years of age.

"Communal Swazi Nation Land" is land that is shared among all members of the community.

"Commercial use" of Swazi Nation Land includes using land for a business, lodging, and cash crop agriculture.

"Derivative right" is a right to occupy and use land created out of a right of occupancy.

The definition of a derivative right is modelled after the definition of the term in Tanzania's Village Land Act. Village Land Act 5 of 1999 s. 1 (Tanz.).

"Customary Marriage" means a marriage concluded in accordance with customary law.

WOMEN'S EQUAL PROPERTY AND LAND RIGHTS

This definition is based on the Recognition of Customary Marriages Act 120 of 1998 s. 1 (S. Afr.).

“Dependents” are persons that an individual must provide for, and might include biological children, adopted children, children that live with the individual, parents, or siblings.

“Dispose of” means to sell.

“Financial institution” means any person carrying on banking business or the business of a stockbroker or dealer in stocks, bonds or shares.

This definition appears in Swaziland’s Financial Institutions (Consolidation) Order, 1975.

“Government and crown land” means land over which the government holds title.

“Immovable Property” includes land and any structures on the land regardless of whether they are temporary or fixed.

“Land” includes title deed, government owned, and Swazi Nation Land.

“Lending institution” means a financial institution, public or private, recognised under the Financial Institutions (Consolidation) Order, 1975, or a lender recognised under the Money-Lending and Credit Financing Act, 1991, that grants loans, mortgages, or other forms of financial credit to the public or other institutions.

“*Lobola*” means an optional gift from the groom and his family to the family of the bride, representing the union of the two families.

Under Swazi law and custom, *lobola** has positive and negative connotations. *Lobola* represents the union of the two families, as well as the purchase of the woman’s future children and her labour. See Woman and Law in Southern Africa Research Trust, Multi Dimensional Approach to Gender Equality in Swaziland: Swazi Culture and Traditions 35 (2001) (“As an exchange in strengthening relations between two families, this is good. This is more so because even the bride does the same when she gives *umhlambiso*.”); Woman and Law in Southern Africa Research and Educational Trust, Multiple Jeopardy: Domestic Violence and Women’s Search for Justice in Swaziland 82 (2001) (“*Khoza* (1973) contends that *emalobola* should not be regarded as a purchase price, but rather as a symbol of gratitude, cementing the relationship between the two families.”); R. T. Nhlapo, Marriage and Divorce in Swazi Law and Custom 101 (1992) (“The wife-seekers pay *lobola* cattle in order to lay claim to the children; the wife-givers take *lobola* in order to enhance their ability to acquire wives to bear children for them.”); Christopher A.B. Zigira, The Role of NGOs in Economic Empowerment of Women: A Case Study of Umtapo Wa Bomake (Women’s Resource Centre) in Swaziland 77 (June 1998) (“[I]n traditional marriages the payment of *lobola* (bridewealth) has meant buying children, rights over women and custody of children.”); Interview with Reverend Pius Magagula, Catholic Priest, in Manzini, Swaziland (Mar. 9, 2007) (“According to the details Swazi custom, *lobola* is the purchasing of the kids, that would be the offspring of the wife, but not the wife.”); R. T. Nhlapo, Marriage and Divorce in Swazi Law and Custom 48 (1992) (“[A]n important rationale in the minds of those who practice the custom is that the cattle transferred

to the woman's family compensate them for the loss of their daughter and her reproductive capacities.”).

Under current interpretation, lobola objectifies and dehumanizes women, in violation of their rights to dignity under the constitution and international law. See, e.g., Swaz. Const. 2005 s. 18(1); African Charter on Human and Peoples' Rights, art. 5, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), entered into force Oct. 21, 1986, ratified by Swaziland Sept. 15, 1995, available at http://www.achpr.org/english/_info/charter_en.html.

This legislation codifies the positive aspects of lobola, by emphasizing that lobola represents the union of the families. This is consistent with the definition of lobola in the Marriage Bill of 2004: “Lobola’ means the gift given by the groom and his family to the bridegroom’s family in the process of building a relationship between the two families. According to Swazi law and custom this gift can pass at anytime after the families have negotiated and agreed on the material issues pertaining to the marriage.” See Marriage Bill of 2004 s. 2.

Other African countries, like Benin, have also declared that dowry is merely symbolic. See Persons and Family Code 2002-07 of 2002 s. 142 (Benin) (“La dot a un caractère symbolique”) [Dowry has a symbolic character].

*Note: Scholars as well as legislators sometimes use the terms lobola, lobolo, emalobolo, dowry, brideprice, and bridewealth interchangeably. The terms, however, sometimes refer to payments made by the groom or the family of the groom to the family of the bride (usually the father of the bride), and at times to the bride; in some cultures the term refer to the opposite transaction. Here, lobola is used to refer to the former practice.

“Marital Home” is the location where spouses live either with each other or extended family including children.

“Microcredit” means small loans to persons in need, as defined by the relevant laws, for personal use or for agricultural activities, and self-employment projects that generate income.

This definition is based on that used during the February 2007 Microcredit Summit and on the types of loans granted by the Swaziland Development Finance Corporation (FINCORP). Grameen Bank, What is Microcredit (1998), available at <http://www.grameen-info.org/mcredit/definit.html>; Swaziland Development Finance Corporation, Products and Services, at http://www.fincorp.co.sz/index.php?option=com_content&task=section&id=2&Itemid=77 (last visited May 15, 2007). The Microcredit Summit also provides helpful guidance for determining whether persons are in financial need, or whether they make up the “poorest” families, which it defined as “those who live in households with incomes that place them in the bottom 50% of the poverty group as defined officially in each country. Households in the top 50% of a country’s poverty group [are] termed “poor.” David S. Gibbons and Jennifer W. Meehan, *The Microcredit Summit’s Challenge: Working Towards Institutional Financial Self-Sufficiency while Maintaining a Commitment to Serving the Poorest Families* (updated June 2000), available at

WOMEN'S EQUAL PROPERTY AND LAND RIGHTS

[http://wbln0018.worldbank.org/HDNet/HD.nsf/0079b63a7bd2158685256b9c00572f30/dc87b0dc9358b5d185256a920076afe3/\\$FILE/Challenges%20Update.pdf](http://wbln0018.worldbank.org/HDNet/HD.nsf/0079b63a7bd2158685256b9c00572f30/dc87b0dc9358b5d185256a920076afe3/$FILE/Challenges%20Update.pdf).

“Movable property” is property that can be moved or displaced and includes, but is not limited to income, livestock, household items, and automobiles.

“Own” means buy, hold, or dispose of.

“Productive use of land” means using the land for growing crops, raising a family, building a home, or running a business.

“Residential use” of Swazi Nation Land includes housing, gardening, cultivating, and agriculture for family sustenance.

“Right of occupancy” means a title to the use and occupation of land.

“Structures” include all permanent and temporary structures including but not limited to kraals and temporary housing.

“Swazi Nation Land” is held in trust by the King for the Swazi Nation.

Part II - APPLICATION

Chapter 2: Application of Act to all persons

2. This Act applies to all Swazi citizens or persons ordinarily and lawfully residing in Swaziland, without discrimination, including on grounds of gender and marital status.

3. Spouses in all marital regimes, including under civil law, common law, religious law, or Swazi law and custom, are governed by the provisions set forth in this Act.

Sections 2 and 3 of this Act aim to clarify the confusion of the dual system of Roman-Dutch law and customary law that currently regulate property and land rights. Elimination of the dual legal system is a concern for many Swazis, especially because many customary property rules remain unwritten and much of the common law is unpublished. This bill seeks to ameliorate those concerns by creating a written and predictable set of laws on property and land for all Swazis to follow.

Other countries on the African continent have also begun eliminate dual regulatory regimes by managing all marital and property regimes under one code or act. For example, Burkina Faso's Code of Persons and the Family, Title III, Article 233 only recognizes marriages under the Marriage and Family Code; Cote d'Ivoire's Act no. 64-375, October 7, 1964 on marriage Art. 19 only recognizes marriages performed by an official registry. *See* Center for Reproductive Law and Policy, Women of the World: Laws and Policies Affecting Their Reproductive Lives, Regional Trends in Reproductive Rights 191 (2003), available at <http://www.reproductiverights.org/pdf/regionaltrends.pdf> (observing that Burkina Faso, Côte d'Ivoire, and Cameroon have abolished bride-price).

The language “persons ordinarily and lawfully residing in Swaziland” is taken from the Constitution s. 45(2)(a) which uses these factors as a condition of registration of citizenship. Swaz. Const. s. 45(2)(a) (2005).

Sections 2 and 3 include common law marriage in compliance with the Constitution section 34(2), which requires Parliament to enact legislation regulating the property rights of spouses in civil law, common law, and Swazi law and custom. Swaz. Const. s. 34(2) (2005).

Part III - Equal Property and land Rights

Chapter 3: Equal rights to property and land

4. All Swazi citizens or persons ordinarily and lawfully residing in Swaziland have the right, without discrimination as to gender, marital status or other protected status, at the age of eighteen years, or earlier if emancipated by the appropriate judicial body to

Although the legal age of majority in Swaziland is twenty-one, many Swazis are beset with the responsibilities of an adult at a much earlier age. For this reason, this provision changes the age of majority to eighteen for purposes of this Act. Women bear a special burden at a young age to care for children, siblings, and other dependents. The current HIV/AIDS crisis has left many younger women as head of household necessitating immediate, full property rights for young women in order to maintain themselves and their dependents. Current law considers people married to be *de facto* majority age. Section 50 in the Swazi Constitution likewise recognizes majority through marriage in regard to renunciation of citizenship. Section 50 extends the age of majority to women who are or are about to be married. Swaz. Const. s. 50 (2005).

Although the Swazi Majority Act sets the age of majority at twenty-one, (The Age of Majority Act 11 of 1853 s. 2 (“men and women shall attain their majority at the age of twenty-one years.”)), the Convention on the Rights of the Child, Article 1 defines child to mean every human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier. Convention on the Rights of the Child, art. 1, G.A. res. 44/25, annex, 44 U.N. GAOR Supp. (No. 49) at 167, U.N. Doc. A/44/49 (1989), entered into force Sept. 2 1990, ratified by Swaziland Jan 17, 2002, *available at* <http://www1.umn.edu/humanrts/instreet/k2crc.htm>.

- (1) Purchase, own, register, administer, use, and dispose of moveable and immoveable property, excluding Swazi Nation Land; and
- (2) Be allocated Swazi Nation Land for residential or commercial use.

Current laws governing property like the Deeds Registry Act of 1968 are in violation of the Constitution and international law which grant all people equality before the law and the equal right to property. Deeds Registry Act 37 of 1968 s. 16 (Swaz.). The Deeds Registry Act section 16 prevents women who are married in community of property from registering property in their own name and requires women married out of community of property to register property with the “assistance” of their husband. Deeds Registry Act 37 of 1968 s. 16 (Swaz.). This section 4 will bring Swazi property laws in line with the Constitution and international law both of which grant all people the equal right to property. The Constitution has

WOMEN'S EQUAL PROPERTY AND LAND RIGHTS

multiple sections that call generally for the equality of all people and specifically for equal property rights. See Swaz. Const. s. 14(1)(f) ("The fundamental human rights and freedoms of the individual enshrined in this Chapter are hereby declared and guaranteed, namely—(f) respect for rights of family, women, children, workers and persons with disabilities."); s. 19(1) ("A person has a right to own property either alone or in association with others."); s. 20(1) ("All persons are equal before 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."); s. 20(2) ("For the avoidance of any doubt, a person shall not be discriminated against on the grounds of gender, race, colour, ethnic origin, tribe, birth, creed or religion, or social or economic standing, political opinion, age or disability."); s. 20(3) ("For the purposes of this section, 'discriminate' means 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."); s. 20(5) ("Nothing in this section shall prevent Parliament from enacting laws that are necessary for implementing policies and programmes aimed at redressing social, economic or other imbalances in society."); s. 28(1) ("Women have the right to equal treatment with men and threat right shall include equal opportunities in political, economic, and social activities."); s. 21(2) ("a citizen of Swaziland, without regard to gender, shall have equal access to land for normal domestic purposes.").

International Treaties ratified by Swaziland also protect the right to equality. See African Charter on Human and Peoples' Rights, Preamble, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), entered into force Oct. 21, 1986, ratified by Swaziland Sept. 15, 1995 ("Considering the Charter of the Organization of African Unity, which stipulates that 'freedom, equality, justice and dignity are essential objectives for the achievement of the legitimate aspirations of the African peoples.'"), available at <http://www1.umn.edu/humanrts/instree/ziafchar.htm>; Convention on the Elimination of All Forms of Discrimination Against Women, art. 2, G.A. res. 34/180, 34 U.N. GAOR, Supp. (No. 46), at 193, U.N. Doc. A/34/46, entered into force Sept. 3, 1981, ratified by Swaziland Mar. 26, 2004, available at <http://www.un.org/womenwatch/daw/cedaw/cedaw.htm> ("States Parties condemn discrimination against women in all forms, agree to pursue by all appropriate means and without delay a policy of eliminating discrimination against women..."); International Covenant on Civil and Political Rights, art. 26, G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S.171, entered into force Mar. 23, 1976, ratified by Swaziland Mar. 26, 2004, available at <http://ohchr.org/english/law/ccpr.htm> ("All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status."); International Covenant on Economic, Social and Cultural Rights, art. 3, G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 993 U.N.T.S.3, entered into force Jan. 3, 1976, ratified by Swaziland Mar. 26, 2004, available at <http://www.ohchr.org/english/law/cescr.htm> ("The States Parties to the present Covenant undertake to ensure the equal right of men and women to the enjoyment of all economic, social and cultural rights set forth in the present Covenant.").

Chapter 4: Abolition of marital power

5. The marital power that the husband had over person and property of his wife whether in civil law, common law or Swazi law and custom is hereby abolished.

6. The marital power which any husband had over the person and property of his wife immediately before the commencement of this Act, is hereby abolished.

This provision is modelled after Namibia's married Person's Equality Act 1 of 1996 s. 2(b) (Namib.) ("the marital power which any husband had over the person and property of his wife immediately before the commencement of this Act, is hereby abolished.").

Chapter 5: Equal property rights of spouses

7. Spouses have equal capacity, subject to section 9 and 10 on mutual consent requirements below:

- (1) to contract and litigate;
- (2) to register property in own name;
- (3) to dispose of assets of the community property;
- (4) to contract debts which lie against the community property;
- (5) to act as an executor of a deceased estate;
- (6) to act as a trustee of an insolvent estate;
- (7) to act as a director of a company; and
- (8) to bind oneself as surety.

Sections 6 and 7 hereby amend section 16 of the Deeds Registry Act. Deeds Registry Act 37 of 1968 s. 16. The language for these provisions is based on Namibia's Married Persons Equality Act 1 of 1996, ss. (2)-(3) (Namib.) and South Africa's Matrimonial Property Act 88 of 1984 ch. II-III (S. Afr.).

Abolition of marital power and the extension of full legal autonomy to all Swazis is essential to achieving equal property rights for women in Swaziland. Marital powers under the civil regime restrict every aspect of a woman's right to property, right to contract, and right to litigate thus limiting her economic security by preventing married women from purchasing, administering, owning, using, and disposing of property or obtaining credit, loans and bank accounts without the consent of their husbands. (See Deeds Registry Act 37 of 1968 s. 16 (Swaz.) (s. 2: "a woman married out of community of property... shall be assisted by her husband in executing any deed or other document required or permitted to be registered in the Deeds Registry . . ."); (s. 3: "Immovable property, bonds or other real rights shall not be transferred or ceded to or registered in the name of a woman married in community of property.")); See also, R.T. Nhlapo, *The Legal Situation of Women in Southern Africa*, in 2 *Women and the Law in Southern Africa* 114 (J. Stewart & A. Armstrong eds., 1990), (marital power leaves a woman with no "locus standi in judicio (i.e. she must be represented in legal proceedings by her husband, no independent contractual capacity, and very little control over the joint property of marriage."); See also, U.S. Department of State, Bureau of Democracy, Human Rights, and Labor,

WOMEN'S EQUAL PROPERTY AND LAND RIGHTS

Country Reports on Human Rights Practices: Swaziland (2004) (released Feb. 28, 2005) available at <http://www.state.gov/g/drl/rls/hrrpt/2004/41629.htm> ("In both civil and traditional marriages, wives are legally treated as minors... . A woman generally must have her husband's permission to borrow money, open a bank account, gain access to land, and in some cases, obtain a job".).

In marriages under Swazi law and custom, the marital powers are more extensive, and give the husband control over the wife's every day decisions: whether the wife works outside of the home, whether the wife can sell her livestock, what should be planted in the fields, what she can wear, and even what company she can keep. See R.T. Nhlapo, *The Legal Situation of Women in Southern Africa* ("marital power under customary law is all-encompassing and reduces the wife to a position analogous to that of 'one of the children' of the household. This has obvious implications for her personal autonomy).

Countries throughout Africa and around the world have taken similar measures to ensure women's equal property rights by eliminating the power of the husband over the affairs of the wife. See Namibia's Married Persons Equality Act of 1996, Part I (2)-(3) (Namib.); South Africa's Matrimonial Property Act, Act 88 of 1984, Ch II-III. (S. Afr.); Belize's Married Woman's Property Ordinance of the laws of Belize, Ch. 142 (1) (Bel.); Kyrgyzstan's Marriage and Family Code Part II, art. 23 (Kyrg.); Bolivia's Family Code arts. 114 and 116 (Bol.); Italy's 1975 Reform (Italy); Laos's Family Law, art. 27. (Laos).

This Act will bring Swaziland's laws into compliance with the Constitution section 28(1) granting women the "the right to equal treatment with men. . . [including] equal opportunities in... economic... activities," and section 211(2) granting all citizens of Swaziland "without regard to gender... equal access to land. . ." Swaz. Const. ss. 28(1), 211(2) (2005). It will also fulfil Swaziland's international obligations under CEDAW Article 16(1)(h) to ensure "the same rights for both spouses in respect of the ownership, acquisition, enjoyment and disposition of property." Abolition of marital powers and the extension of legal autonomy to all Swazis brings Swaziland in line with international obligations under CEDAW Article 15(1) & (2) which accord women equality under the law and "legal capacity to that of men" and "the right to conclude contracts and to administer property. . ." and domestic obligations of the Swazi Constitution sections 20 (1-3) which declare all people equal "before and under the law" regardless of gender. CEDAW, arts. 15(1)-(2), 16(1)(h); see also HRC, General Comment 28, paras. 19, 25; and Committee on the Elimination of Discrimination against Women (CEDAW), General Recommendation 21: Equality in Marriage and Family Relations (13th Sess., 1994), paras. 7, 17, 24-33, U.N. Doc. A49/38 at 1 (1994), available at <http://www.un.org/womenwatch/daw/cedaw/recommendations/recomm.htm#recom21> [hereinafter CEDAW, General Recommendation 21].

