

## Legal responses to HIV and AIDS: lessons from Swaziland

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Since 1999, the HIV and AIDS epidemic in Swaziland has been declared a national disaster, and today HIV and AIDS still pose a great threat to the survival and development of Swaziland and its people. The impact of the pandemic necessitated a multi-faceted response from the government. This paper critically evaluates the Swaziland legal response to HIV and AIDS. The objective is to assess whether and to what extent Swazi law addresses human rights issues related to HIV and AIDS. Through the application of a human rights based theory, the paper analyses the domestication of Swaziland's treaty commitments, and the constitutional and the statutory frameworks. The paper advances the importance of "law" as a tool that can create an enabling environment for a national response to HIV and AIDS. It analyses how the government has successfully crafted the normative framework so as to make it responsive to the fight against HIV and AIDS, and the shortcomings of the Swaziland legal system in this fight. The paper argues that even though a credible legal and policy environment is in place, some laws still need to be supplemented, reviewed and amended so that the legal system adequately addresses the human rights issues related to HIV and AIDS. The paper suggests improvements to the legal system which mainly relate to aligning the legal framework with the Constitution of Swaziland and international conventions to which Swaziland is party.

**Keywords:** constitutional and statutory law, domestication of international law, human rights & HIV, international conventions domestication, Swazi law

### Introduction

Since 1999 the HIV and AIDS epidemic in Swaziland has been declared a national disaster. In 2016 an estimated 220 000 people were living with HIV (UN, 2017). These statistics show that even today, HIV and AIDS still pose a great threat to the survival and development of the Kingdom and its people. The Government of the Kingdom of Swaziland has committed to address this through a variety of legislative and policy actions guided by national and international law. Because of the diverse types of interventions, HIV is no longer regarded as an exclusive health sector issue in Swaziland. The government has adopted a multi-sectoral response to the fight against HIV and AIDS, which is comprehensively outlined in the policy document *Indzaba Yetfu Sonkhe* ["everyone's concern"] (National HIV Prevention Policy Swaziland, 2012).

Since 1987 Swaziland has introduced several periodic strategic plans that have provided a national guiding framework for a multi-sectoral response to HIV and AIDS. Amongst many objectives, these strategic plans have all aimed to develop legislation that would address HIV and AIDS issues, and to reform laws that have an impact on the increase of HIV and AIDS (e.g., child protection laws, civil and customary marriage laws, etc.).

"Law" is an important instrument for an effective response to the unending impact of HIV and AIDS in Swaziland. Indeed, HIV and AIDS are a legal concern, and particularly, a human rights concern. This is because HIV and AIDS inevitably have an effect on the enjoyment of a wide

spectrum of human rights such as the right to life, the right to health, and numerous socio-economic rights. From that perspective, human rights law is an instrument of great value that can create an ideal environment for reducing or stopping HIV contraction, for protecting infected and affected persons, and for promoting good practices in the fight against HIV and AIDS. In an environment where human rights are protected and respected, people's vulnerability to HIV and AIDS can effectively be reduced, the personal and societal impact of HIV infection can be alleviated, and persons infected with or affected by HIV and AIDS can live a life of dignity without discrimination (Piot & Robinson, 1996).

This paper assesses the efficacy of Swaziland's legal framework for its national HIV programmes, devoting particular attention to how the state has accommodated international human rights law in its domestic system. To this end, the paper begins with an analysis of the linkages between human rights law and HIV/AIDS. It proceeds to critically analyse the country's normative and institutional legal responses to the changing demands on the national HIV and AIDS programme. The paper identifies some shortcomings in Swaziland's legal developments related to the pandemic and in the country's legal system, the latter in terms of its capacity to guarantee citizen's constitutional rights and ensure implementation of the various protection mechanisms. The analysis is based on an interpretative assessment of international treaty obligations, constitutional provisions and statutory instruments and on academic literature. The paper does not include a policy analysis. Although policy is germane to this topic, it is beyond the scope of this paper. The paper

is intended to inform the debate on how to reinforce a rights-based approach to HIV/AIDS.

