

Marital Power Finally Obliterated: The History of the Abolition of the Marital Power in Civil Marriages in Eswatini

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Abstract

Women's subordination is not new in the world. As society became human rights conscious, many countries started abrogating or scrapping discriminatory laws and attitudes towards women, in particular married women. However, it has taken Eswatini more than 100 years to deal with the fact that the common law principle of marital power discriminates against women.

This paper traces the reception of marital power into the legal framework of Eswatini and how advocacy groups on women's rights and freedoms have opposed women's subordination, fortified by research. This paper presents a desktop review of selected literature and case laws touching on women's emancipation in Eswatini.

This research work is significant in that it adds to the body of knowledge by recording the origins of women's subjection to marital power and their eventual emancipation in the landmark case of *Sacolo v Sacolo* (1403/2016) [2019] SZHC 166 (30 August 2019).

Keywords

Eswatini, marital power; discrimination; emancipation; advocacy; judicial activism.

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1 Introduction

Although Eswatini is notionally characterised by the "co-existence of both traditional and modern modes of life, cultural identity permeates all forms of social, political and economic interaction" with huge ramifications for gender relations.¹ For more than 100 years women in Swaziland, now Eswatini, were relegated to a position akin to minors in relation to their husbands, as marriage laws included the marital power of the husband, either under customary law or civil law.² This state of affairs limited women's independent access to family and community resources, including the ownership of property, access to credit, access to reproductive health services, and inheritance.³

In this article reference is made to the impact of marital power under both customary and civil marriages on women's emancipation and how the marital power of the husband has been eradicated under civil law, but not under customary law. MacFadden commented 25 years ago that male dominance was assumed to be "natural" and female subordination "normal", a state of affairs that largely persists to this day.⁴ In 1907 the Roman-Dutch common law was incorporated into the law of Eswatini, incorporating marital power in the legal framework, unless excluded by an antenuptial contract.⁵

Marriage in Eswatini is an important rite of passage which is founded on family ties, which makes it a social process as much as it is a legal process, especially under Siswati custom.⁶ According to Nhlapho, marriage in the

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¹ UNDP Date Unknown https://genderlinks.org.za/wp-content/uploads/imported/articles/attachments/09517_gender_in_swaziland_revised.pdf.

² WLSA *Family in Transition* 162.

³ UNDP Date Unknown https://genderlinks.org.za/wp-content/uploads/imported/articles/attachments/09517_gender_in_swaziland_revised.pdf 12.

⁴ McFadden *Gender, Power and Patriarchy* 73.

⁵ Section 3(1) and (2) of the *General Law and Administration Proclamation* 4 of 1907 provided that "The Roman-Dutch common law, save in so far as the same has been heretofore or may from time to time hereafter be modified by statute, shall be law in Swaziland. Save and except in so far as the same have been repealed or amended the statutes in force in the Transvaal on the fifteenth day of October 1904, and the statutory regulations thereunder shall mutatis mutandis, and as far as they may be applicable, be in force in Swaziland."

⁶ WLSA *Customary Practices* 76. See also Nhlapho *Marriage and Divorce* 44.

country seeks to create a solid bond between two clans in negotiations which lead to the wedding ceremony of the two intended spouses.⁷

At common law, marriage is a voluntary union of one man and one woman, to the exclusion of all others as long as it persists.⁸ Marital power created a situation where a married woman and her husband were taken to be a legal unit of which the husband had control. Marital power is defined by Wessels as:

[t]he right of the husband to rule over and defend the person of his wife and this includes the right to administer her goods, dispose of them at his own will, and to prevent his wife from dealing with her own goods except with his knowledge and consent.⁹

Wessels J, who wrote on marriage and divorce in 1908 in "The History of the Roman-Dutch Law" expounded on the subject of marital power:¹⁰

The effect of the old German custom has been that the wife is still regarded as a minor and her husband as her guardian. This power of the husband over his wife extends not only to her person but even to her property. It makes no difference whether in point of years the husband is a major or a minor, in either case, he is the guardian of his wife. A youth of sixteen may marry a widow of forty, and after the union, the widow will in the eye of the law be a minor without the power of appearing in court or of alienating her property. This power of the husband over his wife is known as marital power.