8. Subject to section 9, spouses may perform any juristic act with regard to the joint estate.

9. Except as permitted by section 7 and subject to sections 10 and 11, a spouse must obtain the written consent of the other spouse to:

- (1) alienate, mortgage, burden with a servitude or confer any other real right in any immovable property forming part of the community property;
- (2) enter into any contract for the alienation, mortgaging, burdening with a servitude or conferring of any other real right in immovable property forming part of the community property;
- (3) rent, lease or make any improvements on Swazi Nation Land co-titled in spouses' names;
- (4) alienate, cede, or pledge any deposits in bank accounts, shares, stocks, debentures, debenture bonds, insurance policies, mortgage bonds, fixed deposits or similar assets, or any investment by or on behalf of the other spouse in a financial institution, forming part of the community property;
- (5) receive any money due or accruing to the other spouse or the community property by way of:
 - (a) remuneration, earnings, bonus, allowance, royalty, pension or gratuity by virtue of the other spouse's employment, profession, trade, business, or services rendered by him or her;
 - (b) compensation for loss of any income;
 - (c) inheritance, legacy, donation, bursary or prize left, bequeathed, made or awarded to the other spouse;
 - (d) income derived from the separate property of the other spouse;
 - (e) dividends or interest on or the proceeds of shares or investments in the name of the other spouse; and
 - (f) the proceeds of any insurance policy or annuity in favour of the other spouse;
- (6) alienate or pledge any jewelry, coins, stamps, paintings, livestock, or any other assets forming part of the community property and held mainly as investments; and
- (7) alienate or pledge any furniture, or other effects of the joint household in community property.

10. If a spouse unreasonably withholds the consent required in terms of section 10 or if that consent cannot for any other reason be obtained, a court may on the application of the other spouse give that spouse leave to perform the act in question without the required consent if the court is satisfied, in the case where the consent is withheld, that such withholding is unreasonable or, in any other case, that there is good reason to dispense with the consent.

11. A court may, on the application of a spouse, if it is satisfied that it is essential for the protection of the interest of that spouse in the community estate, suspend for a definite or indefinite period any power that the other spouse may exercise in terms of this Part, either in general or in relation to a particular act as the court may specify in its order.

The above sections 8-11 are modelled on Namibia's Married Persons Equality Act (1996) sections 7-11 (Namib.) and South Africa's Matrimonial Property Act 88 of 1984 ch. II-III (S. Afr.) and will resolve the gendered power imbalance created by marital powers in community of property civil rights marriages. Currently, a woman cannot register property in her own name if married in community of property regardless of whether she purchased the land with her own money. This prevents

WOMEN'S EQUAL PROPERTY AND LAND RIGHTS

women from economic advancement because they are deprived of using their own property for financial security. The current system also enables husbands to sell or mortgage property without their wives' consent regardless of who actually paid for the property. This deprives women of decision making power in the welfare of her family and has resulted in rendering many women and their families destitute. Section 9 of this Act will require both spouses to seek consent when selling or mortgaging property so that no partner in marriage can unilaterally alter the economic stability of the family.

Countries around the world have already changed their marriage and property laws to require the consent of both spouses in selling or mortgaging community property. Countries from Guatemala to Laos to Latvia have implemented laws requiring spousal consent in the administration of joint property. *See e.g.*, Namibia Married Person's Equality Act 1 of 1996 s. 7 (Namib.); South Africa Matrimonial Property Act 88 of 1984 s. 15 (S. Afr.).

The changes to property laws under sections 5 - 11 will bring Swaziland into compliance under its obligations to CEDAW, article 16(1)(h) which requires equal property rights in marriage including the right to equal "ownership, acquisition, management, administration, enjoyment and disposition of property;" and to the International Covenant on Economic, Social and Cultural Rights (ICESCR), article 11(1) requirement of States Parties to "recognize the right of everyone to an adequate standard of living for himself and his family, including... housing, and to the continuous improvement of living conditions." CEDAW, art. 16(1)(h); International Covenant on Economic, Social and Cultural Rights, art. 11(1), G.A. res 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 993 U.N.T.S.3, entered into force Jan. 3, 1976, ratified by Swaziland Mar. 26, 2004, available at <http://www.ohchr.org/english/law/cescr.htm> [hereinafter ICESCR].

Marital power curtails women's access to loans because only men are authorized to administer joint property. Under existing laws, a Swazi wife must obtain her husband's consent, but not vice versa, to acquire or guarantee a loan when using community property to do so. To ensure mutual consent of the spouses is sought about jointly used or held community property, such as the marital home, this Property and Land Equality Bill, 2009 broadens that requirement in several ways. First, it broadens the scope to all co-titled property, whether held between spouses, members of a partnership, or a cooperative, etc. Second, when consent is required, it is required regardless of gender, such that, for instance, a husband must obtain his wife's consent if he wants to obtain a loan using the community property as collateral. Third, this Act conditions consent based on the property itself (community property vs. separate property) rather than the type of marriage (in community of property, out of community of property, etc). Thus, for example, a couple could be out of community of property generally but have some jointly-held property. In that instance, if one of the spouses were to use that jointly held or used property as collateral, the other spouse's consent would be required.

Several countries mandate mutual consent when married couples seek loans or when the collateral is jointly owned, including Bolivia, Cambodia, Eritrea, Jamaica, Lithuania, Malta, and Spain. *See* Center for Reproductive Law and Policy, *Women of the World: Laws and Policies Affecting Their Reproductive Lives*,

Latin America and the Caribbean, Bolivia 43 (1997), available at http://reproductiverights.org/sites/crr.civicaactions.net/files/documents/wowlac_bolivia.pdf; Cambodia, Concluding Observations, CEDAW A/42/38 (1987); Eritrea, State Reports, CEDAW/C/ERI/1-3 (2004); Jamaica, Fifth periodic report of States Parties, U.N. Doc CEDAW/C/JAM/5 (2005), available at <http://www.un.org/womenwatch/daw/cedaw/reports.htm> (under Jamaica); Lithuania, Third periodic report of States parties to the Committee on the Elimination of Discrimination Against Women, para. 419, U.N. Doc. CEDAW/C/LTU/3 (June 17, 2005), available at <http://www.un.org/womenwatch/daw/cedaw/reports.htm> (under Lithuania); Malta, Combined initial, second, and third periodic reports of States parties to the Committee on the Elimination of Discrimination Against Women, (31th Sess., 2006), at 138, U.N. Doc. CEDAW/C/MLT/1-3 (Dec. 18, 2002), available at <http://www.un.org/womenwatch/daw/cedaw/reports.htm> (under Malta); The Secretary General, Report of the Secretary-General submitted in accordance with Commission resolution 2001/34, para. 34, delivered to the Economic and Social Council and the Commission on Human Rights, U.N. Doc. E/CN.4/2002/53 (Jan. 15, 2002), available at <http://www.unhcr.ch/Huridocda/Huridoca.nsf/TestFrame/dbc76479922d0282c1256b990053c4b2?Opendocument>.

Chapter 6: Lobola is an optional and non-returnable gift

12. Lobola, and any other form of brideprice or dowry, is not a legal requirement for marriage. No person may be compelled to pay lobola against his or her will.

The agreement to pay lobola, though not the payment of lobola itself, is currently a legal requirement for customary marriages in Swaziland. See R. T. Nhlapo, *The Legal Situation of Women in Swaziland and Some Thoughts on Research*, in 2 *The Legal Situation of Women in Southern Africa* 97, 113 (Julie Stewart & Alice Armstrong eds., 1990) (“[After the red ochre ceremony,] the marriage is valid even if no lobola has changed hands. Lobola, however, must be negotiated and guarantees about mode of payment must be given.”). However, Swazis pay or at least agree to pay lobola in customary marriages as well as some civil marriages. See *Malambe and Another v. Khoza*, 1970-1976 SLR 375, 375 (1975) (High Ct.) (Swaz.) (noting that the respondent was married by civil rites in community of property but that he had nonetheless paid lobola).

This provision stating that lobola is not a legal requirement for marriage permits people to follow the custom only if they wish. This is consistent with section 252(3) of the Constitution, which gives women the right to refrain from participating in a custom “to which [they are] in conscience opposed.” Swaz. Const. 2005 s. 28(3).

The South Africa Law Reform Commission (formerly the South Africa Law Commission), the body responsible for harmonizing common law and customary law in South Africa, noted the optional nature of lobola under South African law in a 1997 discussion paper: “[P]ayment of bridewealth would be optional, analogous to the solemnization of marriages by religious rites. This approach to bridewealth is already implicit in the courts’ judgments; it is endorsed both by the KwaZulu and Natal Codes and a general reluctance in customary law to call the status of a union into doubt when payment is not forthcoming.” See *South Africa Law Com-*

WOMEN'S EQUAL PROPERTY AND LAND RIGHTS

mission, Discussion Paper 74: Customary Marriages (Aug. 1997), at 65 (internal citations omitted).

Other African countries, like Burkina Faso and Côte d'Ivoire, have taken more drastic steps and have enacted legislation prohibiting the payment of lobola, and sanctioning offenders by imposing prison sentences and fines. See Center for Reproductive Law and Policy, Women of the World: Laws and Policies Affecting Their Reproductive Lives, Francophone Africa, Burkina Faso 57 (2003), available at <http://www.reproductiverights.org/pdf/burkinafaso.pdf> (citing Code of Persons and the Family, Title II, Chapter 1, article 244; and Penal Code articles 378-79); id. at Cote D'Ivoire 124 (2003), available at <http://www.reproductiverights.org/pdf/cotedivoire.pdf> (citing article 20 of the Transitional Clauses of the Marriage Act). Cameroon and Tanzania have also abolished lobola. *Id.* at 191 (2003), available at <http://www.reproductiverights.org/pdf/regionaltrends.pdf>; Center for Reproductive Law and Policy, Women of the World: Laws and Policies Affecting Their Reproductive Lives, Anglophone Africa, Tanzania 116 (2003) available at <http://www.reproductiverights.org/pdf/WOWAAo7.pdf> (citing the Local Customary Laws Declaration Order No.4 which applies to 80% of communities in Tanzania).

13. A person may not use the payment of lobola as justification to control the property, earnings, or behaviour of another person.

Currently, some husbands abuse Swazi law and custom and use the payment of lobola to control the property, earnings, sexual functions, and other behaviour of their wives. See Woman and Law in Southern Africa Research Trust, Multi Dimensional Approach to Gender Equality in Swaziland: Swazi Culture and Traditions 35 (“The payment of emalobolo is often used as justification for men’s marital power. This entails their sole right to administer marital property and to confiscate their wives’ property or wages.”); Woman and Law in Southern Africa Research and Educational Trust, Multiple Jeopardy: Domestic Violence and Women’s Search for Justice in Swaziland 81 (2001) (explaining that women have an “entrenched latent understanding that ‘I was paid for’” and that this objectification makes women the target for spousal abuse).

In an example of such abuse, in 2004 the Supreme Court of Appeal of South Africa sentenced a man to prison for kidnapping and raping his customary wife four years after the marriage broke up. At trial, the defendant argued that the marriage was still intact and that he had a right to conjugal benefits because his wife had not returned the lobola. See *S v. Mvamvu* (350/2003) [2004] ZASCA 90 (S. Afr.), available at <http://www.saflii.org/za/cases/ZASCA/2004/90.html>.

A husband’s use of lobola to justify control of his wife violates a woman’s right to dignity enshrined in the constitution of Swaziland and international law because it dehumanizes the woman and transforms her into mere property. See Swaz. Const. 2005 s. 18; see, e.g., African Charter on Human and Peoples’ Rights, art. 5, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), entered into force Oct. 21, 1986, ratified by Swaziland Sept. 15, 1995, available at http://www.achpr.org/english/_info/charter_en.html.

Some African countries, like Senegal, have allowed the customary practice of lobola to continue, but have enacted statutes declaring that lobola is the sole property of the woman, and that she may dispose of it without the consent of her husband. See Center for Reproductive Law and Policy, *Women of the World: Laws and Policies Affecting Their Reproductive Lives, Francophone Africa*, Senegal 167 (2003), available at <http://www.reproductiverights.org/pdf/senegal.pdf> (citing Family Code article 132).

This provision in conjunction with section 14 is similar to that of Senegal and gives a woman a cause of action to enforce her right to dignity and to be free from the control of her husband after he has paid lobola.

14. Lobola is a non-returnable gift. No person may demand the return of lobola for any reason whatsoever.

(1) A person who collects or attempts to collect the return of lobola by force or threat of force is guilty of a felony and must pay a fine of [X] emalangeni.

(2) A person who has returned lobolo upon demand, may seek restitution for the amount returned.

Under Swazi law and custom, the family of the groom may demand the return of lobola if the couple separates, or if the woman is unable or unwilling to bear children. See *Malambe and Another v. Khoza*, 1970-1976 SLR 375, 375 (1975) (High Ct.) (Swaz.) (citing a compilation made by the Swazi (Central) Law Panel, stating that the father is entitled to the return of the lobolo, less one head for each male child and two heads for each female child born to the couple); R. T. Nhlapo, *Marriage and Divorce in Swazi Law and Custom* 83 (1992). When the family of the wife, however, is unable or unwilling to return the lobola, the woman is forced to stay with an abusive husband or in a relationship to which she is opposed. This violates a woman's right to dignity, health, freedom of movement, and to be free from violence as guaranteed by the constitution and international law.

This provision making lobola an irrevocable gift means that women are free to leave abusive or otherwise untenable marriages. Furthermore, this provision makes lobola consistent with the unconditional gifts that the family of the bride give to the family of the groom under Swazi law and custom.

Liberia has also prohibited by statute the recovery of dowry, and has made any attempt to collect dowry a felony offence. See *Liberia Equal Rights of the Customary Marriage Law of 1998* s. 2.2 (Liber.). Similarly, Cameroon prevents courts from hearing disputes arising out of the existence, payment, or payment terms of lobola. See Center for Reproductive Law and Policy, *Women of the World: Laws and Policies Affecting Their Reproductive Lives, Cameroon* 83 (2003), available at <http://www.reproductiverights.org/pdf/cameroon.pdf> (citing Order No. 81-02 of June 29, 1981, articles 61, 64, and 70).

12. The promise to pay lobola is not enforceable in a civil or customary court.

Civil Courts currently have jurisdiction to hear cases regarding the payment or return of lobola. See *Swazi Courts Act 80 of 1951* s. 9(b) (Swaz.) ("Subject to any express provision conferring jurisdiction, no Swazi Court shall have jurisdiction

WOMEN'S EQUAL PROPERTY AND LAND RIGHTS

to try... (b) cases in connection with marriage other than a marriage contracted under or in accordance with Swazi law or custom, except where and in so far as the case concerns the payment or return or disposal of dowry"). Section 15 would amend the Swazi Courts Act section 9(b) and the Magistrate's Courts Act section 29 by prohibiting the courts from hearing a case for the payment or return of lobola. *See* Swazi Courts Act 80 of 1951 s. 9(b) (Swaz.); Magistrate's Courts Act 66 of 1938 s. 29 (Swaz.). This provision compliments the definition of lobola under this Act as an optional gift.

Other African countries like Cameroon have also removed the jurisdiction of courts to hear cases relating to the existence, payment, or payment terms of lobola. *See* Center for Reproductive Law and Policy, *Women of the World: Laws and Policies Affecting Their Reproductive Lives*, Cameroon 83 (2003), *available at* <http://www.reproductiverights.org/pdf/cameroon.pdf> (citing Order No. 81-02 of June 29, 1981, articles 61, 64, and 70).

Part IV - SWAZI NATION LAND

Chapter 7: Non-discrimination and equality

16. Determinations of allocations of Swazi Nation Land cannot be based on gender, marital status, or place of birth.

This section seeks to codify the process of allocation of Swazi Nation Land to comply with constitutional provisions on equal access to land. Swaz. Const. 2005 s. 211 (2). Other African countries with communal land regimes, including Ethiopia, the Democratic Republic of Congo, Namibia, and Tanzania, also commonly have non-discrimination requirements concerning gender, marital status and place of birth. *See* Rural Land Proclamation 89 of 1997 s. 5 and 6 (Eth.); Democratic Republic of Congo, Fourth and Fifth Periodic Reports to the Committee on the Elimination of Discrimination against Women, U.N. Doc. No. CEDAW/C/COD/4-5 (2004), *available at* <http://www.un.org/womenwatch/daw/cedaw/reports.htm> (under Dem. Rep. Congo) (citing Act No. 73-021 of 1973 (Dem. Rep. Congo) ("the basic principle is that the State has exclusive ownership of the land and subsoil. The right to land concessions is given to men and women without distinction")); Communal Land Reform Act 5 of 2002 s. 17 (Namib.); Village Land Act 5 of 1999 s. 23 (Tanz.) (holding that women cannot be treated less favourably than men in determinations of allocations). International law also requires no discrimination between men and women in general under the law. CEDAW, art. 2 (equality for men and women before the law); International Covenant on Civil and Political Rights, art. 26, G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S.171, entered into force Mar. 23, 1976, ratified by Swaziland Mar. 26, 2004, *available at* <http://ohchr.org/english/law/ccpr.htm> ("All persons are equal before the law and are entitled without any discrimination to the equal protection of the law."); African Charter on Human and Peoples' Rights, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), entered into force Oct. 21, 1986, ratified by Swaziland Sept. 15, 1995, *available at* <http://www1.umn.edu/humanrts/instree/ziafchar.htm> ("Every individual shall be equal before the law" and "Every individual shall be entitled to equal protection of the law"). CEDAW also has a specific provision on the equal treatment of women in land reform. CEDAW, art. 14 (equal treatment for rural women on land reform).

The inclusion of place of birth is due to the fact that men and women may have difficulty accessing land in an area other than their place of birth within Swaziland. See Interview with widow in Mbabane, Swaziland (March 9, 2007) (stating that she had tried to go to four different chiefdoms to be allocated land but had been unsuccessful); Draft National Land Policy s. 2.1.2 (Swaz.) (noting that “there is currently a tendency to discriminate against fellow Swazis on the basis of their being from a different locality.”)

17. An individual, a family unit, or a group of persons who have formed themselves together as an association or a primary cooperative society may apply for an allocation of Swazi Nation Land.