### Linkages between human rights law and HIV/AIDS

Human rights law is a body of universal human entitlements to be enjoyed by all people irrespective of their sex, nationality, religion, culture or other status. Human rights are inherent to human beings; they are the rights one has simply by being human (Morsink, 2009). They are a product of our humanity; they are intrinsic to all persons, not just privileges which governments extend to their people. Human rights are the birth right of all persons as they arise from no special undertaking beyond membership in the human race. To have human rights, one does not have to do anything other than be born a human being (UDHR, 1948).

Human rights law has a major relevance for shaping appropriate responses to the HIV epidemic (Grodin, 2013). An absence or poor protection of healthcare rights aggravates the impact of HIV/AIDS. The pandemic denigrates the realisation of human rights, notably by disproportionately affecting women, children and the poor (Ezer, 2007). For instance, women and children are particularly at risk of HIV infection where cultural norms and poverty endorse discrimination such as gender-based violence, lack access to information, lack of education and other services necessary to safeguard their sexual and reproductive health. Gumedze (2004) also notes how HIV/AIDS generates poverty as it affects the development of affected people. Persons infected or affected by HIV and AIDS face dangers of discrimination which emanate from ignorance, prejudice and mythical beliefs.

From this brief background, it is clear that a rights-based approach to HIV/AIDS is crucial, especially within the Swazi context. The rights-based approach proclaims universality which means that human rights apply to everyone regardless of their HIV status or any other possible distinction. Human rights are also inalienable, meaning that rights cannot be renounced or forfeited. Human rights are indivisible and interdependent, meaning that all rights are linked together and are equally important. A human rights approach advances equality in terms of which all human beings are born free, are equal before the law, and are equal in dignity and rights regardless of their status. Human rights law not only bestows human entitlements and freedoms, but it additionally places obligations on the state to respect, promote, protect, and fulfil protected rights. This then empowers the people to assert or claim their rights.

Human rights law therefore provides standards against which government actions and non-actions can be judged. It provides protections and redress where violations have occurred. Where individuals and communities are able to fully realise their rights, the personal and societal impacts of HIV/AIDS are reduced. Where people infected with HIV are treated with dignity and protected from discrimination they are most likely to deal with their status more effectively through preventing the spread, seeking and receiving proper treatment and psychosocial support, and hence reducing the impact of HIV on the wider society. The protection and promotion of human rights are therefore essential in preventing the spread of HIV

and to mitigating the social and economic impact of the pandemic.

### Legal responses to HIV/AIDS in Swaziland *International law*

The primary procedure for domestication of international law in Swaziland is spelled out in Section 238 (2) of the Constitution which states that:

An international agreement executed by or under the authority of the Government shall be subject to ratification and become binding on the government by (a) an Act of Parliament; or (b) a resolution of at least two-thirds of the members at a joint sitting of the two Chambers of Parliament.

This provision indicates that Swaziland has adopted a dualist model for the incorporation of international treaty law into domestic law. Therefore international treaty law will only be applicable in domestic law once it has been ratified and transformed into domestic law through implementing legislation.

The particular human rights conventions applicable in Swaziland that support HIV/AIDS are: the Universal Declaration of Human Rights, 1948; the United Nations Charter, 1945; the African Charter, 1981; the Convention on the Elimination of all forms of Discrimination against Women (CEDAW), 1979; the United Nations Convention on the Rights of the Child (UNCRC), 1989; the Declaration of Commitment on HIV/AIDS, 2001; the International Convention on the Elimination of all forms of Racial Discrimination, 1965; the International Covenant on Civil and Political Rights (ICCPR), 1966; the International Covenant on Economic, Social and Cultural Rights (ICESCR), 1966; the African Charter on the Rights and Welfare of the Child, 1999; the International Guidelines on HIV/AIDS and Human Rights, 2006; and some International Labour Organization (ILO) conventions.