Hahlo expresses the opinion that marital power is a species of guardianship and that there are similarities shared between the legal position of a minor and that of a married woman who is subjected to her husband's marital power.¹¹ Eswatini entrenched the common law marital power of the husband in 1964 through the promulgation of the *Marriage Act*.¹² For a couple married in terms of civil rites and in community of property including profit and loss, one consequence of contracting such a marriage was that the wife would automatically fall under the husband's marital power, which meant she was under the guardianship of her husband, creating the same kind of imbalance of power and *de jure* dependency imposed by the statute.¹³

⁷ Nhlapo *Marriage and Divorce* 44.

⁸ Hahlo *South African Law of Husband and Wife* 28.

⁹ Wessels *History of the Roman-Dutch Law* 450-453.

¹⁰ Wessels *History of the Roman-Dutch Law* 451.

¹¹ Hahlo *South African Law of Husband and Wife* 161.

¹² Section 24 of the *Marriage Act* 47 of 1964 provides that "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, 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."

¹³ Nhlapo *Marriage and Divorce* 40-44.

Thus, the wife had limited or no active legal capacity, finding herself in a position analogous to that of a minor under her husband's guardianship. Her lack of capacity implied that she could not, without her husband's consent, alienate or encumber property whether her own or that belonging to the joint estate; enter into contracts or other legal transactions, or hold an office such as the trustee or director of a company.¹⁴ Hahlo further notes that

... the husband may deal with assets forming part of the joint estate or his wife's separate estate as he pleases, and may even make donations to third parties to her prejudice.¹⁵

Unless the husband gave consent or authorisation, the wife could also not litigate, which meant that she had no *locus standi in judicio* to sue and be sued in her own name.¹⁶ Alternatively, the husband had the *locus* to sue and to be sued on her behalf, failing which the proceedings would be ineffective.

The common law position of marital power was also incorporated into the law of South Africa, Lesotho, Zimbabwe and Botswana. However, while these Southern African countries abolished the concept of marital power over a decade ago, Eswatini kept it in place.

This paper traces the actions women's rights advocates undertook in challenging the concept of marital power in Eswatini up until their victory with its abolition in August 2019.

2 Advocacy on empowering women for gender equality

Whilst progressive societies over the years have embraced gender equality in marriage between both spouses, the oppression of women in Eswatini has continued. Marital power continued to be preserved under both its customary law and its western law. Women's organisations challenged this protection of unequal status particularly through the publication of research documenting and illustrating women's subordination in Eswatini. For example, the unequal treatment of women in Eswatini was brought to light in 1947 through the research work of Hilda Kuper.¹⁷ She noted:¹⁸

Women in conservative Swazi society have a status inferior to that of men: all their lives they are minors; on marriage they become aliens in the patriarchal homesteads of their husbands, subjected to restrictions in behaviour and language, and humiliations and jealousies associated with a polygamous

¹⁴ Hahlo *South African Law of Husband and Wife* 167.

¹⁵ Hahlo *South African Law of Husband and Wife* 161-162.

¹⁶ Hahlo *South African Law of Husband and Wife* 167.

¹⁷ Kuper *Uniform of Colour* 120.

¹⁸ Kuper *Uniform of Colour* 120.

society; they are excluded from active participation in the ancestral cult and their kin live in separate and often distant homesteads.