This bill seeks to create for all “Swazi citizens or persons ordinarily and lawfully residing in Swaziland” the right to be allocated Swazi Nation Land, regardless of gender or marital status. Swaz. Const. 2005 s. 45. Thus, single and married persons can be individually allocated Swazi Nation Land. This provision also is in line with international and domestic protections of the rights of protection of the family, health, housing and an adequate standard of living as it provides equal access to housing to all Swazis. See Swaz. Const. 2005 s. 27 (recognizing the right of the family to be protected); African Charter on Human and Peoples’ Rights, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), entered into force Oct. 21, 1986, ratified by Swaziland Sept. 15, 1995, *available at* <http://www1.umn.edu/humanrts/instree/z1afchar.htm> (stating that the family is the natural basis of society and “shall be protected by the State which shall take care of its physical health and moral”); ICESCR, art. 12(1) (recognizing “the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.”); art. 11 (requiring States Parties to “recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions.”).

Chapter 8: Establishment of village land board

18. Each chief must establish a village land board, made up of individuals from his inner council and selected by the chief, to allocate Swazi Nation Land to qualified people as defined by this statute.

- (1) No person will be eligible to be appointed as a member of the village land board or continue as a member of the village land board if he or she is:
 - (a) a person under the age of legal majority; or
 - (b) a person who has been convicted of a criminal offence involving fraud or dishonesty.

This section creates a formal village-level land board, tasked with managing Swazi Nation Land. Parliament has the authority to create this board under section 217 of the Constitution, which states that Parliament “may make laws providing for the management of land and settlement of land disputes and for the regulation of any right or interest in land.” Swaz. Const. 2005 s. 217(a). The parliament is empowered to address this matter as it deals with the powers of a chief, Swazi Nation Land, and Swazi law and custom. Swaz. Const. 2005 s. 115(6)(b), (d), and (e). In accordance with section 212 of the Constitution, the Land Management Board, which is responsible for management and rights to Swazi Nation Land, will have

WOMEN'S EQUAL PROPERTY AND LAND RIGHTS

ultimate discretion over this management through the regulations it implements. Swaz. Const. 2005 s. 212 (4).

The provision also ensures that customary chiefs continue to have an important, although not predominant, role in the allocation of Swazi Nation Land through their power to appoint the village land board. At the same time, the rights of women and the interests of justice will be protected through the various membership requirements. Chiefs have not always had the power to allocate land. The Swazi Settlement Act stated that the Principal Secretary of Agriculture would be in charge of giving persons permission to settle on Swazi Nation Land. Swazi Settlement Act of 1946 s. 4 and 5. Also, chiefs already rely on a council to assist them in making land allocation decisions. Interview with Princess Ncoyi, Chief, in Malkerns, Swaziland (March 5, 2007) (“I should also point out the fact that the process of Khonta system does not consist of my decision only. It’s also involves the influence of... the inner council.”).

Other African countries have also moved away from allocation by chiefs into a more inclusive process of boards or committees made up of community members. Birte Scholz & Mayra Gomez, *Bringing Equality Home: Promoting and Protecting the Inheritance Rights of Women: A Survey of Law and Practice in Sub-Saharan Africa* 51 (Centre on Housing Rights and Evictions, 2004) (explaining that whereas land was previously administered by chiefs in Botswana, land is now administered by the Tribal Land Boards but still governed by tribal traditions, norms, and customs), *available at* <http://www.cohre.org/store/attachments/COHRE%20Bringing%20Equality%20Home.pdf>; Communal Land Reform Act 5 of 2002 s. 2 (Namib.) (establishing communal land boards to allocate land).

19. The composition of the village land board must have an equal number of male and female members and must be representative of the interests of the community.

This provision complies with section 60(4) of the Constitution, which states that the government should ensure “gender balance and fair representation of marginalized groups in all constitutional and other bodies.” Swaz. Const. 2005 s. 60(4). This principle of gender balance is to guide the interpretation of the Constitution and statutory law. The African Union recognizes the importance of gender balance on governing bodies; half of the members of the African Union Commission are women. African Union Commission Leaders, *available at* <http://www.africa-union.org/root/au/AUC/AUCleaders/aucleaders.html>. The Southern Africa Development Community, of which Swaziland is a member, has set a goal of having women account for 30 percent of decision making posts in member countries. *Thirty Percent Women in Power by 2005*, *available at* http://www.sardc.net/widsaa/sgm/1999/sgm_ch3.html. CEDAW also requires States Parties to take all appropriate measures to ensure women have the right to “participate in and benefit from rural development” on an equal basis with men. Convention on the Elimination of All Forms of Discrimination against Women, art. 14, G.A. res. 34/180, 34 U.N. GAOR, Supp. (No. 46), at 193, U.N. Doc. A/34/46, entered into force Sept. 3, 1981, ratified by Swaziland Mar. 26, 2004, *available at* <http://www.un.org/womenwatch/daw/cedaw/cedaw.htm>. The preamble for CEDAW emphasizes that the full potential and development of a country requires “maximum participation of women on equal terms with men in all fields.” CEDAW, Preamble.

In the interviews conducted by the IWHRC in Swaziland, twenty out of twenty-four people, ranging from chiefs, lawyers, NGO workers, and parliament members, stated it would be a good idea to include women on the village land board. One chief said he preferred to have women on his inner council and stressed that he believed “women stick to decisions and also if they think people in authority are wrong, they will say so.” Interview with Chief Dlamini, in Ezulwini, Swaziland (March 5, 2007).

With an equal number of women on the village land board, women will also be able to more accurately represent the needs and interests of the community. In its recent communal land law reform, Namibia opened appointments to land allocation boards to consultation with organizations focused on community interests. Communal Land Reform Act 5 of 2002 s. 4(3) (a) (Namib.).

Chapter 9: Village land board functions

20. The village land board will

- (1) receive applications for Swazi Nation Land;
- (2) decide whether to grant an allocation of land;
- (3) determine what size plot should be allocated; and
- (4) perform such other functions as are assigned to a board by this Act.

21. The village land board will keep a record of allocations and will be responsible for registering all Swazi Nation Land with the Land Management Board and Deeds Registrar.

- (1) Where spouses apply for Swazi Nation Land, the village land board will register them as having co-title to the land, meaning each spouse has a right of occupancy to the entire property.

In order to ensure that a husband and wife have equal rights to the land, they should be treated as having rights to the complete property rather than a portion of the property. This also ensures that for decisions related to the land, spouses must consult each other. This is meant to remedy the current situation where men have final authority over decisions related to the land. See CEDAW, art. 16(h) (guaranteeing “the same rights for both spouses in respect of the ownership, acquisition, management, administration, enjoyment and disposition of property, whether free of charge or for a valuable consideration.”).

- (2) Where a group or cooperative apply for Swazi Nation Land, it will be treated as each having partial title to the land, meaning each member will have a distinct share in the land.

22. If land given to an individual or family is bequeathed to heirs of the individual or family to whom it was originally allocated, the village land board must register this change with the Land Management Board and Deeds Registrar.

WOMEN'S EQUAL PROPERTY AND LAND RIGHTS

Countries such as Botswana and Kenya have also implemented registration of communal land. This ensures that men and women will be able to prove rights of occupancy to the land to reduce disputes over land boundaries and avoid duplicative allocations, such as allocating the same land to different people. See Emmanuel Tembo and Julian V. Simela, *Optimizing Land Information Management in Tribal Lands of Botswana* (2004) (Land Boards were created in different jurisdictions in Botswana to register communal land when allocated); Roger Southall, *The Ndungu Report: Land & Graft in Kenya 142-51* (2005) ("Trust land is held by County Councils on behalf of local communities, groups, families and individuals ...until it is registered under any land registration statutes"), available at http://www.oxfam.org.uk/what_we_do/issues/livelihoods/landrights/downloads/ndungu_report_land_graft.rtf.

Registering all plots of Swazi Nation Land will ensure that there is no dispute as to who has been allocated land. Registering will also ensure that no person is taking more land than they can use so that every person eligible to have land allocated to him or her can be allocated land. See Tanzania's Village Land Act 5 of 1999 s. 8 (recognizing that different consideration is necessary depending on the size of the plot to be allocated).

23. Chiefs and members of the village land board must be paid such allowances in respect of their services as the Land Management Board may determine with the concurrence of the Equal Property and Land Committee.

Traditionally, Swazi chiefs did not receive a salary or wages from the state, though they carried out administrative functions. In the absence of a stable income, chiefs have been forced to rely on gifts from inhabitants, and at times on extracting bribes. Recognizing this problem, the Swazi Parliament has already issued an order that chiefs be paid by a stipend. Swaziland Administrative Order of 1998 s. 39(1). This provision is modelled after the 1998 Swaziland Administrative order and the Namibia reforms on communal land. Communal Land Reform Act 5 of 2002 s. 10 (Namib.). The Equal Property and Land Committee will consult on allowances for village land board members and chiefs since it is charged with oversight of the Land Management Board under section 92 of this Act.

24. The Village Land Board has the authority to recommend to a Magistrate Court with jurisdiction how Swazi Nation Land should be distributed upon the divorce of civil rites marriages, the dissolution of common law marriages, and the break up of marriages governed by Swazi law and custom. The recommendation is not binding on the Magistrate Court.

Chapter 10: Application procedure

25. An application to the village land board for an allocation of Swazi Nation Land must be—

- (1) made in writing on the prescribed Registration Form A, which indicates the use of the land;
- (2) signed—

- (a) where the application is made by an individual, by the applicant;
 - (b) where the application is made by a family, by all adult persons from such family unit; or
 - (c) where the application is made by a cooperative or small business, by all members of that cooperative or small business.
- (3) accompanied by a nominal fee to be determined by the Land Management Board; and
- (4) submitted to the village land board within whose boundaries the land is situated.

26. The application fee for Swazi Nation Land will replace the traditional payment of Khonta to the chief for Swazi Nation Land allocation.

The requirement of an application fee rather than khonta (an “allegiance” payment traditionally accepted exclusively from men) allow for more transparency in the allocation process and guarantee equality in the application procedure (i.e., no special requirements for women). Currently, the Khonta process gives the chief much discretion in determining questions of admissions to the chiefdom. See Swazi Administration Order of 1998 s. 12 (“chiefs... may determine questions of admission of persons to the chiefdom”). A fee for an application will make obtaining land more affordable. The use of a small fee is already in place in Namibia. Communal Land Reform Act 5 of 2002 s. 42(2) (Namib.) (allows that fees and charges may be prescribed for applications and issuing of documents). The fee for application will be used to fund training for the chiefs and village land board to assure compliance with this new Act.

27. Where the village land board has determined to allocate land to an applicant, it must issue a certificate to the applicant signed by all members of the village land board.

28. For each applicant, the village land board will retain one copy of the certificate granting an allocation of land and submit to the Land Management Board within sixty (60) days of receiving the application either:

- (1) A copy of the certificate granting an allocation of land; or
- (2) The denied application of the applicant, stating the reasons for the denial.

The requirement that determinations for land allocation occur within sixty days will ensure that the village land board does not use delays to deny women land. Tanzania also has a requirement that determinations be made within a specified time period. See Village Land Act 5 of 1999 s. 23(1) (Tanz.) (stating that when a person is denied land, they must be furnished with a statement of the reasons).

Statutes of several other African countries, such as Tanzania, require that the board furnish the applicant with the reasons for refusal. See Village Land Act 5 of 1999 ss. 23(3), (4), 25 (Tanz.). Requiring the board to give reasons will ensure that they do not act arbitrarily and that they do not use a discriminatory basis to deny allocation of land.

29. Upon receiving certificates and applications, the Land Management Board will review the certificates and applications to ensure that the size of the plot allo-

WOMEN'S EQUAL PROPERTY AND LAND RIGHTS

cated to applicants is in line with the criteria for land allocation in section 33, any other criteria set out in regulations by the Land Management Board and that land was allocated without discrimination.

This provision recognizes the Constitutional authority of the Land Management Board for “the overall management, and for the regulation of any right or interest in land whether urban or rural or vesting in iNqwenyama.” See Swaz. Const. 2005 s. 212(4).

30. Once an individual or group of persons have been allocated Swazi Nation Land, they may request a change of designation of use for the entire plot or for a portion of the plot.

(1) The applicant(s) must apply for a change of designation of land use in writing on the prescribed Registration Form A.

31. Any person or group who immediately before the commencement of this Act had been allocated Swazi Nation Land shall continue to hold a right of occupancy to that land.

This section is modeled on the Namibia land reforms law. Communal Land Reform Act 5 of 2002 s. 28 (Namib.).

Chapter 11: Allocation criteria

32. The Land Management Board will issue regulations specifying the maximum size of land a person or group can have rights of occupancy to.

This provision addresses concerns over the finite supply of available land for allocation. Namibian law, for example, regulates the size of land a person may be allocated. Communal Land Reform Act 5 of 2002 s. 3 (Namib.).

33. In allocating Swazi Nation Land and determining the size of the plot to be allocated, the village land board must take into account the following criteria:

- (1) the number of dependents of the applicant;
- (2) the intended use of the land; and
- (3) amount of land available and land demand.

This provision ensures that the village land board has certain criteria to consider in determining the size of land that will be allocated to an applicant. A chief interviewed by the IWHRC in Swaziland stated that already chiefs consider family size in allocating land: “Depends on the size of the family. Chiefs allocated a place to accommodate them. A man will plough land to feed himself.” Interview with one of the Chiefs Dlamini, in Ezulwini, Swaziland (March 5, 2007). This provision will ensure that women are not discriminated against and granted smaller pieces of land. Ethiopia in its rural land law notes that the amount of land allocated should also take account of the demand for land. Rural Land Proclamation 89 of 1997 s. 6(5) (Eth.).

34. In allocating Swazi Nation Land, the village land board must give priority to an application from a woman or a group of women to accelerate equality.

This provision seeks to achieve equality in the number of men and women who hold rights to Swazi Nation Land. Since currently no women have had Swazi Nation Land allocated to them, in order to achieve equality women's allocations of Swazi Nation Land must be accelerated. The Constitution requires that chiefs implement "just" measures. Swaz. Const. 2005 s. 233(9) (chiefs must enforce practices which are "just and not discriminatory"). Ethiopia's rural land law specifically ensures that women are not discriminated against. Rural Land Proclamation 89 of 1997 s. 4 (Eth.). Mauritius has recognized the importance of accelerating equality by focusing on developing women's cooperative societies. Mauritius, Combined initial and second periodic reports of States parties to the Committee on the Elimination of Discrimination against Women, (14th Sess., 1995), para. 375, U.N. Doc. CEDAW/C/MAR/1-2 (Jul. 3, 1992), *available at* <http://www.un.org/womenwatch/daw/cedaw/reports.htm> (under Mauritius).

35. The village land board can increase the size of the plot allocated to an individual or group for increased land need due to expansion of business or expansion of family.

Chapter 12: Rights associated with Swazi Nation Land

36. The Land Management Board will review chiefdom boundaries and will publish a report detailing what the boundaries of each chiefdom are and what land within each chiefdom is to be designated as Swazi Nation Land.

This provision is modeled after Namibia's Communal Land Act. Communal Land Act 5 of 2002 s. 15 (Namib.) (defining communal land).

37. Swazi Nation Land will be divided into land which may be:

- (1) occupied or used by an individual or family for residential use;
- (2) available for groups or individuals for commercial use; or
- (3) occupied and used or available for occupation and use on a community and public basis, to be known as communal Swazi Nation Land.

To allow land to be used for collateral in certain circumstances, but also to protect the traditional permanent allocation of land, land should be divided into different uses. Other countries also make distinctions based on the purpose of the land allocation. See Village Land Act 5 of 1999 s. 12 (Tanz.) (distinguishing between land for communal use and land for individual use); B. Machacha, Ministry of Local Government and Lands, Botswana's Land Tenure: Institutional reform and policy formulation (explaining that individuals are allocated land permanently for any use and business sites enter a lease agreement with the land board), *available at* <http://www.unu.edu/unupress/unupbooks/80604e/80604E07.htm#Botswana's%20land%20tenure:%20Institutional%20reform%20and%20policy%20formulation>.

38. In each chiefdom, the Swazi Nation Land must be divided so that a certain percentage of the land is set aside for residential uses, for commercial uses, and for communal purposes. These percentages will be reviewed every year by the village

WOMEN'S EQUAL PROPERTY AND LAND RIGHTS

land board and adjusted if demand for one type of land exceeds the amount set aside for that purpose.

This provision follows Tanzania's Village Land Act 5 of 1999 s. 13 and Namibia's Communal Land Reform Act 5 of 2002 s. 19. Although Tanzania's act does not outline specific percentages, it contemplates that the village council will recommend the portions of land that should be set aside for each usage. The percentages are meant to ensure that land is not overwhelmingly used for commercial purposes at the expense of not having enough land to allocate for people to live on.

39. Land set aside for communal purposes can be used for:

- (1) burial grounds, sites for churches, schools, health centres, or for any other public or official purpose he may deem desirable for the progress and welfare of settlers;
- (2) grazing;
- (3) for sport or other recreation; or
- (4) for any other purpose which the Land Management Board may approve.

This language is modeled after the Swazi Land Settlement Act of 1946 s. 8.

40. An allocation of Swazi Nation Land will be granted—

- (1) To the applicant(s) and their heirs if the land is allocated to an individual or family unit for residential use, unless the family is removed from the land for a valid reason under section 49 of this Act; or
- (2) For a renewable lease of up to 99 years if the land is allocated to a person or group of people for commercial use.

To preserve Swazi culture and the importance of ancestral land to Swazi families, individuals and families who seek Swazi Nation Land should be allocated land permanently and be able to pass the title on to their children. This will preserve the importance of being on the same land as ancestors and ensure that families will always have land to live on. A review of the communal land practices of several African countries reveals that individuals are not granted leases on land, but rather use rights.

At the same time, in order to allow small businesses and cooperatives that would like to be able to use the land to obtain loans and credit, Swazi Nation Land should be granted for a term of up to 99-years. This is consistent with the National Land Policy, which envisions a 99-year lease in limited, commercial circumstances. Draft Land Policy s. 2.2.2a (Swaz.). It also is consistent with 99-year lease programs in other African countries, such as Zimbabwe, where leases are meant for commercial purposes.