The Swaziland Government recognised the importance of acceding to these conventions for many reasons. Firstly, the government recognised the importance of aligning state law and practice to international standards. It may therefore be argued that the Swaziland Government's original intention was to develop the body of human rights norms applicable in Swaziland. It may also be observed that becoming party to these conventions has assisted the state in securing international donor support for its HIV programmes, and to generally maintain good inter-state relations. These conventions have been instrumental in inspiring and guiding state law-making and policy. For example, during the process of creation of the Swaziland Constitution of 2005, King Mswati III established a Constitutional Review Commission (CRC Decree No. 2, 1996), which was mandated to conduct a national review of basic principles that would form the country's new constitution. The CRC carried out extensive community-based and international legal consultations, and considered a variety of proposals on state governance (Mzizi, 2001). The CRC's report delivered in 2001 stated in part that:

The nation recommends that rights and freedoms which we accept must not conflict with our customs and traditions as the Swazi nation. Agreements with other states and international organisations which

deal with rights and freedoms must be submitted to the nation (at *tinkhundla*) before such agreements become law in the Kingdom. The nation must know what those rights are. The nation must be taught about agreements which the Kingdom concluded with other states and international organisations (Swaziland Government, 2001).

This part of the report shows that international human rights conventions would have a significant impact on what was to become Swaziland's new Constitution, and specifically its Bill of Rights. Moreover, Swazis would be made aware of the content of international human rights treaties. Even though most of the human rights conventions that Swaziland has ratified do not include HIV and AIDS-specific provisions, several norms enshrined therein indirectly have an impact on people living with HIV and AIDS.

By ratifying all the above treaties, Swaziland has indicated a willingness to harmonise its national laws with international standards. By making such commitments and assuming international human rights obligations, Swaziland has shown an appreciation of the scourge of HIV and AIDS, and has demonstrated a willingness to have its human rights conduct subject to checks and balances, outside of its sovereign status.

International human rights law is instrumental in guaranteeing basic human rights norms. For example, even though the Universal Declaration of Human Rights (UDHR) is a non-binding instrument (Diller, 2012), its norms have been widely accepted as universal principles of human rights, and have been reiterated in numerous human rights conventions and national bills of rights, including the Swaziland Constitutional Bill of Rights. Some of its provisions have also acquired the force of customary international law today (Smith, 2016). The UDHR therefore is relevant to the protection of rights of persons infected or affected by HIV and AIDS in Swaziland. For example, article 7 recognises the rights to equality and article 25 recognises the right to an adequate standard of health and wellbeing. By recognising a wide range of human rights in a single document, the UDHR promotes the principle of non-divisibility of rights. The UDHR promotes, "universal respect for and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion" (UDHR, art. 1). The rights recognised by the UDHR provide opportunities for persons infected or affected by HIV and AIDS to realise other rights such as non-discrimination, rights to health care, treatment, etc. Another example is the ICESCR which affirms that state parties to the Covenant should recognise the right of everyone to the enjoyment of the highest attainable standard of physical and mental health (ICESCR, art. 12 (1)). Swaziland therefore has an obligation, as party to the convention, to prevent, treat and control HIV and AIDS to ensure the realisation of that right (ICESCR, art. 12). CEDAW, which enshrines a comprehensive bill of women's rights, is generally based on the principles of gender equality and the advancement of women. In the context of HIV and AIDS, Swazi women are most vulnerable, and their rights can be better protected through domestic legislation that would incorporate these rights.

But even though Swaziland has ratified or acceded to the many human rights treaties, much more action is

still desired. To ensure an effective national human rights system, measures of protection and implementation must come from within the state (Alston & Goodman, 2013). This is to say that, firstly, there must be a formal institutional arrangement dedicated to the implementation of human rights treaties. Secondly, the Constitution must clarify the mandate and procedure of domestic implementation. And thirdly, national law must not only allow for the incorporation of international law, but also for the harmonisation of all national laws with the international and national bill of rights.

The bulk of the international human rights instruments ratified have not been domesticated. When parliament fails to fulfil its role of incorporating international conventions, as required by the treaties and by section 238 of the Constitution, it becomes difficult to hold the state accountable in terms of its commitments. Acts of the government cannot be legally tested against obligations assumed under non-incorporated and non-self-executing treaties. The Swaziland Government has, however, recently incorporated the UNCRC through the Child Protection and Welfare Act (CPWA) of 2012. The CPWA is now the principal instrument providing for the protection of children affected by HIV and AIDS.