This excerpt from Kuper's research shows that Eswatini women have had to endure oppression for more than a century. Kuper began her research for the International Institute of African Languages and Cultures in 1934, and her first leading articles appeared in the journal *Bantu Studies in Africa* in 1935.¹⁹ She was a confidante of the late King Sobhuza II, who personally granted her Swazi citizenship in 1970.²⁰ She died in Los Angeles at the age of 80 on 23 April 1992.²¹

Another record of the subjugation of women is found in the 1966 work of Marwick.²² The author showed that in Eswatini a marriage establishes various legal relationships under which the husband becomes the "guardian over his wife and minor children", and that his daughters remain under his guardianship until they get married.²³ Writing about his observations of how women were treated, Marwick pointed out that the description of the legal position of women as minors was similar to the situation of women in Europe in previous centuries – bearing in mind that the author said this over 50 years ago in 1966.²⁴

Marwick's contribution was profound in that it unmasked the contention that certain values and practices are uniquely Swazi or African, and as such reflect unique, deeply-held and worthy traditional or customary norms.²⁵ However, those were the values and norms which were once held in other cultures and later discarded. There was nothing unique about them.

As a result of these early studies, women's rights advocates were empowered to label the unequal power men had over women as discrimination and not a cultural norm or tradition. In 1985, in a book titled *Law and the Other Sex: The Legal Position of Women in Swaziland*, Armstrong and Nhlapo posited that:²⁶

Swaziland women must contend with the issue of marital power. Marital power under customary law is all-encompassing, grants the husband full power over the wife, and reduces the wife to a status similar to that of a child in the household. Under general law, marital power is limited to the husband's power to represent the wife in legal proceedings and to administer her property.

¹⁹ Anon 1994 *Africa* 145.

²⁰ Anon 1994 *Africa* 145.

²¹ Anon 1994 *Africa* 145.

²² Marwick *The Swazi* 30-31.

²³ Marwick *The Swazi* 30-31.

²⁴ Marwick *The Swazi* 30-31.

²⁵ Brian Allan Marwick (1908-92) was a colonial administrator and anthropologist who worked extensively with the Swazi people.

²⁶ Armstrong and Nhlapo *Law and the Other Sex* 179.

In 1992, in a book titled *Marriage and Divorce in Swazi Law and Custom*, Nhlapo reported on a research project he had carried out which focussed on the law of marriage and the law of dissolution of marriage in Eswatini.²⁷ Nhlapo was one man amongst a group of women who founded the Women and Law in Southern Africa Research and Educational Trust (WLSA-Eswatini).²⁸ The mission of WLSA-Eswatini was to contribute to the socio-economic, political, and legal advancement of women as well as the protection of women's and girls' rights.

Over the years, WLSA-Eswatini has interrogated the experiences of women in Eswatini through research. For instance, the outcomes of research conducted in 1998 were published in a book titled *Family in Transition – the Experiences of Swaziland*, providing information and action-oriented research on how the laws negatively affected women, and advancing recommendations on improving the status of women.²⁹ This research demonstrated the "unequal power relations between men and women" and that women lacked or received minimal protection from some state laws and practices, and noted the need for gender awareness in civil society and amongst lawmakers and policymakers.³⁰

That research was followed in 2000 by another study by WLSA titled *Charting the Maze – Women in Pursuit of Justice in Swaziland*.³¹ This project attempted to understand the position of women in Swazi society in order to develop a critique which challenged the patriarchal system and institutions.³² In 2001 research was carried out to address violence against women and justice for women³³ titled *Multiple Jeopardy: Domestic Violence and Women's Search for Justice in Swaziland*, finding that gender discrimination against girls and women extended across their life cycle because of their socialisation. They were found to have internalised their socially defined status of inferiority and subordination to men.³⁴

While advocates for women's rights were interrogating discrimination against women in Eswatini, in 2006 the Constitution of Eswatini came into force.³⁵ It provided for the rights and freedoms of women in section 28, and

²⁷ Nhlapo *Marriage and Divorce* 28-95.

²⁸ E-mail of 21 April 2020. Prof Nhlapo confirmed that he was one of the founding members of the Women and Law in Southern Africa Research Project, which was later named the WLSA Trust.

²⁹ WLSA *Family in Transition* 9.