A review of the land policies of Botswana, Democratic Republic of Congo, Ethiopia, Eritrea, Ghana, Kenya, Namibia, Nigeria, Uganda, Zambia and Zimbabwe,

reveal that 99-year leases have been used for commercial or development purposes, rather than for residential uses. Distinguishing between land being used by individuals or families to support themselves and for commercial purposes will respect the uniqueness of Swazi Nation Land, which is meant to be free and available for all Swazi people. B. Machacha, Ministry of Local Government and Lands, Botswana's Land Tenure: Institutional reform and policy formulation (explaining that individuals are allocated land permanently for any use and business sites enter a lease agreement with the land board), *available at* <http://www.unu.edu/unupress/unupbooks/80604e/80604E07.htm#Botswana's%20land%20tenure:%20Institutional%20reform%20and%20policy%20formulation>; Proclamation 58 of 1994 (Erit.) (granting occupancy rather than lease rights to land); Legal Assistance Centre, Analysis of the Namibian Commercial Land Reform Process (2005), *available at* <http://www.lac.org.na/lead/Pdf/landwefarm.pdf> (discussing that leases on land are designed for large farmers in communal areas and that some land is distributed in formal resettlement schemes; stating that banks are not providing loans because resettlement farms "cannot currently offer collateral as the land belongs to the State."); Emea O. Arua and Eugene C. Okorji, Centre for Rural Development and Cooperatives, University of Nigeria, Multidimensional analysis of land tenure systems in eastern Nigeria (1998), *available at* <http://www.fao.org/sd/LTdirect/LR972/w6728t14.htm> (describing Nigerian land tenure systems as based on the concept of group ownership of rights in land with individuals being able to access and use the land); African Studies Quarterly, Women's Movements, Customary Law, and Land Rights in Africa: The Case of Uganda, *available at* <http://www.africa.ufl.edu/asq/v7/v7i4a1.htm> (Volume 7, Issue 4, Spring 2004) (citing Land Act of 1999 and Village Land Act of 1999); C.T.A. Banda, Commissioner of Lands, Institutional, administrative, and management aspects of land tenure in Zambia, *available at* <http://www.unu.edu/unupress/unupbooks/80604e/80604E08.htm#Institutional,%20administrative,%20and%20management%20aspects%20of%20land%20tenure%20in%20Zambia> (explaining that Zambians hold and use land but that "leases and rights of occupancy are seldom granted to indigenous persons"); Joseph Mbinji, Program Office for Zambia Land Alliance, Getting Agreement on Land Tenure Reform: The Case of Zambia, *available at* http://www.capri.cgiar.org/wp/..%5Cpdf%5Cbrief_land-12.pdf (stating that Zambia has been trying for years to change land policy to allow for more privatization but has been met with hostility from traditional leaders and the poor who are concerned that such a policy would disadvantage women and the poor).

41. Once an applicant is allocated Swazi Nation Land, the applicant receives all the rights to

- (1) use the land for residential or commercial purposes, as long as it does not reduce the value of the land beyond ordinary wear and tear;
- (2) rent the land out, subject to the restrictions in the section 46 - 48;
- (3) use hired labour on the land;
- (4) engage in afforestation by planting trees or seeds and receive the proceeds from the by-products of such planting; and
- (5) use and dispose of the by-products of that land, including crops grown on the land or animals raised on the land.

WOMEN'S EQUAL PROPERTY AND LAND RIGHTS

This provision responds to section 211(2) of the Swazi Constitution, which states that all people are entitled to Swazi Nation Land for “normal domestic purposes.” SWAZ. CONST. 2005 s. 211(2). The phrase, “normal domestic purposes” is not defined which caused ambiguity as to how a person may use Swazi Nation Land. This section is meant to provide guidance to resolve this ambiguity.

42. Once an applicant is allocated Swazi Nation Land for commercial use, the applicant receives all the rights enumerated in section 41, in addition to the right to alienate the land in whole or in part.

43. The duties of holders of a right of occupancy on Swazi Nation Land are as follows

- (1) individually and collectively for the maintenance and care of –
 - (a) roads and paths separating allotments;
 - (b) water furrows and other means of conveying water on or adjacent to allotments; and
 - (c) laundry blocks, taps and all other facilities provided for the maintenance of a pure water supply for the community.
- (2) Any person who fails to carry out the duties imposed by this section will be guilty of an offence.

The duties of holders of rights of occupancy are modeled after the Swazi Land Settlement Act of 1946 s. 13.

44. When more than one person has been allocated land, all persons allocated the land must mutually consent to all decisions related to the land, including but not limited to:

- (1) Renting the land;
- (2) Applying to alter the designation of the use of the land; and
- (3) Mortgaging the land if the land was allocated for commercial use.

This provision is meant to ensure that all members of cooperatives or businesses consent to major decisions regarding the land. Section 9 of this Act already specifies that spouses must consent to such decisions.

45. A co-holder of a right of occupancy on the land cannot withhold consent unreasonably.

Chapter 13: Renting Swazi Nation Land

46. Should a person who has been allocated Swazi Nation Land for residential purposes choose to temporarily reside at another location, he may grant derivate rights to the Swazi Nation Land allocated to him to another person, and may be compensated by that person, subject to village land board approval if:

- (1) the holder of the right of occupancy on the land is renting the land for a fixed term of over one year to another person; or

(2) the holder of the right of occupancy on the land is renting the land to an individual that intends to erect permanent structures on the land or make any improvements on the land.

Currently, holders of Swazi Nation Land may not, even temporarily, transfer their interest in the land, risking its permanent loss. Unable to rent one's land has undermined people's ability to move in search of work, schooling, or due to marital breakdown. This provision allows people with customary land rights to temporarily move from the land while still retaining rights to the land. Tanzania's Village Land Act specifies when consent is required to transfer rights of occupancy temporarily. Village Land Act 5 of 1999 s. 31 (Tanz.). This section respects the community, which would be affected if a new person would be moving to the community on a long term basis or the land will be changed drastically.

47. In determining whether to grant a derivative right to Swazi Nation Land, the village land board should account for:

- (1) sufficient reserve of land for allocation and communal use; and
- (2) that the need to grant land on an accelerate basis to women is and will continue to be met.

If the land will be granted derivatively for a long period of time, the village land board should consider whether others in the community, especially women, are in need of land. *See* Village Land Act 5 of 1999 s. 33 (Tanz.). If there is a shortage of land and there is a danger that women will not be able to have land allocated them because others have more than sufficient for residential and subsistence needs, the derivative right may not be issued and the land may be reclaimed.

48. When approval of the village land board is required for granting a derivative right to Swazi Nation Land, the holder of a right of occupancy on the land and the holder of derivative rights to the land will go to the village land board and obtain a certificate listing the permanent and temporary holder of the rights to the land.

This provision provides transparency in grant or denial of land rights. *See* Village Land Act 5 of 1999 s. 32 (Tanz.) (requiring a certificate for granting of a derivative right).

Chapter 14: Cancellation of a right of occupancy

49. Only the village land board may remove a person or group from Swazi Nation Land and cancel their right of occupancy. A person may not be removed by a co-occupant, spouse, in-laws, parents, or any other person or group other than the village land board. The village land board may only require a person with a certificate of a right of occupancy on Swazi Nation Land to leave the land for just cause, which may include:

- (1) if the holder of the right fails to observe in a material respect any condition or restriction attached to the right of occupancy under this Act;
- (2) if the land is being used predominantly for a purpose not recognized under this Act; or

WOMEN'S EQUAL PROPERTY AND LAND RIGHTS

(3) on any other ground as may be prescribed by the Land Management Board.

The criteria for just cause are modeled after the Namibia Communal Land Reform Act. Communal Land Reform Act 5 of 2002 s. 27(1) (Namib.).

50. Just cause does not include removal based on:

- (1) Allegations by any person that a holder of a right of occupancy has engaged in witchcraft, adultery or another act of moral turpitude;
- (2) Inability to bear children; or
- (3) Inability to bear male children.

Chiefs, husbands and in-laws have evicted women for witchcraft or adultery. Sara Mvududu and Patricia McFadden, *Reconceptualising the Family in a Changing Southern African Environment* 85 (2001). Women also have been removed from their homes because they were not able to bear children or only bore female children. Interview with Thabsile Dlamini, woman in customary marriage, in Swaziland (March 7, 2007). This violates the right to equality and housing because women, but not men, can be removed for adultery, witchcraft and inability to bear male children. Men can only be removed for witchcraft, and even then they may go with their entire family.

51. Should a person who has been allocated Swazi Nation Land choose to permanently relocate to another chiefdom, he must inform the village land board of such a decision, which will in turn notify the Land Management Board.

- (1) The Land Management Board must register the relocation request; and
- (2) As of the registered date of relocation, the land which has been left may be allocated to another person.

This provision gives people greater mobility in specifying that all Swazi citizens or persons ordinarily and lawfully residing in Swaziland can terminate their rights of occupancy on one piece of land in order to be allocated land elsewhere in Swaziland. This will protect the freedom of movement, which is guaranteed in the Constitution. Swaz. Const. 2005 s. 26 (right to move freely and reside in any part of Swaziland). People will be able to choose to leave their allocated land, and their relocation must be registered so that when they attempt to be allocated land in another region, the village land board will see that they do not have the previous land allocated to them anymore. The Draft Land Policy recognizes the importance of mobility and sought to allow all Swazi citizens or persons ordinarily and lawfully residing in Swaziland the right to be allocated land anywhere in Swaziland. Draft Land Policy s. 2.1.2 (Swaz.).

52. A person or group has abandoned Swazi Nation Land where:

- (1) The holder of the right of occupancy has not occupied the land for any purpose, including not granting derivative rights to another individual or group, for not less than five years; or
- (2) The holder of the right of occupancy has left the country for not less than

six months without making any arrangement for any person to be responsible for the land and has not given any notification to the village land board.

See Village Land Act 5 of 1999 s. 45 (Tanz.) (stating the same criteria for determining whether land is abandoned).

53. Once a person has abandoned Swazi Nation Land, his name will be removed from the certificate designating the holder(s) of a right of occupancy on the land.

This section is meant to protect women whose husbands leave them for several years, fail to support them, or their joint children, and build a life elsewhere. In some situations, such men return to reclaim the land when they need a place to live. This provision tackles this situation created because Swazi men work in South Africa and sometimes do not return. Women and Law in Southern Africa Research Trust, *Family in Transition: The Experience of Swaziland* 114 (1998).

54. Any person whose right of occupancy to Swazi Nation Land has been cancelled may apply to be allocated land in either the same region or another region.

55. If cooperative or small business with a right of occupancy on Swazi Nation Land breaks up before the end of its lease, the individuals who will retain rights of occupancy on the land will be determined by regulations on cooperatives and small businesses, to be created by the Ministry of Employment and Enterprise.

The Ministry of Employment and Enterprise is responsible for overseeing “the development, promotion and coordination of small and medium enterprise policies and programs.” Swazi Government Website, Ministry of Enterprise and Employment Home Page, available at <http://www.gov.sz/home.asp?pid=58>.

Chapter 15: Training and oversight responsibilities of the Land Management Board

56. The Land Management Board must implement a training program to instruct chiefs and the village land board on laws and regulations regarding Swazi Nation Land allocation. Non-governmental organizations can be used to assist with training. Training must include:

- (1) the application of this Act on rights of occupancy on Swazi Nation Land; and
- (2) gender sensitivity in allocating land.

The African Charter at section 25 obligates states parties not only to enact non-discriminatory laws, but to educate individuals on the rights and freedoms of others and to make sure that those rights and freedoms are understood. Furthermore, section 28 of the African Charter obligates every individual to “respect and consider his fellow beings without discrimination.” African Charter on Human and Peoples’ Rights, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), entered into force Oct. 21, 1986, ratified by Swaziland Sept. 15, 1995, available at http://www.achpr.org/english/_info/charter_en.html.

WOMEN'S EQUAL PROPERTY AND LAND RIGHTS

57. The Land Management Board must perform an annual audit to ensure that the provisions of the Act, the Constitution, and other laws concerning the allocation, use and removal from Swazi Nation Land.

58. If the Land Management Board finds that the provisions of this Act regarding Swazi Nation Land are not followed, the board can begin an action directly in the High Court.

Part V - GOVERNMENT LAND

This Part addresses government land which includes public and Crown land. *See* Crown Lands (Conditions) Act of 1968 (government land includes crown land).

Chapter 16: Transparent and non-discriminatory sale and acquisition of government land

59. Any Swazi citizens or persons ordinarily and lawfully residing in Swaziland may purchase or acquire government land regardless of gender, marital status or other protected status.

60. The Land Management Board will announce the sale of government land to the public in each Tinkhundla at least one month before the land goes on sale by

- (1) publications in all nationally distributed and local newspapers for at least two weeks;
- (2) announcements on Swazi Radio in both English and SiSwati for at least two weeks;
- (3) one month period before the land goes on sale; and
- (4) publication and distribution of flyers with appropriate information on the impending sale of government land.

61. The process for putting in a bid or request for a government land plot

- (1) must take place in offices accessible to everyone in the community, ideally in the Tinkhundla house;
- (2) must be clearly defined for all applicants; and
- (3) must be affordable to applicants based on a sliding scale according to the individual's or family's net income.

62. The Land Management Board will inventory government land and sale thereof on a quarterly basis to include information about the location, owners, and prospective buyers of government land plots.

The entire process of administering and selling government land must become more transparent and non-discriminatory. While government land is sold to private citizens it is often a closed process and not publicised to the general public. Telephone Interview with Ms. Thabisile Lange, Legislative Drafter, Office of the Attorney General (May 10, 2007). Because government land is sold at lower rates than private land, women with little money and many dependents are foreclosed from the opportunity to buy land at a low price they may be able to afford when

the sale of government land is not publicly advertised. Disorganization and corruption in the administering of government land further prevents the Swazi public from accessing government land. According to the Draft Land Policy, there is no consolidated inventory of government land holdings, which prevents any useful and strategic sale of government land for the benefit of the Swazi people. Draft National Land Policy 4.1.3. (Swaz.). Additionally, government institutions are known to hoard valuable land and government officials are known to restrict sale of government land to their friends and family. Draft National Land Policy 4.1.3. (Swaz.). With ample publication of sales, and periodic inventory of amount of land and to whom it is sold, the sale of government land can become more transparent.

Chapter 17: Government land reform projects

63. The Land Management Board and Ministry of Natural Resources will set aside at least fifty (50) percent of available subsidized government land plots up for sale for women and female households with multiple dependents.

Government land projects in rural and peri-urban areas that sell government and crown land at subsidized rates need to prioritize women and female headed households in the distribution of this land. Female headed households are the poorest of any households in Swaziland and are the least able to purchase title deed land. *See* Ministry of Economic Planning and Development The Kingdom of Swaziland, Swaziland: Poverty Assessment By the Poor, Report on Participatory Poverty Assessment, 3 (CB 226) Aug. 1997; *see also* Human Development Group Eastern and Southern Africa The World Bank, Swaziland: Reducing Poverty Through Shared Growth, report no. 19658-SW, vi (CB 171) (Jan. 12, 2000) (Female headed households account for more than one-third of rural households and have the highest poverty rates in Swaziland). Purchasing of land at market value is especially difficult for women who have historically been excluded from land and property ownership. Women are also disproportionately left out of or are restricted from the wage labour market making their access to government and crown land schemes all the more important.

The Constitution in section 20(5) requires the state to act to make the Constitutional opportunities a reality for women: Parliament has the power to enact land reform laws or implement policies and programmes “aimed at redressing social, economic or educational or other imbalances in society.” Section 28(2) requires the government to “provide facilities and opportunities necessary to enhance the welfare of women to enable them to realise their full potential and advancement.” The 50 percent policy is a corrective measure much like sections 86(2) and 95(3)(a) of the Constitution which mandate a certain number of women representatives in the House of Assembly.

Section 63 will help Swaziland meet its domestic obligations under the Constitution’s section 21(2) granting all citizens of Swaziland “without regard to gender... equal access to land for normal domestic purposes,” and “the right to equal treatment with men [including] equal opportunities in political, economic and social activities,” as well as “equality of economic opportunity” under section 28(1)

WOMEN'S EQUAL PROPERTY AND LAND RIGHTS

(binding equality right) and section 59(5) (non-binding directive). Swaz. Const. ss. 28(1), 59(5), 211(2).

Countries around the world have implemented or are in the process of implementing measures that guarantee women access to subsidized government land. Egypt requires 20% of land earmarked for land reform to be settled by female-headed households who face special hardship, making settler women eligible for membership in agricultural cooperatives and for formal credit. The Secretary General, Report of the Secretary-General submitted in accordance with Commission resolution 2001/34, para. 54, delivered to the Economic and Social Council and the Commission on Human Rights, U.N. Doc. E/CN.4/2002/53 (Jan. 15, 2002), available at <http://www.unhcr.ch/Huridocda/Huridoca.nsf/TestFrame/dbc76479922d0282c1256b990053c4b2?Opendocument>; Jamaica is currently reviewing their land reform policy under the Married Women's Property Act which increases land availability to poor women (Jamaica, Fifth periodic report of States Parties to CEDAW, U.N. Doc CEDAW/C/JAM/5 (2005), available at <http://www.un.org/womenwatch/daw/cedaw/reports.htm> (under Jamaica)); China guarantees women an equal right to property including the allotment of agricultural land and land for housing construction. (Law of the P.R.C. on the Protection of Rights and Interests of Women, arts. 32, 33 (2005) (effective Jan. 1, 2006) cited in Center for Reproductive Law and Policy, Women of the World: Laws and Policies Affecting Their Reproductive Lives, East and Southeast Asia: China 56-57 (2005) available at <http://www.reproductiverights.org/pdf/China.pdf>; Kazakhstan's Ministry of Agriculture has recommended the allocation of plots of land on a priority basis to mothers with large families and to single mothers. Kazakhstan, Initial reports of States parties to CEDAW, U.N. Doc. CEDAW/C/KAZ/1 (2000) at para. 143, available at http://www.bayefsky.com/reports/kazakhstan_cedaw_c_kaz_1_2000.pdf.

Part VI - BANKING

Chapter 18: Equal rights to loans and credit

64. Lending institutions may not consider gender, marital status, marital regime, or other protected grounds as outlined in section 20 of the Constitution, in its criteria and procedures for awarding and allowing a person to guarantee loans and other forms of financial credit;

The purpose of this provision is to ensure that all Swazi nationals and persons ordinarily and lawfully residing in Swaziland have equal access to loans, mortgages, and other forms of financial credit and subject them to equal procedures. Specifically, any banking policies that prohibit individual women or groups of women from obtaining or guaranteeing loans will hereby be unlawful.

Currently, there are two procedural differences between men and women in obtaining and guaranteeing loans. See Interview with SwaziBank Housing Loan Officers in Mbabane, Swaziland (Mar. 6, 2007). First, it is official bank policy to require women married in community of property to sign a renunciation of benefits to complete their capacity to contract. In other words, they are required to renounce their benefit to be perceived as minors. Second, such a woman must obtain her husband's consent to acquire or guarantee a loan, because by doing so, she is en-

cumbering the marital property. With respect to the first requirement, this legislation seeks to abolish the marital power, a change which renders a renunciation of contract benefits moot. This legislation preserves the second requirement but does so on a gender-, marital status-, and marital regime-neutral basis. Thus, any person who co-owns property with any other person must obtain the latter's consent when acquiring or guaranteeing a loan using that property as collateral, thereby making the procedure equal regardless of gender, marital status, or marital regime.