As stated earlier, the direct applicability of these conventions depends on their domestic incorporation through a legislative Act. In my view, section 238 of the Constitution has not been effectively used by the Swaziland Parliament to domesticate international treaty law. Langwenya (2013) believes that the reason for parliament's failure to pass implementing legislation is largely due to the poor political and public pressure to domesticate its international obligations. Indeed, many ordinary Swazis, especially those without higher education, do not appreciate the value or relevance of international law in their daily lives.

International human rights conventions have also been used by Swazi courts as interpretative aids for national law. For example, the Swaziland Court of Appeal has stated that, "unincorporated international agreements and treaties may be used as aids to interpretation but may not be treated as part of municipal law for purposes of adjudication in a municipal court" (*Jan Sithole v. Prime Minister of Swaziland*, 2007). However, it has been difficult to find a precedent where the courts have had to determine the applicability of an international human rights norm when seized with an HIV and AIDS issue. The reason for this, I presume, is because the national bill of rights is often found to be expressive enough to base legal argument and judgment in many cases.

It may be argued that even though Swazi courts are without mandate to directly apply non-incorporated treaties, judges still can and should apply non-incorporated principles of international human rights law in their determination of human rights violations. This can be done through a "progressive interpretation" of the obligations assumed under an international convention. Becoming party to a treaty either through signature, ratification or accession signifies the consent of the state to be bound by the provisions of that treaty. Additionally, it signifies an undertaking to harmonise domestic legislation with the states international obligations. Therefore, judges may assume the authority to interpret national law in light of international human rights law. For

example, in 2009 the Swaziland High Court pronounced that since Swaziland had ratified the Convention on the Rights of the Child, "... the principles enshrined therein [UNCRC] may ... be properly taken into account in dealing with matters before this court" (*Rex v. Siboniso Sifanyana Mngometulu*, 2009). Note that this statement was made by the court 3 years before the Child Protection and Welfare Act of 2012 (which incorporates the United Nations Convention on the Rights of the Child (UNCRC) was passed. This is an example of the important proactive role that our courts can play in ensuring observance of international human rights norms in Swaziland. From a general review of judicial precedents, it appears that international human rights law is included in the judgments as *obiter dicta*. International human rights law seldom has a clear influence on the outcome of cases.

### **The Swaziland Constitution**

The Constitution is the supreme law of Swaziland (s. 2 (1)). The supremacy of the Constitution means that all laws that are inconsistent with it shall be void. Constitutional supremacy gives all citizens, regardless of status, the power to assert their rights and hold the government and other persons accountable for any form of human rights violation. The state and government are bound to respect, protect and uphold the Bill of Rights (s. 14(2)).

The constitutional Bill of Rights enshrines rights that are relevant to HIV and AIDS prevention, care and support. Those provisions resemble the normal human rights catalogues of many world constitutions in their generality and indirectness. The constitution protects the right to life. Section 15 (5) provides that abortion is unlawful, but may be allowed on medical grounds where a doctor certifies that continued pregnancy will endanger the life and health of the woman or the child, and where such pregnancy resulted from rape. The Constitution also provides for the rights of arrested or detained persons to access to medical treatment (s. 16 (6)). Equality before the law and equal protection by the law is also guaranteed by the Constitution (s. 14 (1) (a) and s. 20).

Non-discrimination is, however, not explicitly mentioned in the Bill of Rights. While section 20 provides for equality and outlaws various forms of discrimination, its provision are inadequate and insufficient to effectively respond to HIV and AIDS issues. Section 20 lacks explicit reference to non-discrimination on the grounds of HIV status. An example of an explicit provision is found in article 22 of the Constitution of Burundi, which provides that: "All citizens are equal before the law ... No one may be subject to discrimination ... because they are suffering from HIV/AIDS or any other incurable disease." When one strictly construes the unclear provisions in the Swaziland Constitution, one can argue that non-discrimination on the grounds of HIV status is not a justiciable right. A justiciable right is one that can be enforced by a court of law purely on the basis of legislation, and violations of those rights can be remedied according to the law. In my view, it was important to include the "non-discrimination" provision at the drafting stage of the Constitution, especially because the drafting occurred during the time when HIV and AIDS were already recognised as a major pandemic in Swaziland (2001–2003). In the present state, it might be difficult for some to consider the

guaranteed rights to life and equal protection before the law as being analogous grounds for non-discrimination in the context of HIV and AIDS.