³⁰ WLSA *Family in Transition* 159, 162-197.

³¹ WLSA *Charting the Maze* 30.

³² WLSA *Charting the Maze* 71-90.

³³ WLSA *Multiple Jeopardy* 33-107.

³⁴ WLSA *Multiple Jeopardy* 73.

³⁵ *Kingdom of Eswatini Constitution Act, 2005* (the Constitution).

for equality and non-discrimination in section 20. Section 20 explicitly states that:³⁶

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.

Section 20(2) clarifies the prohibition of discrimination and provides that:

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.

Section 28(1) provides as follows:³⁷

Woman have the right to equal treatment with men and that right shall include equal opportunities in political, economic and social activities. (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. (3) A woman shall not be compelled to undergo or uphold any custom to which she is in conscience opposed.

The existence of these provisions in the Constitution did not eliminate discriminatory laws and practices against women, as the Constitution is not self-executing. Legal challenges were necessary to give effect to the changes in the civil and customary laws that discriminate against women, as women continued to be subservient to their husbands' marital power. More activism needed to be undertaken to assist women to gain their full rights as equal citizens.

In 2008 the WLSA conducted further research titled *Customary Practices, the Laws and Risky Behaviours – a Concern for the Increased Prevalence and Vulnerability to HIV and AIDS among Women and the Girl-Child: A Rights-Based Approach*.³⁸ This work exposed the fact that "gender-related factors" characterise the extent to which women, men, girls and boys were vulnerable to infection by the HI virus, the way in "which AIDS affects them, and the kind of responses that are feasible."³⁹

3 Eswatini's international obligations on women's rights and freedoms

Like many other countries in the region, Eswatini is a party to international, regional, and sub-regional treaties responding to women's unequal social

³⁶ Section 20 of the Constitution.

³⁷ Section 28(1) of the Constitution.

³⁸ WLSA *Customary Practices* 75-141.

³⁹ WLSA *Customary Practices* 41.

status in society. Eswatini is a party to the *Universal Declaration of Human Rights* (UDHR).⁴⁰ The UDHR is centred on the notion that all human beings everywhere have the same fundamental human rights which no one can revoke or take away, as the basis for justice, freedom, and peace in the world.

In 2004 Eswatini ratified the *Convention on the Elimination of All Forms of Discrimination against Women* (CEDAW), compelling the recognition of the rights of women and girls to be free from discrimination.⁴¹ Article 1 of CEDAW defines discrimination against women so as to embrace all facets of human rights and fundamental freedoms⁴² as follows:

*Discrimination against women*⁴³ shall mean 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 the basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.⁴⁴

Also, Eswatini ratified both the *International Covenant on Civil and Political Rights* (ICCPR) and the *International Covenant on Economic, Social and Cultural Rights* (ICESCR) in 2004. The instruments elaborate on the right to self-determination, and people's rights to freely dispose of their wealth.⁴⁵

At regional level, Eswatini ratified the *African Charter on Human and Peoples' Rights* 1995 (ACHPR).⁴⁶ Whilst the Charter contains fewer articles explicitly targeting women's advancement, article 18 obliges member states to abolish women's discrimination in their countries and to adopt measures that ensure the protection of all women's rights as envisaged in international Declarations and Conventions. It provides for the principle of equality before the law in article 19, which makes provision for the right of all people to enjoy the same rights and respect; and the domination of one group of people by another is strictly forbidden.

The *Maputo Protocol* was adopted in 2003 and Eswatini ratified it in 2013. The Protocol enumerates the fundamental human rights of African women,

⁴⁰ *Universal Declaration of Human Rights* (1948) (UDHR).

⁴¹ *Convention on the Elimination of all Forms of Discrimination against Women* (1979) (CEDAW).

⁴² Article 1 of CEDAW.

⁴³ Emphasis added.

⁴⁴ Article 1 of CEDAW.