Section 69 of the Property and Land Equality Act, 2007 would bring Swaziland into compliance with its constitutional and international obligations. Under the Constitution, “[s]ubject to the availability of resources, the Government shall provide facilities and opportunities necessary to enhance the welfare of women to enable them to realise their full potential and advancement.” Swaz. Const. 2005 s. 28(2). The Directive Principles of State Policy (Directive Principles) provide valuable guidance for Parliament when it is “applying or interpreting this Constitution or any other law and in taking and implementing any policy decisions, for the establishment of a just, free and democratic society.” Swaz. Const. 2005 s. 56(1). Under these Directive Principles, “the State shall afford equality of economic opportunity to all citizens and, in particular, the State shall take all necessary steps so as to ensure the full integration of women into the mainstream of economic development,” Swaz. Const. 2005 s. 59(5) and “shall give the highest priority to the enactment of legislation for economic empowerment of citizens.” Swaz. Const. 2005 s. 60(3). The Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) also mandates that its “States Parties...take all appropriate measures to eliminate discrimination against women in other areas of economic and social life in order to ensure, on a basis of equality of men and women, the same rights, in particular the right to bank loans, mortgages and other forms of financial credit.” Convention on the Elimination of All Forms of Discrimination Against Women, art. 13(b), G.A. res 34/180, 34 U.N. GAOR, Supp. (No. 46), at 193, U.N. Doc. A/34/46, entered into force Sept. 3, 1981, ratified by Swaziland Mar. 26, 2004, *available at* <http://www.un.org/womenwatch/daw/cedaw/cedaw.htm> [hereinafter CEDAW]. Under the Protocol to the African Charter on the Rights of Women in Africa, which Swaziland has signed and reflects a regional understanding of priorities and aspirations, “[w]omen shall have the right to fully enjoy their right to sustainable development. In this connection, the States Parties shall take all appropriate measures to promote women’s access to credit, training, skills development and extension services at rural and urban levels in order to provide women with a higher quality of life and reduce the level of poverty among women.” Protocol to the African Charter on the Rights of Women in Africa art. 8, *available at* <http://www.achpr.org/english/women/protocolwomen.pdf> [hereinafter African Women’s Rights Protocol].

The loan and credit provisions of twenty-three different countries in Africa, Asia, the Caribbean, Central America, and Europe, whose credit laws were surveyed provide equal treatment for loan applications regardless of gender, and women regardless of marital status do not require the consent of their husbands in obtaining loans or mortgages for themselves in their names. See Austria, CEDAW Concluding Observations, CEDAW A/40/45 (1985); Bhutan, State Report, CEDAW/C/BTN/1-6 (2003); Cambodia, Initial through third periodic report of States Parties, U.N. Doc CEDAW/C/KHM/1-3 (2004), *available at* <http://www.un.org/womenwatch/daw/cedaw/reports.htm> (under Cambodia); The Secretary General,

WOMEN'S EQUAL PROPERTY AND LAND RIGHTS

Report of the Secretary-General submitted in accordance with Commission resolution 2001/34, para. 31, delivered to the Economic and Social Council and the Commission on Human Rights, U.N. Doc. E/CN.4/2002/53 (Jan. 15, 2002), *available at* <http://www.unhchr.ch/Huridocda/Huridoca.nsf/TestFrame/dbc76479922do282c1256b990053c4b2?Opendocument> (Canada); Cuba, Concluding Observations, CEDAW A/39/45 (1984); Democratic People's Republic of Korea, State Reports, CEDAW/C/PRK/1 (2002); Estonia, State Reports, CEDAW/C/EST/1-3 (2001); Georgia, Initial periodic report of States Parties, U.N. Doc CEDAW/C/GEO/1 (1998), *available at* <http://www.un.org/womenwatch/daw/cedaw/reports.htm> (under Georgia); Hungary, CEDAW Concluding Observations: Hungary, 1984; Jamaica, Fifth periodic report of States Parties, U.N. Doc CEDAW/C/JAM/5 (2005), *available at* <http://www.un.org/womenwatch/daw/cedaw/reports.htm> (under Jamaica); Jordan, Second periodic report of States Parties, U.N. Doc CEDAW/C/JOR/2 (1999), *available at* <http://www.un.org/womenwatch/daw/cedaw/reports.htm> (under Jordan); Kazakhstan, Second periodic report of States Parties to the Committee on the Elimination of Discrimination Against Women, at 51, U.N. Doc. CEDAW/C/KAZ/2 (Mar. 17, 2005), *available at* <http://www.un.org/womenwatch/daw/cedaw/reports.htm> (under Kazakhstan); Kenya, Third and fourth periodic reports of States parties to the Committee on the Elimination of Discrimination Against Women, para. At 35, U.N. Doc. CEDAW/C/KEN/3-4 (Feb. 14, 2000), *available at* <http://www.un.org/womenwatch/daw/cedaw/reports.htm> (under Kenya); Lao People's Democratic Republic, Combined initial, second, third, fourth and fifth periodic reports of States parties to the Committee on the Elimination of Discrimination Against Women, (32nd Sess., 2005), at 11-12, U.N. Doc. CEDAW/C/LAO/1-5 (Aug. 18, 2003), *available at* <http://www.un.org/womenwatch/daw/cedaw/reports.htm> (under Lao People's Democratic Republic); Libyan Arab Jamahiriya, Second periodic report of States parties to the Committee on the Elimination of Discrimination Against Women, at 45, U.N. Doc. CEDAW/C/LBY/2 (Mar. 15, 1999), *available at* <http://www.un.org/womenwatch/daw/cedaw/reports.htm> (under Libyan Arab Jamahiriya); Madagascar, Initial report of States parties to the Committee on the Elimination of Discrimination Against Women, (13th Sess., 1994), at 31, U.N. Doc. CEDAW/C/5/Add.65/Rev.2 (Nov. 11, 1993), *available at* <http://www.un.org/womenwatch/daw/cedaw/reports.htm> (under Madagascar); Malta, Combined initial, second, and third periodic reports of States parties to the Committee on the Elimination of Discrimination Against Women, (31st Sess., 2006), at 138, U.N. Doc. CEDAW/C/MLT/1-3 (Dec. 18, 2002), *available at* <http://www.un.org/womenwatch/daw/cedaw/reports.htm> (under Malta); The Secretary General, Report of the Secretary-General submitted in accordance with Commission resolution 2001/34, para. 33, delivered to the Economic and Social Council and the Commission on Human Rights, U.N. Doc. E/CN.4/2002/53 (Jan. 15, 2002), *available at* <http://www.unhchr.ch/Huridocda/Huridoca.nsf/TestFrame/dbc76479922do282c1256b990053c4b2?Opendocument> (Mexico); Myanmar, Initial report of States parties to the Committee on the Elimination of Discrimination Against Women, at 19, U.N. Doc. CEDAW/C/MMR/1 (June 25, 1999), *available at* <http://www.un.org/womenwatch/daw/cedaw/reports.htm> (under Myanmar); Mexico, Third and fourth periodic report of States parties to the Committee on the Elimination of Discrimination Against Women, para. 345, U.N. Doc. CEDAW/C/MEX/3-4 (May 21, 1997), *available at* <http://documents.un.org> (After clicking "welcome," then click "simple search," and insert the U.N. Doc. No. at "symbol."); Namibia, Combined second and third periodic reports of States parties to the Committee on the Elimination of Discrimination

Against Women, at 68, U.N. Doc. No. CEDAW/C/NAM/2-3 (Sept. 2, 2005), *available at* <http://www.un.org/womenwatch/daw/cedaw/reports.htm> (under Namibia); Nepal, Combined second and third periodic report of States parties to the Committee on the Elimination of Discrimination Against Women, at 7, U.N. Doc. No. CEDAW/C/NPL/2-3 (April 7, 2003), *available at* <http://www.un.org/womenwatch/daw/cedaw/reports.htm> (under Nepal); Philippines, Combined fifth and sixth periodic reports of States parties to the Committee on the Elimination of Discrimination Against Women, (36th Sess., 2006), para. 85, U.N. Doc. No. CEDAW/C/PHI/5-6 (Aug. 2, 2004), *available at* <http://www.un.org/womenwatch/daw/cedaw/reports.htm> (under Philippines); Poland, Sixth periodic report of States parties to the Committee on the Elimination of Discrimination Against Women, para. 228, U.N. Doc. No. CEDAW/C/POL/6 (Dec. 13, 2004), *available at* <http://www.un.org/womenwatch/daw/cedaw/reports.htm> (under Poland).

- (1) Lending institutions may set a preference for granting loans and other forms of financial credit to women, with an aim to redress economic imbalances in society.
- (2) The Ministry of Finance may provide incentives in its regulations to lending institutions for granting preferential treatment to women in awarding loans and other forms of financial credit.

Though this bill directs lending institutions to utilize neutral criteria in granting loans and permitting persons or groups to be guarantors of loans, women may still be denied loans and guarantor status on an unequal basis as men due to their disadvantaged economic status and lack of rights and access to property. This provision allows lending institutions to implement preferential treatment for women, and the government through the Ministry of Finance to reward such lending institutions for doing so, in an attempt to remedy the violations of women's rights that have been occurring in the credit and loan area and also allow the government to act consistently with its duties to "redress...social, economic...or other imbalances in society," Swaz. Const. 2005 sec. 20(5), by providing the "facilities and opportunities necessary to enhance the welfare of women to enable them to realise their full potential and advancement." Swaz. Const. 2005 sec. 28(2). *See also* Swaz. Const. 2005 sec. 59(5) ("The State shall take all necessary steps so as to ensure the full integration of women into the mainstream of economic development."); Swaz. Const. 2005 60(3) ("The State shall give the highest priority to the enactment of legislation for economic empowerment of citizens."); Human Rights Committee, General Comment No. 18, Non-discrimination, (37th Sess., 1989), para. 8, *available at* <http://www.ohchr.org/english/bodies/hrc/comments.htm> [hereinafter HRC General Comment 18] ("The principle of equality sometimes requires States parties to take affirmative action in order to diminish or eliminate conditions which cause or help to perpetuate discrimination prohibited by the Covenant."); Human Rights Committee, General Comment No. 28, Equality of rights between men and women (article 3) (68th Sess., 2000), para. 31, *available at* <http://www.ohchr.org/english/bodies/hrc/comments.htm> [hereinafter HRC General Comment 28] ("States parties should review their legislation and practices and take the lead in implementing all

WOMEN'S EQUAL PROPERTY AND LAND RIGHTS

measures necessary to eliminate discrimination against women in all fields, for example...in areas such as...the provision of accommodation, goods and services.”)

Mexico's National Housing Fund for Workers and Institute of Social Security for State Employees both give priority to female heads of households. The Secretary General, Report of the Secretary-General submitted in accordance with Commission resolution 2001/34, para. 33, delivered to the Economic and Social Council and the Commission on Human Rights, U.N. Doc. E/CN.4/2002/53 (Jan. 15, 2002), *available at* <http://www.unhcr.ch/Huridocda/Huridoca.nsf/TestFrame/dbc76479922d0282c1256b990053c4b2?Opendocument>. Spain's Third Equal Opportunity Plan includes measures to facilitate access of women entrepreneurs to bank credit. The Secretary General, Report of the Secretary-General submitted in accordance with Commission resolution 2001/34, para. 34, delivered to the Economic and Social Council and the Commission on Human Rights, U.N. Doc. E/CN.4/2002/53 (Jan. 15, 2002), *available at* <http://www.unhcr.ch/Huridocda/Huridoca.nsf/TestFrame/dbc76479922d0282c1256b990053c4b2?Opendocument>.

65. Microcredit programs and Tinkhundlas shall not discriminate in awarding loans and other forms of financial credit on the basis of gender, marital status, or marital regime.

(1) Microcredit programs and tinkhundlas must grant at least 50 percent of their loans and other forms of financial credit to women. The Ministry of Finance in collaboration with the Ministry of Enterprise and Employment may change these percentages on a yearly basis.

Together, the Ministry of Finance and the Ministry of Enterprise and Employment oversee microcredit programs, which grant loans and other forms of financial credit to persons in need for various purposes. Tinkhundlas (regional governments) receive funds from the Ministry of Finance for loan programs which lend mostly to cooperatives, small businesses, and other groups, usually for agricultural purposes. They also fall under the oversight of the Ministry of Enterprise, which acts as the government focal point on small and medium enterprise issues via its Small and Medium Enterprises Unit. *See* Telephone Interview with Ms. Thabisile Lange, Legislative Drafter, Office of the Attorney General (May 10, 2007); Ministry of Enterprise and Employment, Small and Medium Enterprises Unit, <http://www.gov.sz/home.asp?pid=2106> (last visited May 15, 2007). The fact that “[t]he establishment of Small and Medium Entrepreneurs (SME’s) Unit in government [within the Ministry of Enterprise and Employment]. . . provides a support structure to women in business venture[s],” displays the government’s understanding of the importance of women’s participation in Swaziland’s private sector. The Ministries can combine their consideration for gender equality with their insight into the country’s business environment and utilize this knowledge in analyzing the annual reports as mandated in section 94 of this Act and changing the gender quotas accordingly. Ministry of Home Affairs, Swaziland Country Report: Sub-Regional Review on Implementation of the Beijing Platform for Action (1995) and the Outcome of the Twenty-Third Special Session of the General Assembly (2000) (April 2004) at 6.

Because Swaziland is largely an agricultural and rural society, it is especially important for financial institutions to grant special preferences to women in the area of the agriculture. The majority of the poor live in rural areas, where “per capita income is about four times lower than in urban areas, food consumption is two times lower, and severe poverty is nearly twice as common. About 76 per cent of the rural population is poor, and 43 per cent live in extreme poverty Women are particularly vulnerable to poverty [because] traditional social systems discriminate severely against women, who are often barred from owning and controlling land and other assets.” International Fund for Agricultural Development (IFAD), *Rural Poverty in Swaziland* (Mar. 7, 2007), available at <http://www.ruralpoverty-portal.org/english/regions/africa/swz/index.htm> (last visited May 15, 2007).

Preferential or corrective treatment for women in receiving agricultural loans from tinkhundlas would be consistent with Directive Principle Section 59(2)(d) of the Constitution, which lists as an economic objective “improving the conditions of life in the rural areas, and generally, redressing any imbalance in development between the rural and urban areas.” The government would also come into compliance with its CEDAW obligation to “take all appropriate measures to eliminate discrimination against women in rural areas in order to ensure, on a basis of equality of men and women, that they participate in and benefit from rural development and, in particular, shall ensure to such women the right to have access to agricultural credit and loans. . . .” CEDAW, art. 14(2)(d).

Microcredit programs in other countries also have preferential policies directed at women, to help correct for their lower economic status. For example, the Banco Sol microcredit bank in Angola has a policy requiring that a borrower must be a group of five people whose leader is a woman. Angola, Fourth and Fifth Periodic Reports of States Parties to the Committee on the Elimination of Discrimination Against Women, (2004), p. 44, U.N. Doc. CEDAW/C/AGO/4-5 (June 8, 2004), available at <http://www.un.org/womenwatch/daw/cedaw>. Similarly, Malawi has had several microfinance programmes that are targeted to the poorest who have no collateral such as women. Malawi, Combined Second, Third, Fourth and Fifth Periodic Report of States Parties to the Committee on the Elimination of Discrimination Against Women, (2004), para. 4.4.7, U.N. Doc. CEDAW/C/MWI/2-5 (June 28, 2004), available at <http://www.un.org/womenwatch/daw/cedaw>. In Kazakhstan, from 2001 through 2003, approximately 48,300 microcredits totalling 6.7 billion tenge were issued, and two-thirds of them were received by rural women for the creation and expansion of their own businesses. Kazakhstan, Second periodic report of States Parties to the Committee on the Elimination of Discrimination Against Women, at 51, U.N. Doc. CEDAW/C/KAZ/2 (Mar. 17, 2005), available at <http://www.un.org/womenwatch/daw/cedaw/reports.htm> (under Kazakhstan).

Colombia, the Democratic Republic of Congo, and Kazakhstan all include special provisions to ensure that rural women are granted loans. Colombia, Combined Second and Third Report to CEDAW, U.N. Doc. CEDAW/C/COL/2-3, Rev.1 (1993), p. 65, available at http://www.bayefsky.com/reports/colombia_cedaw_c_col_2_3_rev_1_1993.pdf (stating that with 1991 land reforms women were given priority as female-headed if rural households, as being with out land); Kazakhstan, Second periodic report of States Parties to CEDAW, at 51, U.N. Doc. CEDAW/C/

WOMEN'S EQUAL PROPERTY AND LAND RIGHTS

KAZ/2 (Mar. 17, 2005), *available at* <http://www.un.org/womenwatch/daw/cedaw/reports.htm> (under Kazakhstan).

For example, the Ministry of Rural Development for the Democratic Republic of Congo made available to rural women, through the urban and peri-urban horticulture project (HUP project) seeds, fertilisers and other inputs, which the women could purchase on credit to boost their production capacity. Arrangements were also made to provide loans in cash as well as in kind.

Democratic Republic of Congo, Responses to list of issues to CEDAW, U.N. Doc. CEDAW/C/COD/Q/5/Add.1 (2006), para 27, *available at* <http://www2.ohchr.org/english/bodies/cedaw/cedaws36.htm> (under Democratic Republic of Congo)

Chapter 19: Equal rights to accounts with financial institutions

66. A person has the right to open, administer, use, and close a bank account in his or her own name without the consent of another, regardless of gender, marital status, or marital regime.

67. The procedures adopted by a financial institution, by which a person may open, administer, use, and close a bank account, shall not discriminate on the basis of gender, marital status, or marital regime.

Many women in Swaziland have trouble accessing bank accounts without the consent of their husbands. This provision seeks to give all Swazi citizens and persons ordinarily and lawfully residing in Swaziland equal access to bank accounts in their names without anyone else's consent, as well as mandate banks and other financial institutions to utilize equal procedures in granting and managing bank accounts.

Part VII - DESIGNATION OF COMMUNITY PROPERTY AND SEPARATE PROPERTY

Chapter 20: Definition of community property

28. For the purposes of this Part, community property includes:

- (1) Property registered in the name of both spouses;
- (2) Property acquired by both of the spouses during marriage by gift, bequest, devise, or descent;
- (3) Any rents, issues, profits, or other income derived from community property;
- (4) Property designated as community property on Form B, or by a written agreement between the spouses;
- (5) Damages awarded for loss or injury to community property;
- (6) Property designated as community property by a judgment or decree of a court having jurisdiction; and
- (7) Property not classified by this Act as separate property.

Both in community of property and out of community of property marriages may have community property that is jointly owned and administered by the spouses. The above definition of community property is narrowly constructed so that it applies to both regimes.

The definition of community property in this provision resembles the current common law conception of community property in Swaziland. *See* Alice Kavanaugh Armstrong and R.T. Nhlapo, *Law and the Other Sex: The Legal Position of Women in Swaziland* 35 (1986).