Another interesting provision is section 27 which provides for the rights and protection of the family. It states that motherhood and childhood are entitled to special care and assistance by society and the state (s. 27 (4)). This provision is especially important because it has been proven in Swaziland how women and children are most vulnerable to HIV and AIDS (Ezer, 2007). This provision therefore informs and supports government's national policy on HIV and AIDS. The Constitution requires parliament to enact laws that will ensure the welfare of mothers, children and the needy (s. 27). These rights are provided "subject to the availability of resources", and as such, the rights and government's obligations are not absolute in this respect.

Section 28 (3) states that: "a woman shall not be compelled to undergo or uphold any custom to which she is in conscience opposed". On the strength of this provision it may be argued that women have the right not to be compelled to participate in traditional practices that would expose them to the risk of contracting HIV. But this provision is in direct conflict with Swazi customary law on traditional marriages. In terms of Swazi customary law, polygamy is allowed. In a polygamous marriage, a husband can have multiple sex partners and is under no legal obligation to use protection. Without a doubt, women in a polygamous marriage are at risk of contracting HIV. The conflict then is in the fact that women who are already in a customary polygamous marriage are compelled to uphold the custom, to their own prejudice. Section 28(3) therefore needs to be reinforced by a more descriptive statute that would criminalise the non-consensual subjection of women to such cultural practices.

Regrettably, the Constitution has failed to guarantee other important rights in respect of people infected or affected by HIV and AIDS such as the right to dignity, health, and social security, and access to justice. Recognising the dignity of a human being is the first step in human rights protection. The right to health is important as it places a duty on state institutions to ensure its realisation. The inextricable links between HIV/AIDS and poverty makes social security rights imperative. Access to social security has the potential to protect women and children from HIV.

### **Statutory law**

Swaziland does not have HIV and AIDS-specific legislation that would address matters such as intentional transmission of HIV, discrimination of people living with HIV, etc. However, there is a network of statutes that support the national response to HIV and AIDS. For example, The NERCHA Act No. 8 of 2003 has established a coordination mechanism named the National Emergency Response Committee on HIV and AIDS. The mandate of NERCHA is to organise and manage the national response to the AIDS epidemic; to receive and manage finances received from government and the UN Global Fund to Fight HIV/AIDS; and to inform government policy. The establishment of this institution has been a great achievement which has ensured that comprehensive services are delivered at the grassroots level throughout the nation.

Other legislative instruments that are in the pipeline include the Sexual Offences and Domestic Violence Bill which requires disclosure of HIV status between sex partners. The Public Health Bill (which will repeal the Public Health Act, No. 5 of 1969) also aims to criminalise wilful transmission of sexually transmitted diseases. Section 29 of the Employment Act of 1980 provides for non-discrimination. It states that an employer: “shall not discriminate between himself and an employee, not discriminate against any person or between employees on the grounds of race, colour, marital status, national origin, tribal clan, extraction, political affiliation or social status”. We may progressively interpret the term “social status” to include HIV status. The Swaziland Crimes Act No. 6 of 1889 criminalises public prostitution, operating a brothel, managing a prostitution business and living on the earnings of prostitution (s. 32–45). In view of the fact that sex work still persists in Swaziland, there is need for legislation that will “decriminalise” and instead “regulate” it with the objective of minimising the risk of HIV so as to promote safe sex and enable the implementation of public health measures within that industry.

Legislation on same-sex partners does not exist. However, society enforces a moral proscription on homosexuality. Swaziland is a Christian nation, and it is believed that homosexuality violates the rules of Christianity. In my view, it is the very rules of morality that force same sex partners not to disclose their sexual orientation, and therefore to remain anonymous. In that way, they are vulnerable to contracting HIV, and they are at risk of not seeking and not receiving proper health care.