⁴⁵ Article 1 of the *International Covenant on Civil and Political Rights* (1966) (ICCPR) and Art 1 of the *International Covenant on Economic, Social and Cultural Rights* (1966) (ICESCR).

⁴⁶ *African Charter on Human and Peoples' Rights* (1981) (Banjul Charter).

and state parties to it are obliged to adopt legislative and other measures to protect women's rights and promote their realisation.⁴⁷

The Protocol makes the pursuit of women's rights a legitimate African cause as opposed to being "unAfrican" or western. The main aim of the *Maputo Protocol* is to address gender inequality in Africa, which is seen as driving the spread of HIV at an alarming rate on the continent.⁴⁸ It prohibits "discrimination against women in all spheres of life", be they political, social, economic, or cultural. It defines discrimination against women to include differential treatment which is based on sex; and may include distinction, exclusion or restriction which inhibits the enjoyment of all fundamental human rights by women regardless of their civil status and spheres of life.⁴⁹

The *Maputo Protocol* also prohibits harmful practices directed towards women, and it defines harmful practices in the broadest sense to include all practices and behaviours which negatively impede the enjoyment of fundamental rights such as "the right to life, health, dignity, education and integrity".⁵⁰

The Kingdom of Eswatini ratified the *SADC Protocol on Gender and Development* in 2008. Article 6 of the Protocol urges countries to ensure that all laws that discriminate based solely on sex or gender be reviewed, amended, and repealed by 2015. Also, states are called upon to pass and enforce laws and other measures to

[E]nsure equal access to justice and protection before the law; abolish the minority status of women by 2015; eliminate practices which are detrimental to the achievement of the rights of women by prohibiting such practices and attaching deterrent sanctions thereto, and eliminate gender based violence.⁵¹

Although Eswatini is a signatory to international instruments that aim to "*protect women from violence*",⁵² the country's obligations on the rights of women and freedoms, in particular gender equality, are yet to be met. This assertion is in stark contrast to the plethora of international and national laws adopted to protect women from discrimination.

⁴⁷ *Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa* (2003) (Maputo Protocol).

⁴⁸ Stefiszyn "Adolescent Girls" 155.

⁴⁹ Article 1(f) of the Maputo Protocol.

⁵⁰ Article 1(g) of the Maputo Protocol.

⁵¹ Articles 6(1) and (2)(a)-(d) of the *SADC Protocol on Gender and Development* (2008) (SADC Protocol).

⁵² Emphasis added.

For instance, the 2016 Universal Periodic Review (UPR) of the implementation by member states of treaties and protocols and rights declarations observed that Eswatini must

... review all national policies and legislation that violated the principle of equality and non-discrimination; abrogate legislative and regulatory provisions that discriminated against women; adopt new laws following the principle of gender equality and non-discrimination as set out in CEDAW.⁵³

The UPR representative reported that:

No systematic national legislative and policy reform process had been established to align all laws and policies with the principle of equality and non-discrimination as stated in the Constitution, and as espoused in CEDAW by the year 2016.⁵⁴

This means that international human rights remained paper rights which did not apply in practice to Eswatini women.

4 Advocacy through judicial activism

The phrase "judicial activism" denotes a judicial assessment approach whereby the presiding judicial official is perceived to be more inclined to make decisions on constitutional matters and where appropriate to nullify legislative measures or government actions contrary to the Constitution.⁵⁵ Thus, judicial activism concerns the assumption that the judiciary has an active role to play in society, and as such it is "expected to adjudicate or evaluate the policies promulgated by the legislature, or the executive" to gauge if they are in line with the constitution of the country.⁵⁶

4.1 Challenge one: the right of married women to register property

The first challenge to this area of the law came in 2010 in the civil appeal case of *The Attorney General v Aphane*.⁵⁷ The facts were that on November 2008 a couple married by civil rites in community of property, Michael Zulu and Doo Aphane, purchased a piece of land in the capital city, Mbabane. They tried to have the land registered in both their names. Aphane had preferred to continue using her maiden surname after they were married, something which she did without difficulty. In terms of the their civil marriage, "all their property attained before or after the marriage and regardless of how much each of them had contributed, be combined into a

⁵³ Para 26 of the SADC Protocol.