The definition of community property is modelled after the accrual system of South Africa, and the civil code of Louisiana. *See* Matrimonial Property Act 88 of 1984 s. 2-10 (S. Afr.); La. Civ. Code Ann. art. 2338 (2007).

69. For in community of property marriages only, community property includes property designated in Section 68 of this Chapter as community property, and:

(1) Property acquired during marriage by either spouse;

The most significant difference between in community of property and out of community of property marriages is that in the latter, nearly all property acquired during marriage is community property.

(2) Property possessed at the time of marriage, unless excluded on Form B: Designation of Property Upon Registration of Marriage or by written agreement between the spouses.

This Act includes as community property that property which is possessed by the spouses at the time of marriage because women typically enter into marriage with far less property than men. This default setup puts the spouse with fewer resources and the spouse with greater resources on equal footing. This codifies the current common law practice in Swaziland. *See* Alice Kavanaugh Armstrong and R.T. Nhlapo, *Law and the Other Sex: The Legal Position of Women in Swaziland* 35 (1986).

Note that Form B: Designation of Property Upon Registration of Marriage, allows parties to modify the impact of this provision, by designating any property as separate, including property possessed at the time of the marriage.

Chapter 21: Definition of separate property

70. For the purposes of this Part, separate property includes:

(1) Property acquired by one of the spouses during marriage by gift, bequest, devise, or descent;

Gifts and inheritance are special cases excluded from community property because a third party designates a particular recipient. This provision respects the giver-recipient relationship, and protects against the perversion where a person

WOMEN'S EQUAL PROPERTY AND LAND RIGHTS

enters into marriage in order to receive a share of the spouse's inheritance. This codifies the current practice under the common law of Swaziland. *See* Alice Kavanaugh Armstrong & R.T. Nhlapo, *Law and the Other Sex: The Legal Position of Women in Swaziland* 35 (1986).

This provision is modeled after statutes of South Africa, Germany, and Texas. *See* South Africa, Matrimonial Property Act 88 of 1984 s. 5(1) (S. Afr.); Germany, Bürgerliches Gesetzbuch [BGB] [Civil Code] Jan. 2, 2002, s. 1478(2)(2) (F.R.G.); Texas, Tex. Fam. Code. Ann. s. 5.01(a)(2).

(2) Any rents, issues, profits, or other income derived from separate property;

The gains from separate property return to the owner of that separate property. This provision is modeled after an Idaho Statute. *See* Idaho Code Ann. s. 32-906.

(3) Property designated by the spouses as separate property on Form B: Designation of Property Upon Registration of Marriage;

Spouses have the ability to designate property that would not be separate property under this Act as separate property on a case by case basis. Full and informed consent is required by both spouses, and the contract must be entered into without coercion. The form is deposited with the Deed's Registrar so that there is government oversight of the process.

(4) Damages awarded for personal injuries sustained by the spouse during marriage, except for the amount paid or otherwise satisfied from marital property and except the amount attributable to loss of income during the marriage;

This provision is modeled after the South African Matrimonial Property Act 88 of 1984, and a Wisconsin statute. *See* South Africa, Matrimonial Property Act 88 of 1984 s. 4(1)(b)(i) (S. Afr.); Wisconsin, Wis. Stat. s. 766.31(f) (2007).

(5) Property designated as separate property by a judgment or decree of a court having jurisdiction; and

Courts have the ability to deviate from the definition of separate property under this Act as required by equitable justice. Deviation may be appropriate, for example, where one spouse has helped maintain the separate property of the other spouse, and the court compensates the contributing spouse out of the separate property. Similarly, where community property is insufficient to compensate the contributing spouse for his or her contributions to the marriage, the court may assign separate property to make the distribution fair and equitable. The criteria for assigning separate property to the other spouse is provided in section 70. This codifies the current common law practice of Swaziland, which allows spouses to enter into antenuptial contracts designating certain property as separate from the community property. *See* Alice Kavanaugh Armstrong & R.T. Nhlapo, *Law and the Other Sex: The Legal Position of Women in Swaziland* 36 (1986).

This provision is modeled after a New Mexico statute. *See* N.M. Stat. s. 40-3-8(A) (3) (2007).

(6) Property not classified by this act as community property.

71. For out of community of property marriages only, separate property includes:

- (1) Property designated in section 70 of this Chapter as separate property;
- (2) Property acquired before the marriage;

Making property acquired before the marriage separate property for out of community marriages is consistent with the definition of community property for in community marriages in section 69(t). This provision is modeled after the Texas Family Code. *See* Tex. Fam. Code. Ann. s. 5.01(a)(t).

- (3) Property acquired during marriage using the funds of one of the spouses; and
- (4) Property registered in the name of only one spouse.

Registration determines the ownership of separate property for out of community marriages.

Note that spouses married in community of property may have property registered in only one of their names, but the property will nonetheless be community property.

Part VIII - DIVISION OF PROPERTY AT DIVORCE, DISSOLUTION, AND BREAK UP OF MARRIAGE

Chapter 22: Application of this part

72. The division of property upon the divorce of civil rites marriages, the dissolution of common law marriages, and the break up of marriages governed by Swazi law and custom is governed by sections 72-87 of this Act.

This Part determines how property is divided at the break up of all marriages recognized under the laws of Swaziland, and ensures that spouses are adequately protected at the break up of marriage, regardless of the marital regime.

This Part expands the jurisdiction of the magistrate courts. The lusenvo (family council) currently has the authority to decide without the participation of the spouses how property is distributed at the break up of a customary marriage. The Family Council divides property in an unjust and discriminatory manner, granting men the property of value and leaving women with only a nominal share or the basic household items. With this legislation, the magistrate courts instead of the family council will hear evidence from the spouses, and consider specific factors enumerated in this Part when dividing the estate.

WOMEN'S EQUAL PROPERTY AND LAND RIGHTS

In addition, this Part governs the division of property for the dissolution of common law marriages, as recognized in section 34(2) of the Constitution. *See* Swaz. Const. 2005 s. 34(2) (“Parliament shall, as soon as practicable after the commencement of this Constitution, enact legislation regulating the property rights of spouses including common-law husband and wife.”). Neighbouring South Africa, whose common law Swazi courts frequently reference, also grants property rights at the break up of common law marriages. *See* June D. Sinclair, *The Law of Marriage* 278-81 (1996) (describing the notion of universal partnerships where there is an implied contract between a couple who live together but are not officially married); *see also* *Ally v. Dinath* 1984 (2) SA 451 (T) (S. Afr.) (holding that the woman was entitled to half of the property because she had lived with a man for fifteen years and met the requirements of a universal partnership).

The division of property after the break up of a common law marriage is also consistent with CEDAW General Recommendation 21, which states that “Women living in [de facto] relationships should have their equality of status with men both in family life and in the sharing of income and assets protected by law.” *See* Committee on the Elimination of Discrimination against Women, General Recommendation No. 21, Equality in marriage and family relations, (13th Sess., 1992), para. 18, U.N. Doc. A/49/38 at 1 (1994), available at <http://www.un.org/womenwatch/daw/cedaw/recommendations/recomm.htm#recom21>.

Furthermore, no person will be advantaged or disadvantaged by unknowingly having their proprietary rights at the dissolution of marriage governed by Swazi law and custom. Currently, under Marriage Act sections 24 and 25, the proprietary rights of spouses who marry under civil rites and do not enter into an ante-nuptial agreement, are governed by Swazi law and custom. *See* Marriage Act 47 of 1964 s. 24-25(a). Section 72 of this act removes the pass through provision in Marriage Act sections 25, such that the property of spouses married under civil rites is divided at the dissolution of the marriage according to whether the couple is married in community of property or out of community of property.

The grounds for divorce of a civil rites marriage, dissolution of a common law marriage, and the break up of a customary marriage, as well as the related administrative or judicial procedures are outside of the scope of this Act. This Act governs only the division of property once the marriage has been dissolved. For comparative law on how other African countries have established procedures for and registered divorces of customary marriages, see, e.g., Ghana, Customary Marriage and Divorce (Registration) Law of 1985 s. 6-8 (Ghana); South Africa, Recognition of Customary Marriages Act of 1998 s. 8 (S. Afr.); Madagascar, Marriage Ordinance 62-089 of 1962 arts. 94-108 (Madag.).

Chapter 23: Customary marriages are in community of property

73. Marriages entered into under Swazi law and custom are in community of property, unless the spouses by written agreement state that the marriage is out of community of property.

Making customary marriage in community of property will protect the majority of Swazi women who do not own property when they enter into marriage, and who

do not accumulate property during marriage because they traditionally tend to the home and take care of the children rather than pursue outside employment.

South Africa in the Recognition of Customary Marriages Act of 1998, also declares that customary marriages are in community of property unless the spouses enter into an antenuptial contract. *See* Recognition of Customary Marriages Act of 1998 s. 7(2) (S. Afr.).

Chapter 24: Standard division of community property

74. Upon divorce, dissolution, or break up of marriage where there are two spouses, the court shall divide community property equally between the two spouses (assigning fifty percent to the husband, and fifty percent to the wife), unless sections 79-81 of this Act apply.

For a monogamous relationship, the default is that community property is divided equally (50-50) between the spouses. This codifies the current common law in Swaziland. *See* Alice Kavanaugh Armstrong & R.T. Nhlapo, *Law and the Other Sex: The Legal Position of Women in Swaziland* 35 (1986). This is the standard case, and the court will deviate from it only in certain limited circumstances described in sections 79-81.

The equal division of community property is standard practice throughout Africa and the world. *See, e.g.*, South Africa, Divorce Act 70 of 1979 s. 20(1) (S. Afr.); Ethiopia, Revised Family Code of 2000 s. 90 (Eth.); Center for Reproductive Law and Policy, *Women of the World: Laws and Policies Affecting Their Reproductive Lives*, Chad 103 (2003) *available at* <http://www.reproductiverights.org/pdf/chad.pdf>; *see also* Legal Assistance Centre, *Proposals for Divorce Reform in Namibia*, 2000, at 100-104, <http://www.lac.org.na/grap/Pdf/divlawref.pdf> (last visited May 4, 2007) (summarizing the Romano-Germanic model, the Nordic model, and the Anglo-American model to property division at divorce).

Equal division of property is also consistent with CEDAW General Recommendation 21, para. 28, which requires that men and women receive an equal share of property upon the dissolution of marriage: “any law or custom that grants men a right to a greater share of property at the end of a marriage or de facto relationship, or on the death of a relative, is discriminatory and will have a serious impact on a woman’s practical ability to divorce her husband, to support herself or her family and to live in dignity as an independent person.” *See* Committee on the Elimination of Discrimination against Women, General Recommendation No. 21, Equality in marriage and family relations, (13th Session, 1992), para. 28, U.N. Doc. A/49/38 at 1 (1994), *available at* <http://www.un.org/womenwatch/daw/cedaw/recommendations/recomm.htm#recom21>. Similarly, Human Rights Committee General Comment 28 requires that state parties “ensure equality in regard to the dissolution of marriage,” and that “decisions with regard to property distribution” should be the same for men and women. *See* Human Rights Committee, General Comment No. 28, Equality of rights between men and women (Article 3), (68th Sess., 2000), para. 26, U.N. Doc. CCPR/C/21/Rev.1/Add.10 (2000), *available at* <http://www.ohchr.org/english/bodies/hrc/comments.htm>.

WOMEN'S EQUAL PROPERTY AND LAND RIGHTS

75. Upon break up of a polygamous marriage where the husband and one wife are separating, the court shall:

- (1) Assign the wife who is separating a share of community property equal to $1/n$ / number of husbands and wives in the polygamous marriage; and

The division of community property remains equal even in a polygamous marriage. While international human rights law prohibits polygamous marriages, this Act deals with the diversity of marriage in Swaziland today and takes an intermediary step of regulating polygamous marriages so that spouses are treated equally without discrimination. *See, e.g.*, Committee on the Elimination of Discrimination against Women, General Recommendation No. 21, Equality in marriage and family relations, (13th Session, 1992), para. 14, U.N. Doc. A/49/38 at 1 (1994), *available at* <http://www.un.org/womenwatch/daw/cedaw/recommendations/recomm.htm#recom21> (“Polygamous marriage contravenes a woman’s right to equality with men, and can have such serious emotional and financial consequences for her and her dependants that such marriages ought to be discouraged and prohibited.”).

Chad has enacted legislation with a similar formula, but one that is less favourable to women, in the Transitional Clauses of the Marriage Act, article 15. In Chad, the divorcing woman receives a fraction of one half of the community property, where the fraction is equal to one over the number of wives, including the wife who is divorcing. *See* Center for Reproductive Law and Policy, Women of the World: Laws and Policies Affecting Their Reproductive Lives, Chad 125 (2003), *available at* <http://www.reproductiverights.org/pdf/chad.pdf>.

The provision uses the term “wife” rather than “spouse” because the provision assumes that only one of the wives will be leaving the polygamous relationship, and the other wives will stay with the one husband. If the husband wishes to break ties with all of his wives, however, he will have to seek different separation orders for each of them.

- (2) Leave intact as community property the community property remaining after the wife who is separating has received her share.

A wife who leaves a polygamous marriage does not destroy the community property. The community property, less the separating wife’s share, remains intact as community property to be administered jointly among the remaining spouses.

76. Where the community property will remain in the possession of one or more of the spouses because it cannot be divided, cannot be sold, or for any other reason, the court must:

- (1) Determine the monetary value of the community property;
- (2) Calculate the appropriate share of each spouse using the formulas under section 74 or section 75; and
- (3) Order the party/parties who will retain possession of the community property to pay the other party/parties their share.

Where the spouses agree that the community property will remain in the possession of one or more spouses for any reason whatsoever, the spouse(s) keeping the property may pay out the share(s) of the other spouse(s). In determining the monetary value of the community property, the court may seek the assistance of expert witnesses or assessors. The spouses may also call their own expert witnesses to testify only as to the value of the community property.

Madagascar has similar legislation that allows one spouse to keep the community property by paying the other spouse his or her share after the value of the property has been estimated and certified. *See* Loi 67-030 of 1966 art. 47 (Madag.) (“Les parties peuvent convenir que l’un des époux recevra sa part de communauté sous la forme d’une somme d’argent. En ce cas, la remise de la somme sera précédée d’un inventaire estimatif des biens à partager et constatée par un acte authentique ou authentifié.”) [“The parties can agree that one of the spouses will receive his or her share of the community property in the form of money. In such a case, payment will be made following an estimation of the inventory of the property to be shared, which must be certified by an authentic or authenticated act.”].

77. Where the community property will be sold and the proceeds from the sale distributed, the court must:

If the community property cannot be easily divided, if the spouses cannot agree who will retain possession of the community property, or if the spouse does not have the means to purchase the other spouse’s share, the community property will be sold and the proceeds divided equally.

In Ethiopia, the Revised Family Code of 2000 s. 92 (Eth.) states that “properties which are difficult to divide” will be sold at auction.

(1) Ensure that the community property is sold for a fair price within sixty (60) days of the official divorce, dissolution, or break up of the marriage; and

The requirement that the sale take place within sixty days will ensure that the money is not tied up for a significant amount of time, thereby reducing the financial hardship of the spouses. This is consistent with the fundamental right to an adequate standard of living, enshrined in, for example, ICESCR art. 11(1) and CEDAW General Recommendation 21. *See* International Covenant on Economic, Social and Cultural Rights art. 11(1), G.A. res 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 993 U.N.T.S.3, entered into force Jan. 3, 1976, ratified by Swaziland Mar. 26, 2004, *available at* <http://www.ohchr.org/english/law/cescr.htm>; Committee on the Elimination of Discrimination against Women, General Recommendation No. 21, Equality in marriage and family relations, (13th Session, 1992), U.N. Doc. A/49/38 at 1 (1994), *available at* <http://www.un.org/womenwatch/daw/cedaw/recommendations/recomm.htm#recom21>.

(2) Order that:

(a) In a monogamous marriage, the proceeds from the sale are distributed between the two spouses equally, using the formula under section 74.

WOMEN'S EQUAL PROPERTY AND LAND RIGHTS

Community property is divided equally between the two spouses (assigning fifty percent to the husband, and fifty percent to the wife).

(b) In a polygamous marriage:

(i) The husband pay the wife who is separating her share of the proceeds from the sale using the formula under section 75; and

The community property is divided equally among the spouses, with one share equal to $1 / \text{number of people in the polygamous marriage}$.

(ii) The remaining proceeds from the sale are community property to be administered equally by the remaining wives and their husband.

A wife who leaves a polygamous marriage does not destroy the community property arrangement.

Chapter 25: Standard division of separate property

78. Upon divorce or dissolution of marriage, the court shall assign each spouse's separate property to such spouse.

The default rule is that separate property is not divided between the spouses. Property is assigned according to ownership, codifying the current common law practice in Swaziland. *See* Alice Kavanaugh Armstrong & R.T. Nhlapo, *Law and the Other Sex: The Legal Position of Women in Swaziland* 38-40 (1986).

For examples of other countries that assign separate property to the spouses upon divorce see South Africa, Madagascar, Ethiopia, and New Zealand. *See* H. R. Hahlo, *The South African Law of Husband and Wife* 425-27 (1963) (describing how property is divided at the dissolution of an out of community of property marriage); Madagascar, *Loi 67-0303 Relative aux Régime Matrimoniaux et à la Forme des Testaments* of 1966 art. 57 (Madag.); Ethiopia, *Civil Code Proclamation No. 165 of 1960 art. 692(2)* (Eth.); New Zealand, *Property (Relationships) Act 1976 s. 15A* (N.Z.).

Chapter 26: Deviation from the standard divisions of community and separate property

79. Spouses may petition the court to deviate from the standard equal (50-50) division of community property and the standard assignment of separate property upon showing that the standard divisions would unfairly disadvantage one of the spouses.

The court may deviate from the equal division of community property only in limited circumstances. Flexibility in the law allows courts to be fair and just. Consistency in the application of the law, however, is equally important. Courts should therefore carefully exercise their discretion when determining whether to deviate from the equal division of community property.

Examples of other countries whose statutes divide community property 50-50 between the spouses, but give the court the ability to deviate from this division in certain circumstances, include Madagascar, Ethiopia, and New Zealand. *See* Madagascar, *Loi 67-0303 Relative aux Régime Matrimoniaux et à la Forme des Testaments* of 1966 art. 59 (Madag.); Ethiopia, *Civil Code Proclamation No. 165* of 1960 art. 692(1) (Eth.); New Zealand, *Property (Relationships) Act 1976* s. 13 (N.Z.).