### Overcoming legislative challenges

The foregoing analysis has demonstrated some strengths and some shortcomings of the Swaziland legal framework that addresses HIV and AIDS. Firstly, it was observed how dualism poses an obstacle to the domestic application of international human rights law. International conventions to which Swaziland is party have to be incorporated through an Act of Parliament before they become applicable or enforceable. The process is that once the Minister of Foreign Affairs and International Cooperation signs a treaty on behalf of government, a bill incorporating that convention must be drafted by the ministry responsible for the subject matter together with the Attorney General’s Office. The minister responsible then tables the bill before parliament for debate. Once the bill is passed by the legislature, the King can give his assent and thereafter that legislation will be published in the Gazette. Once a treaty has been incorporated into domestic law in this manner, national courts can directly apply it. This process is obviously embodied by delays at the drafting stage and during prolonged parliamentary debates where it takes a considerable time for members of parliament to understand the content, relevance and urgency of international human rights treaties. The constitutional provisions on dualism in section 238 must therefore be reviewed because they support a relativist approach to international human rights law, to the detriment of the intended beneficiaries of these rights.

As stated in the above analysis, the lack or poor formulation of specific provisions in the constitutional Bill

of Rights negates the protection of people living with HIV and AIDS. The Constitution fails to clearly articulate the right to non-discrimination, the right to human dignity, the right to health and the right to social security. These rights can only be established through progressive and inclusive interpretation of other provisions within the Bill of Rights. These are serious shortcomings to the national HIV and AIDS legal framework since the Constitution is the supreme law, and is expected to be the trailblazer for a human rights approach to HIV and AIDS. One would expect the above human rights provisions to be included in the new Constitution, especially because the Constitution was drafted and promulgated after Swaziland had ratified many of the international human rights conventions. These pertinent omissions show that human rights and the eradication of HIV were not high on the agenda of the drafters.

The Constitution also fails to make a clear statement on the precedence of human rights over conflicting cultural or customary law norms. Swazi customary law and cultural practices continue to play an important role in the lives of ordinary Swazis and in the fight against HIV and AIDS (Sibbald, 2013). Swazi customs such as polygamy are inevitably linked to the spread of HIV and AIDS. Polygamy is a customary norm and practice that allows men to have multiple sex partners. It is still not outlawed, yet it contributes to the spread of HIV (Kraus, 2007). The legislature has discouraged, but has not outlawed harmful cultural practices that contribute to the spread of HIV and AIDS. Even though the constitution provides that, “a woman shall not be compelled to undergo or uphold any custom to which she is in conscience opposed”, it is true that traditionalists may still place a woman under the risk of contracting HIV.

### Concluding observations

This analysis shows that Swaziland does not have “the best” legal framework that would ensure an effective response to HIV and AIDS. To protect the rights of people currently affected or infected by HIV and AIDS, the country must rely heavily on progressive legislative interpretation. There is a dire need for direct rules and explicit rights which will not depend on a judge’s conviction or approach to interpretation. A progressive or inclusive interpretation of human rights is not always a given, and because of that, our law must give expression to rights through clear, direct provisions and legislation aimed at addressing specific HIV and AIDS related issues. This is the best way to ensure legal certainty.

It is also recommended that the Swaziland Parliament takes the first step towards legislative reform. Parliament must conduct a comprehensive review of national legislation to harmonise it with the state’s HIV and AIDS-related international obligations. The review must be conducted with the objective of domesticating international treaties, filling in gaps, supplementing national legislation, and harmonising inconsistencies. Policy must be turned into law, because law creates rights and duties as well as mechanisms for ensuring accountability. The state must adopt laws that directly address HIV and AIDS so as to guarantee a greater certainty of the law and access to justice. For example, anti-discrimination legislation can protect people living with HIV and AIDS from discrimination. It can ensure that

they live their lives without fear of consequential effects of disclosing their status, and it can encourage them to pursue treatment.

Swazi customary law must also be harmonised with human rights law. These two regimes need not necessarily be at odds with each other. Our law has to transform or modify traditional practices that violate human rights. Static and unchanging traditional norms will soon become irrelevant. The key is transformation that will remove the elements that violate human rights.

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