Statutes that allow the court to deviate from the separate assignment of separate property based on principles of justice and equality include the *Matrimonial Causes Act* of 1971 of Ghana and divorce provisions within the general *Arizona Statutes*. *See* *Matrimonial Causes Act* of 1971 s. 21(1) (Ghana); *Ariz. Rev. Stat.* s. 25-318(A) (2007).

80. Where a court deviates from the standard equal (50-50) division of community property and the standard assignment of separate property, the court will be guided by principles of justice and equity, as enshrined in the Constitution in sections 14(1)(a), 19(1), and 20.

Justice and fairness will be the primary considerations of the court because the principles of fairness, equality, and non-discrimination are cornerstones to the Constitution of Swaziland. *See* *Swaz. Const.* 2005 s. 14(1)(a) (guaranteeing the “respect for life, liberty, right to fair hearing, equality before the law and equal protection of the law”); *Swaz. Const.* 2005 s. 19(1) (“A person has a right to own property either alone or in association with others.”); *Swaz. Const.* 2005 s. 20(1) (“All persons are equal before 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.”); *Swaz. Const.* 2005 s. 20(2) (“For the avoidance of any doubt, a person shall not be discriminated against on the grounds of gender. . .”). Courts may not deviate from the equal division of property in a way that discriminates against women.

Other examples of statutes that allow the court to deviate from the equal division of property based on principles of justice and equality include the *Divorce Act* of 1979 of South Africa, the *Matrimonial Causes Act* of 1971 of Ghana, and the *Property (Relationships) Act 1976* of New Zealand. *See* South Africa, *Divorce Act* 70 of 1979 s. 7(4) (S. Afr.); Ghana, *Matrimonial Causes Act* of 1971 s. 20 (Ghana); New Zealand, *Property (Relationships) Act 1976* s. 13 (N.Z.).

81. When deviating from the standard equal (50-50) division of community property and the standard assignment of separate property, financial and non-financial factors which a court may consider when determining how to divide community property include, but are not limited to:

The factors that a court may consider are broad so that the court may balance all of the equities and make a just and fair assessment. In particular, the court should weigh non-financial as well as financial contributions by the spouses. This will account for contributions that have traditionally been made by women in the home.

Countries in Africa and across the world, such as neighbouring South Africa, Zimbabwe, Madagascar, and Ethiopia, as well as Commonwealth members Tanzania, England, New Zealand, and Australia, require courts to consider financial and

WOMEN'S EQUAL PROPERTY AND LAND RIGHTS

non-financial factors when dividing property at divorce. *See* South Africa, Divorce Act 70 of 1979 s. 7(4) (S. Afr.); Zimbabwe, Matrimonial Causes Act of 1985 s. 7(4) (Zimb.); Madagascar, Loi 67-0303 Relative aux Régime Matrimoniaux et à la Forme des Testaments of 1966 art. 57 (Madag.); Ethiopia, Civil Code Proclamation No. 165 of 1960 art. 692(i) (Eth.); Tanzania, Law of Marriage Act 5 of 1971 art. 114(2)(b) (Tanz.); England, Matrimonial Causes Act, 1973, s. 25(f) (Eng.); New Zealand, Property (Relationships) Act 1976 s. 18 (N.Z.); Australia, Family Law Act, 1975, c. 4 (Austl.). The Legal Assistance Centre of Namibia, a non-governmental organization whose mission is to protect the human rights of Namibian citizens, has also proposed changes to Namibian divorce law, recommending that courts take into consideration a list of specific financial and non-financial factors when dividing property at divorce. *See* Legal Assistance Centre, Proposals for Divorce Reform in Namibia, 2000, at 4-5, <http://www.lac.org.na/grap/Pdf/divlaw-ref.pdf> (last visited May 4, 2007).

This provision is consistent with CEDAW General Recommendation 21, requiring states to consider non-financial contributions to the home: “In some countries, on division of marital property, greater emphasis is placed on financial contributions to property acquired during a marriage, and other contributions, such as raising children, caring for elderly relatives and discharging household duties are diminished. Often, such contributions of a non-financial nature by the wife enable the husband to earn an income and increase the assets. Financial and non-financial contributions should be accorded the same weight.” *See* Committee on the Elimination of Discrimination against Women, General Recommendation No. 21, Equality in marriage and family relations, (13th Session, 1992), para. 32, U.N. Doc. A/49/38 at 1 (1994), available at <http://www.un.org/womenwatch/daw/cedaw/recommendations/recomm.htm#recom21>.

Also in General Recommendation 21, the Committee observes that women who have “traditionally performed their roles in the private or domestic sphere have long had those activities treated as inferior,” and that “such activities are invaluable for the survival of society.” *See id.* at para. 12.

This provision would ensure that courts consider non-financial factors and that women are fairly and equitably compensated for their private and domestic contributions to the relationship.

(i) Primary childcare responsibilities during marriage, including but not limited to housing, food, schooling, and healthcare;

The spouse who is primarily responsible for childcare makes a financial contribution to the marriage in terms of savings; if the spouse did not provide childcare, the couple may have to pay a third party to care for the children. The magistrate court should take such savings into consideration when dividing property and compensate the spouse who has primary childcare responsibilities for her or his indirect financial contributions.

The Australian Family Law Act of 1975 requires courts to consider in property settlement proceedings contributions made to the “welfare of the family constituted by the parties to the marriage and any children of the marriage, including

any contribution make in the capacity of homemaker or parent.” *See* Family Law Act, 1975, c. 4(c) (Austl.). Similarly, England and New Zealand take into consideration childrearing responsibilities. *See* England, Matrimonial Causes Act, 1973, s. 25 (Eng.); New Zealand, Property (Relationships) Act 1976 s. 18(1)(a) (N.Z.).

(2) Whether after divorce, one of the spouses has custody of their children, and the property is required for the support of their children;

This provision requires the court take into consideration the best interests of the child, and ensures that the spouse who has primary childcare responsibilities will have adequate resources to care for that child. Other statutes that take custody into consideration include: Tanzania, Law of Marriage Act of 1971 s. 114(2)(d) (Tanz.); Illinois, 503(d)(9) Ill. Comp. Stat. 5/503 (2007).

(3) The contribution of each spouse to the assets of the marriage, including maintenance of the marital home and marital land;

For examples of statutes that take non-financial and financial contributions to the maintenance of the estate, see, e.g., South Africa, Divorce Act 70 of 1979 s. 7(4) (S. Afr.); Tanzania, Law of Marriage Act of 1971 s. 114(2)(b) (Tanz.); Zimbabwe, Matrimonial Causes Act of 1985 s. 7(4) (Zimb.); England, Matrimonial Causes Act, 1973, s. 25(f) (Eng.); New Zealand, Property (Relationships) Act 1976 s. 18(1)(b) (N.Z.); Illinois, 503(d)(1) Ill. Comp. Stat. 5/503 (2007).

(4) The contribution by one spouse to the education, training, or increased earning power of the other;

See Wisconsin, Wis. Stat. s. 767.61(3)(f) (2007)

(5) Any ante nuptial agreement entered into with full and informed consent of the spouses;

See Illinois, 503(d)(7) Ill. Comp. Stat. 5/503 (2007).

(6) The tax consequences to each spouse;

See Illinois, 503(d)(12) Ill. Comp. Stat. 5/503 (2007).

(7) The particularized needs of each spouse;

If one of the spouses, for example, is mentally or physically handicapped, the court should consider how the special needs of that spouse can be met through the distribution of property. *See* Zimbabwe, Matrimonial Causes Act of 1985 s. 7(4) (Zimb.); England, Matrimonial Causes Act, 1973, s. 25(e) (Eng.).

(8) Whether one of the spouses has unjustifiably wasted, concealed, sold, gifted, or fraudulently disposed of community property to the detriment of the other spouse;

This provision protects a woman from fraud, and codifies the common law of Swaziland. *See* Alice Kavanaugh Armstrong & R.T. Nhlapo, *Law and the Other Sex: The Legal Position of Women in Swaziland* 36 (1986). Other countries, like New Zealand, have also enacted statutory protections against fraud perpetrated by one

WOMEN'S EQUAL PROPERTY AND LAND RIGHTS

spouse on the other spouse. *See also* New Zealand, Property (Relationships) Act 1976 s. 18C (N.Z.).

(9) The failure of one spouse to designate property as separate property in an ante-nuptial agreement; and

Courts must have the authority to evaluate the fairness of the ante-nuptial agreement to determine whether it is a legally binding contract. CEDAW article 15(3) declares that “States Parties agree that all contracts and all other private instruments of any kind with a legal effect which is directed at restricting the legal capacity of women shall be deemed null and void.” Convention on the Elimination of All Forms of Discrimination against Women art. 15(3), G.A. res. 34/180, 34 U.N. GAOR, Supp. (No. 46), at 193, U.N. Doc. A/34/46, entered into force Sept. 3, 1981, ratified by Swaziland Mar. 26, 2004, *available at* <http://www.un.org/womenwatch/daw/cedaw/cedaw.htm>. This provision ensures that women and men are not disadvantaged because they failed to list property as separate property on Form B: Designation of Property upon Registration of Marriage or on another ante-nuptial agreement.

(10) Such other factors as the court may in each individual case determine to be relevant.

Chapter 27: Assignment or division of the marital home

82. The spouse who retains custody of the children has the right to remain in the marital home throughout the period of custody.

83. The court shall determine who owns the marital home according to the provisions of this Part governing separate property and community property.

See Illinois, 503(d) (5) ill. Comp. Stat. 5/503 (2007); Washington, WASH. REV. CODE s. 26.09.080 (2007).

Chapter 28: Assignment or division of Swazi Nation Land

84. If part of the estate being divided includes Swazi Nation Land, the magistrate court shall determine which spouse is to remain on the Swazi Nation Land by considering the factors enumerated in section 81, particularly factors regarding contributions and improvements to the land, as well as:

- (1) Any recommendation by the Village Land Board, as authorized under section 24;
- (2) The preferences of each spouse;
- (3) Whether the Swazi Nation Land is located on or near the homestead of the natal family of one of the spouses;

Under Swazi law and custom, the woman often lives on Swazi Nation Land that is on or near the homestead of her in-laws. Where this is the case, the in-laws may make life difficult for a woman who remains on the land after she separate from her husband. Magistrate courts should therefore consider the location of the land and the welfare of the woman when determining which spouse shall remain on the land.

(4) Such other factors as the court may in each individual case determine to

be relevant.

85. The spouse who remains on the Swazi Nation Land will have the land registered in that spouse's name.

86. The spouse who remains on the Swazi Nation Land will compensate the spouse who leaves the land for any improvements, contributions, or other investments that the spouse who leaves has made to the land.

Chapter 29: Liens

87. The court may impress a lien upon the separate property of either spouse, or the community property awarded to either spouse, in order to secure the payment of any interest or equity the other spouse has in or to such property.

The power to impress liens, gives the court an important tool to ensure that the division of property between the spouses is equal and just where as a practical matter, property cannot be easily divided between the parties.

This provision is modelled after an Arizona statute. *See* Ariz. Rev. Stat. s. 25-318(C).

Part IX - DISPUTE RESOLUTION AND OVERSIGHT

Chapter 30: Dispute resolution

88. The Magistrate's Court, in addition to jurisdiction granted under the Magistrate's Courts Act 66 of 1939, will have jurisdiction to determine all disputes related to any provisions of this Act regarding:

- (1) discriminatory rejection of land allocation applications;
- (2) wrongful eviction;
- (3) discriminatory private property registration practices;
- (4) discriminatory distribution of government land or disregard for gender based quotas in distribution of government land;
- (5) discriminatory rejection of loan or credit applications;
- (6) discriminatory restrictions on management of bank accounts;
- (7) discriminatory division of property upon break up of marriage; and
- (8) any other dispute that may arise under this Act.

The Magistrate's Court will be the court of first instance when resolving disputes under any of the provisions of this Act unless otherwise provided. Magistrate Courts are best equipped to handle disputes because they have courts in all four regions and are therefore accessible to all Swazis around the country. The Magistrate Courts Act 66 of 1939 section 16 does not restrict the Magistrate's jurisdiction over property issues such as allocation of Swazi Nation Land, wrongful eviction, registration of private property, distribution of government land, loans, credit and bank accounts, or division of property upon break-up of marriage. Magistrate Courts Act 66 of 1939 ss. 15-16. In line with the Constitution and the Magistrate Courts Act section 68, the High Court will have the power to review any decisions made by the Magistrate's Court implicating constitutional rights. Swaz. Const. 2005 s. 35; Magistrates Courts Act 66 of 1939 s. 68.

WOMEN'S EQUAL PROPERTY AND LAND RIGHTS

The Constitution at section 217(a) allows Parliament to make laws expanding the jurisdiction of the Magistrate's Court in order to foster "the management of land and settlement of land disputes and for the regulation of any right or interest in land whether urban or rural and whether privately owned or vesting in the King." Swaz. Const. s. 217(a). Parliament may grant the Magistrate Courts jurisdiction to hear Swazi Nation Land disputes. Magistrate Courts are currently empowered to hear cases related to Swazi Nation Land in other statutes. For example, the Swazi Settlement Act of 1946 designates the Magistrate Courts to hear claims related to evictions from the land. Swazi Land Settlement Act of 1946 s. 6(2).

Chapter 31: Oversight of land

89. The Land Management Board will oversee all types of land including

- (1) Title Deed or privately held land;
- (2) Swazi Nation Land;
- (3) government land; and
- (4) any other land vesting in the King.

90. The Land Management Board is responsible for the creation and facilitation of educational trainings on the equality provisions of this Act for

- (1) the Deeds Registrar;
- (2) the village land board; and
- (3) any other government or non-governmental bodies that assist in carrying out the property and land provisions of this act.

91. The Land Management Board may contract out the creation and facilitation of educational trainings to non-governmental organizations

The Constitution section 212(1) has given power to create a Land Management Board and section 212(4) makes the Board "responsible for the overall management, and for the regulation of any right or interest in land whether urban or rural." Swaz. Const. s. 212(2), (4)

92. An inter-ministerial committee (The Equal Property and Land Committee) will oversee the Land Management Board and will include representatives from the Ministries of

- (1) Housing and Urban Development;
- (2) Agriculture and Cooperatives;
- (3) Natural Resources;
- (4) Economic Planning and Development;
- (5) Home Affairs; and
- (6) Health and Social Welfare.

An inter-ministerial committee is necessary to oversee that the equality provisions of this Act are properly carried out. The Draft National Land Policy also suggests an inter-ministerial committee to continually monitor the effectiveness of the body which carries out the objectives of the Policy. The Draft National Land Policy, 4.1.2.

(Swaz.). Each ministry involved has administrative expertise in either property or land or gender sensitivity. The Ministry of Housing and Urban Development has expertise in housing and urban services in the fast growing peri-urban development areas where much of the government land lies. (Swaziland Government official website, Ministry of Housing and Urban Development, at <http://www.gov.sz/home.asp?pid=5082>). The Ministry of Natural Resources and Energy currently determines the valuation of land and advises on the feasibility of economic and development proposals. (Swaziland Government official website, the Ministry of natural Resources and Energy, at <http://www.gov.sz/home.asp?pid=1153>). The Ministry of Economic Planning and Development has expertise in general sustainable development strategies and will have knowledge of all current development projects. (Swaziland Government official website, Ministry of Economic Planning and Development, at <http://www.gov.sz/home.asp?pid=56>). The Ministry of Home Affairs has expertise in coordinating gender and development issues (Swaziland Government official website, Ministry of Home Affairs: Gender Coordination Unit, at <http://www.gov.sz/home.asp?pid=2901>). The Ministry of Health and Social Welfare has expertise in dealing with the growing burden of HIV/AIDS and other diseases that affect almost half of the population in Swaziland and surely affect the women who will benefit from government and crown land reform. (Swaziland Government official website, Ministry of Health and Social Welfare, at <http://www.gov.sz/home.asp?pid=77>).

93. The Equal Property and Land Committee is responsible for overseeing the Land Management Board by

- (1) producing an annual report on the Land Management Board's compliance with this Act; and
- (2) developing an annual strategic plan for gender sensitive land reform in cooperation with and carried out by the Land Management Board.

Chapter 32: Oversight of banking

94. Microcredit programs and tinkhundlas shall submit to the Ministry of Finance and the Ministry of Enterprise and Employment an annual, gender-disaggregated report of loans and other forms of financial credit that have been awarded.

The Ministries of Finance and of Enterprise and Employment together oversee the distribution of loans to small and medium enterprises. *See* Telephone Interview with Ms. Sibonelo Mdluli, Legal Officer, WLSA (Apr. 26, 2007). Microcredit is often extended to small businesses and people planning to use that money to start businesses, whether they be commercial or agricultural in nature. Tinkhundlas (regional governments) receive funds from the Ministry of Finance for the lonas that they usually grant to small businesses, cooperatives, and other groups in their communities. Telephone Interview with Ms. Thabisile Lange, Legislative Drafter, Office of the Attorney General (May 10, 2007).

The government is currently investigating Swaziland's current microcredit program, the Swaziland Development Finance Corporation FINCORP, for the alleged misappropriation of 50 million emalangeni. *See* U.S. Department of State, Bureau of Democracy, Human Rights, and Labor, Country Reports on Human Rights Practices: Swaziland (2006) (released March 6, 2007) *available at* <http://>

WOMEN'S EQUAL PROPERTY AND LAND RIGHTS

www.state.gov/g/drl/rls/hrrpt/2006/78760.htm; Telephone Interview with Ms. Sibonelo Mdluli, Legal Officer, WLSA (Apr. 26, 2007). Through the annual audit system, the Ministries of Finance and of Enterprise and Employment will be better equipped to prevent the misappropriations of funds, ensure that women are given special protections under microcredit programs and tinkhundlas, and certify compliance with section 65 of the Property and Land Equality Act, 2007.

95. Ministry of Finance shall have oversight responsibilities over lending and financial institutions with an aim to ensure non-discrimination and protection of women

**Schedule I - FORM A
Proposed Property Equality Act, 2009**

Application for Swazi Nation Land

Date: _____

Applicant's Name

Last Name: _____ First Name: _____

Number and Ages of children: _____

Co-applicant's Name(s) (if applicable)

Last Name: _____ First Name: _____

Chief

Last Name: _____ First Name: _____ Region: _____

Location of land requested (if specific area desired)

Coordinates: _____ Size: _____

The applicant must designate all other Swazi Nation Land he or she holds in Swaziland:

	Location of Land	Co-owner of land
1.		
2.		
3.		
4.		
5.		
6.		
7.		
8.		
9.		
10.		

Signature of Applicant

Date

Signature of Co-Applicant

Date

Witness

Date

If the applicant(s) is unable to sign the form, they may use a thumbprint instead.

Registered in the Land Register of Swaziland, Book_____, Folio _____,
on the ____ day of _____, Two Thousand and ____
Registrar of Deeds for Swaziland.

For Village Land Board use only:

Application for land is:

- Granted
- Denied

Reason for denial:

- Insufficient amount of land
- Applicant already has already been allocated land of the same type
- Other. Please _____

**Schedule II - FORM B
Proposed Property and land Equality Act, 2009**

**DESIGNATION OF PROPERTY UPON REGISTRATION OF
MARRIAGE**

Date: _____

Spouse 1

Last Name: _____ First Name: _____

Spouse 2

Last Name: _____ First Name: _____

The marriage of the above parties is governed by the marital regime designated in box 2.10 of the Form for Information of a Marriage Solemnized According to Civil Rites.

The parties should list below separate property that the Proposed Property and Land Equality Act does not already define as separate property under section 70 (e.g., property acquired by one of the spouses during marriage by gift, bequest, devise, or descent), which the parties wish to designate as separate property. Property not listed on this form will be defined as separate property or community property according to the Proposed Property and Land Equality Act.

WOMEN'S EQUAL PROPERTY AND LAND RIGHTS

	Spouse 1 - Seperate Property	Spouse 2 - Seperate Property
1.		
2.		
3.		
4.		
5.		
6.		
7.		
8.		
9.		
10.		

Designation of seperate property continues on _____ (number) attached pages.

Signature of Spouse 1 Date Signature of Spouse 2 Date

_____ _____ _____ _____

Registered in the Marriage Ragister of Swaziland, Book _____, Folio _____,
in the _____ day of _____, Two Thousand and _____

Deed's Registrar for Swaziland.

Schedule III - AMENDMENTS AND REPEALS

Schedule III seeks to amend and repeal key and commonly invoked provisions that have excluded women from ownership of and access to property and land. This Schedule of Amendments and Repeals does not aim to provide a comprehensive review of the more than 79 laws and regulations that address property and land in Swaziland. Pursuant to its obligations under the Constitution to equality and in matters of property and land, the Parliament must continue to amend and pass laws to ensure equal treatment, regardless of on gender, marital status, and marital regime, of Swazi citizens and persons ordinarily and lawfully residing in Swaziland.

The Deeds Registry Act, 1968

96. Section 16(1) of the Deeds Registry Act, 1968 is hereby amended as follows:

Special provisions relating to women spouses.

(1) All deeds executed or attested by the Registrar, or attested by a notary public and required to be registered in the Deeds Registry, ~~and made by or on behalf of or in favour of women~~, shall in each case disclose the full

name and status of the ~~woman concerned~~ registrant, whether unmarried, married, widowed, or divorced as the case may be. If the ~~woman~~ registrant is married the full name of ~~her husband~~ the registrant's spouse shall also be disclosed...

97. Section 16(2) of the Deeds Registry Act, 1968 is hereby repealed. It is replaced by sections 5-6 of the Property and Land Equality Act, 2009.

The original Section 16(2) required that a woman married out of community of property and a woman married under the laws of another country obtain the assistance of her husband in "executing any deed or other document required or permitted to be registered in the Deeds Registry," unless the marital power is excluded or the Registrar deems such assistance unnecessary. Deeds Registry Act of 1968, s. 16(2). Under sections 8-9 of the Property and Land Equality Act of 2009, mutual spousal consent or assistance is only necessary when dealing with jointly owned, or community property.

98. Section 16(3) of the Deeds Registry Act, 1968 is hereby repealed. It is replaced by sections 4(1), 5-6, and 7(2) of the Property and Land Equality Act, 2009.

The original section 16(3) prohibited a woman married in community of property from having community property (consisting of immovable property, bonds or real rights) registered in her name. The cited provisions remove that prohibition.

99. Section 16(4) of the Deeds Registry Act, 1968 is hereby amended as follows:

(4) If immovable property or a bond not excluded from the community has at the commencement of this Act been registered in the name of a ~~woman person~~ married in community of property which still subsists, ~~her husband to whom she is so married~~ both spouses shall ~~may~~, unless ~~she has been~~ solely authorized by an order of court to deal therewith, ~~alone together~~ deal with such property or bond

Section 16(6) of the Deeds Registry Act, 1968 is hereby amended as follows:

(6) When immovable property or a bond is registered in the name of

(a) a ~~woman person~~ who has married since the registration was effected; or

(b) a ~~woman person~~ who at the date of registration was married out of community of property or whose marriage was at that date governed by the law of any country other than Swaziland, and who has since been widowed or divorced;

it shall be competent for the Registrar, on written application by such ~~woman person~~, ~~assisted where necessary by her husband~~, and on production of the relevant deed and of proof to his satisfaction of the change in ~~her~~ the person's status, to record that change on the deed and in the registers...

WOMEN'S EQUAL PROPERTY AND LAND RIGHTS

101. Section 25(3)(d) of the Deeds Registry Act, 1968 is hereby repealed.

102. Section 56(4)(c) of the Deeds Registry Act, 1968 is hereby repealed.

Sections 25(3)(d) and 56(4)(c) of the Deeds Registry Act, 1968 required a woman to renounce “any special legal exceptions which she would otherwise be entitled to raise” in the context of registered mortgage bonds. The term “special legal exceptions” reflects the concern of parties to such transactions that the vast marital power of a husband, which renders a married woman a legal minority or non-legal person, would vitiate her ability to enter into contracts, sue or be sued, or hold property in her own name, and thus their ability to hold her liable for debts incurred in the course of their economic activities. *See* Interview with Mr. Juba Dlamini, Registrar of Deeds, Deeds Registry Office, in Mbabane, Swaziland (Mar. 6, 2007) (“You see, for instance, you will not get some property as a woman. Because the situation is legally, in common law, a woman who’s married in community of property has the minority status. If, for, instance you are making a mortgage loan, the women are going to renounce those special exceptions. [These renunciations] make you the mortgagee, to treat you as if you have got all the legal capacities.”). The Property and Land Equality Act, 2009, by abolishing the marital power in sections 5-6, renders these two provisions null and void.

103. Section 84(2) of the Deeds Registry Act, 1968 is hereby amended as follows:

(1) An antenuptial contract entered into by an intended husband spouse domiciled in Swaziland at the time of the marriage executed elsewhere than within Swaziland shall be attested by a notary public....

104. Section 90 of the Deeds Registry Act, 1968 is hereby amended as follows:

~~Women w~~Witnesses of deeds and documents.

90. Any competent person, regardless of gender, marital status, marital regime, or other protected status, may witness a document intended for registration or filing or production in the Deeds Registry, ~~shall be competent to witness that document and any document, which was witnessed before the commencement of this Act by a female person, shall be as valid as if she had been a male person.~~

The original provision, which stated that “[a] female person, who would, if she were a male person, be competent to witness a document intended for registration or filing or production in the Deeds Registry....” Deeds Registry Act of 1968, s. 90. The revised language more clearly and in gender neutral language recognizes men and women’s equality under the law as was intended by the original section and as is contemplated by Constitution Sections 14(1), 20, 28, 38(a), and 59, as well as international law, including CEDAW Article 15, ICCPR Articles 16 and 26, ICESCR Article 3, and the African Charter Article 18(3).

The Deeds Registry Regulations, 1973

105. Section 9(2) of the Deeds Registry Regulations, 1973 is hereby amended as follows:

(2) Deeds by which a woman person married out of community of property or a duly registered company acquire rights shall in the vesting clause disclose the registered number ...

106. Section 19 of the Deeds Registry Regulations, 1973 is hereby repealed. It is replaced by the following:

Spousal consent.

19. For dealings with land or a bond in community of property, both spouses must affix their signatures and the date thereof to related deeds or documents in the presence of a witness as evidence of consent, and if one spouse omits to do so, other satisfactory proof of such consent shall be produced. For land or a bond out of community of property, the spouse in whose name it is registered is authorized alone to deal with such land or bond.

The original version of section 19 allowed a husband married in community of property to administer land or a bond registered in the name of his wife by obtaining her signature or other "evidence that the marriage still subsists." Deeds Registry Regulations of 1973, sec. 19. This provision is amended in accordance with sections 7-10 of the Property and Land Equality Act of 2009 that require mutual spousal consent for the administration of community property (in this case, land or bonds). No spousal consent is needed to administer separate property which is to be controlled solely by the person in whose name that property is registered.

The Marriage Act, 1964

107. Section 24 of the Marriage Act, 1964 is hereby amended as follows:

Common Law

24. The consequences flowing from a marriage in terms of this Act shall be in accordance with the common law as varied from time to time by any law, including the Property and Land Equality Act, 2009 ~~unless both parties to the marriage are Africans in which case, subject to the terms of section 25, the marital power of the husband and the proprietary rights of the spouses shall be governed by Swazi law and custom.~~

108. Section 25 of the Marriage Act, 1964 is hereby repealed.

Section 24 of the Marriage Act originally stated that in a marriage between "Africans" (i.e., Black Swazis) under the Marriage Act (i.e., a marriage under civil law), the marital power and the proprietary rights of the spouses would be governed by Swazi law and custom. This section is often known as the pass-through provision, because it resulted in civil law marriages between Africans "passing through" into Swazi law and custom on the most crucial areas of marriage, namely, the marital power and the proprietary consequences. Section 25 then allowed the couple to agree via antenuptial contract that the marriage would instead be governed by civil law.

WOMEN'S EQUAL PROPERTY AND LAND RIGHTS

The amendment to Section 24 removes the pass-through provision and instead states that the consequences of all civil marriages in Swaziland, regardless of race, will be governed by civil law and the Property and Land Equality Act, 2009. As a consequence, Section 25 of the Act, which offers couples the option to antenuptial out of the pass-through provision, is rendered null and void.

The Safeguarding of Swazi Areas Act, 1910

109. Section 3(i) of the Swazi Areas Act, 1910 is hereby amended as follows:

Use of land in Swazi areas.

3. (i) ~~No person other than a Swazi shall without the written permission of the Ngwenyama, In accordance with sections 39-42 of the Property and Land Equality Act, 2009, any person residing on Swazi Nation~~ Land may use or occupy any portion of a Swazi area or allow any cattle or sheep which are his property or in his charge to graze upon any Swazi area or burn grass or cause it to be burnt on any Swazi area...

The Swazi Land Settlement Act, 1946

110. Section 2 of the Swazi Land Settlement Act, 1946 is hereby amended as follows:

Interpretation.

2. In this Act, unless the context otherwise requires –

“certificate of occupancy” means a right of occupancy under the Property and Land Equality Act, 2009, or a document issued by the Principal Secretary a village land board authorising the occupation by a settler of land within the land settlement areas under conditions specified in this Act, the Property and Land Equality Act of 2009, and any rules issued thereunder;

“Principal Secretary” means the Principal Secretary for Agriculture village land board, the Land Management Board, or the Ministry of Natural Resources as designated by the Property and Land Equality Act, 2009;

111. Section 5 of the Swazi Land Settlement Act, 1946 is hereby amended as follows:

Prohibition of unauthorised residence.

5. No ~~Swazis~~ person shall move on to or take up residence on or cultivate or use any land for any purpose whatsoever in the land settlement area except with the prior written permission of the appropriate village land

board in accordance with section 17 of the Property and Land Equality Act, 2009 Principal Secretary issued after consultation with the indvuna of the locality concerned.

112. Section 6 of the Swazi Land Settlement Act, 1946 is hereby repealed. It is replaced by section 49 of the Property and Land Equality Act of 2009.

113. Section 7 of the Swazi Land Settlement Act, 1946 is hereby amended as follows:

Allocation of land for allotments, afforestation and commonage.

7. It shall be lawful for the village land board ~~Principal Secretary~~, to allocate Swazi Nation Land in the land settlement areas for agricultural, residential, commercial and garden allotments, for afforestation and for commonage, in accordance with sections 37-42 of the Property and Land Equality Act, 2009.

114. Section 8 of the Swazi Land Settlement Act, 1946 is hereby repealed. It is replaced by section 39 of the Property and Land Equality Act, 2009.

115. Section 17 is hereby repealed. It is replaced by section 41 of the Property and Land Equality Act, 2009.

The Magistrate's Courts Act, 1939

116. Section 16(1) of the Magistrate's Courts Act, 1939 is hereby amended as follows:

Jurisdiction in respect of causes of action.

...Provided that when both parties are Swazis, the jurisdiction of the magistrate's courts does not fall under section 16(3) of this Act, and the cause of action is, in the opinion of the clerk of the court, one suitable to be heard in a Swazi Court of appropriate jurisdiction established or recognised under the Swazi Courts Act, No. 80 of 1950, he may refuse to issue summons, and may order the plaintiff to commence his action in such Swazi court:

Provided further that at any time after the issue of summons commencing action in any case where both parties are Swazis, and the jurisdiction of the magistrate's courts does not fall under section 16(3) of this Act, the court may order that the action be transferred to a Swazi court of appropriate jurisdiction established or recognised under the Swazi Courts Act, No. 80 of 1950. (Amended P.39/1964.)

117. Section 29 of the Magistrate's Courts Act, 1939 is hereby amended as follows:

WOMEN'S EQUAL PROPERTY AND LAND RIGHTS

Matters beyond jurisdiction of magistrate's courts.

29. Magistrate's courts shall have no jurisdiction in matters in which –

- (a) the dissolution of a marriage or separation from bed and board or of goods of married persons is sought, where the parties to the action are not Swazis;
- (b) the validity or interpretation of a will or other testamentary document is in question;
- (c) the status of a person in respect of mental capacity is sought to be affected;
- (d) is sought the specific performance of an act without an alternative of payment of damages (except the rendering of an account in respect of which the claim does not exceed an amount within the jurisdiction of the court, or the delivery or transfer of property not exceeding in value the jurisdiction of the court);
- (e) is sought a decree of perpetual silence;
- (f) provisional sentence is sought.
- (g) the dispute arises from the existence, payment, or payment terms of lobola.

118. Section 88 of the Property and Land Equality Act, 2009 is hereby added as Section 16(3) of the Magistrate's Courts Act, 1939.

Magistrate's Court Rules, 1942

119. Order No. XIII, Section 2(2)(h) of the Magistrate's Court Rules, 1942 is hereby amended as follows:

(2) The only objections that may be taken are:

(h) non locus standi in judicio, e.g. by reason of minority ~~or marriage in community of property~~

120. Order No. XIII, Section 4(4) of the Magistrate's Court Rules, 1942 is hereby repealed.

Section 4(4) sets out the requirement a defendant must raise when "raising the objection of non locus standi in judicio by reason of her marriage." Magistrate's Courts Rules of 1942, Order XIII, sec. 4(4). This objection based on a woman's minority by reason of marriage is rendered null and void by section 5-6 of the Property and Land Equality Act, which abolishes the marital power and therefore a married woman's minority status.

The Swazi Courts Act, 1950

121. Section 9(b) of the Swazi Courts Act, 1950 is hereby amended as follows:

Cases excluded from ordinary jurisdiction.

9. Subject to any express provision conferring jurisdiction, no Swazi Court shall have jurisdiction to try –

(b) cases in connection with marriage, whether concluded under the Marriage Act, 1964, or other than a marriage contracted under or in accordance with Swazi law or custom, except where and in so far as the case concerns the payment or return or disposal of dowry or cases in connection with the proprietary consequences flowing from marriage or at its dissolution;

Swazi Administration Order, 1998

122. Section 12 of the Swazi Administration Order, 1998 is hereby repealed. It is replaced by section 18 of the Equal Property and Land Act, 2009.

123. Section 19(b) of the Swazi Administration Order, 1998 is hereby amended as follows:

Cases excluded from ordinary jurisdiction.

19. Subject to any express provision conferring jurisdiction, no Chief's Court shall have jurisdiction to try:

(b) cases in connection with marriage, whether concluded under the Marriage Act, 1964, or other than a marriage contracted under or in accordance with Swazi law or custom, except where and in so far as the case concerns the payment or return or disposal of lobola or custody of children for whom customary damages have been paid or cases in connection with the proprietary consequences flowing from marriage or at its dissolution;

Immovable Property (Race Discrimination) Act, 1963

124. The title of the Immovable Property (Race Discrimination) Act, 1963 is hereby amended as follows:

IMMOVABLE PROPERTY (RACE AND GENDER DISCRIMINATION)
ACT, 1963

... An Act to prohibit restrictions on the ownership or tenure of immovable property based solely on the grounds of race and gender.

WOMEN'S EQUAL PROPERTY AND LAND RIGHTS

125. Section 1 of the Immovable Property (Race Discrimination) Act, 1963 is hereby amended as follows:

Short title.

1. This Act may be cited as the Immovable Property (Race and Gender Discrimination) Act, 1963, as amended in 2009.

126. Section 2(a) of the Immovable Property (Race Discrimination) Act, 1963 is hereby amended as follows:

2. A condition—

(a) In a deed of grant, transfer, lease or other notarial deed conveying rights to immovable property which, on the grounds of race or sex alone, restricts or purports to restrict a person from owning or occupying that property or from exercising any servitude or other real right in respect thereof...

The original Immovable Property (Race Discrimination) Act, 1963 demonstrates Swaziland's commitment to eliminating the exclusions inherent in the country's once racist policies on immovable property. The amendments to the Act expand its commitment to ending past injustices and bringing those discriminated against on the basis of gender within its protection.

Schedule IV - TABLE SUMMARY OF AMENDMENTS AND REPEALS

<u>Title</u>	<u>Section</u>	<u>Action</u>
Deeds Registry Act, 1968	Section 16(1)	Amended
	Section 16(2)	Repealed, replaced
	Section 16(3)	Repealed, replaced
	Section 16(4)	Amended
	Section 16(6)	Amended
	Section 25(3)(d)	Repealed
	Section 56(4)(c)	Repealed
	Section 84(2)	Amended
Deeds Registry Regulations, 1973	Section 90	Amender
	Section 9(2)	Amended
	Section 19	Repealed

Title	Section	Action
Immovable Property (Race Discrimination) Act, 1963	Title	Amended
	Section 1	Amended
	Section 2(a)	Amended
Magistrate's Courts Act, 1939	Section 16(1)	Amended
	Section 16(3)	Added
Magistrate's Court Rules, 1942	Order No. XIII, Section 2(2)(h)	Amended
	Order No. XIII, Section 4(4)	Repealed
Marriage Act, 1964	Section 24	Amended
	Section 25	Repealed, replaced
Safeguarding of Swazi Areas Act, 1910	Section 3(1)	Amended
Swazi Administration Order, 1998	Section 19(b)	Amended
Swazi Courts Act, 1950	Section 9(b)	Amended
Swazi Land Settlement Act, 1946	Section 2	Amended
	Section 5	Amended
	Section 6	Repealed, replaced
	Section 7	Amended
	Section 8	Repealed, replaced
	Section 17	Repealed, replaced

This Summary Schedule of Amendments and Repeals is based on neighbouring South African statutes' summary schedules of repeals.