⁵⁴ UN Human Rights Council *Working Group on the Universal Periodic Review* para 28.

⁵⁵ Semwal and Khosla 2008 *Indian Journal of Political Science* 113-126.

⁵⁶ Semwal and Khosla 2008 *Indian Journal of Political Science* 113-126.

⁵⁷ *Attorney General v Aphane* (12/09) [2010] SZSC 32 (28 May 2010) (herein after the *Aphane* case).

joint estate."⁵⁸ Aphane believed she had a right to have the title deed of the land bear her name as well as that of her husband. This was not the case, according to the office of the Registrar of Deeds, who maintained that "the property could only be registered in the name of her husband Michael Zulu following section 16(3) of the Deeds Registry Act, 1968."⁵⁹ This statement was based on Eswatini's common law holding that a woman married in community of property was akin to a minor and was under the marital power and guardianship of her husband.

Aphane went to court claiming that she had the right to be treated as being equal with her husband rather than in an inferior and unequal manner.⁶⁰ The High Court of Swaziland ruled in favour of Aphane, and the decision was upheld on appeal to the Supreme Court. It also declared section 16(3) of the *Deeds Registry Act* invalid as being inconsistent with sections 20 and 28 of the Constitution, suspending this declaration of invalidity for 12 months to provide Parliament with sufficient time to amend the unconstitutional section of the *Deeds Registry Act*. The Supreme Court also authorised the Registrar of Deeds to "register immovable property, bonds and other real rights in the joint names of husbands and wives married to each other in community of property"⁶¹ pending parliament's promulgation of the new legislation.

The effect of this case on the status of married women was criticised by Langwenya,⁶² who argued that the judgment did not deal with the legal position establishing the different status of married women, nor did it address the common law position of marital power. Even after this case, it is still a legal requirement for women, unlike men, to disclose their marital status when they seek to register property.

4.2 Challenge two: the right of married women to appear in court unassisted

In the High Court case of *Nombuyiselo Sihlongonyane v Mholi Sihlongonyane*,⁶³ the concept of marital power was dealt with insofar as the right of women to administer matrimonial property is concerned, with the

⁵⁸ Hahlo *South African Law of Husband and Wife* 215.

⁵⁹ *Aphane* case paras 7-8.

⁶⁰ *Aphane* case para 4.

⁶¹ *Aphane* case para 70(5).

⁶² Langwenya 2012 https://issuu.com/osisa/docs/open_debate_6_-_doo_aphane_v_regist 8.

⁶³ *Nombuyiselo Sihlongonyane v Mholi Joseph Sihlongonyane* (470/2013A) [2013] SZHC 144 (18 July 2013) (*Sihlongonyane* decision of July 2013) and *Nombuyiselo Sihlongonyane v Mholi Joseph Sihlongonyane* (470/13) [2013] SZHC 207 (19 September 2013) (*Sihlongonyane* decision of September 2013).

"*husband retaining the power to administer the matrimonial possessions*".⁶⁴ The wife had applied to have her husband, who had allegedly mismanaged their estate, removed as an administrator of their joint property. The husband challenged his wife's capacity to institute legal proceedings without his assistance. The court looked at the concept of marital power in the light of sections 20 and 28 of the Swaziland Constitution of 2005 on equality before the law and the rights and freedoms of women respectively. The court relied heavily on the decision in the *Aphane* case, finding that:

Marital power unlawfully and arbitrarily subordinates the wife to the power of her husband and [is] unfair discrimination based on sex or gender since it adversely affects women who have contracted a civil rites marriage in community of property with no antenuptial contract.⁶⁵

The court also found that⁶⁶

Whilst it is accepted in common law that a married woman who is subject to the marital power may approach the court for leave to sue without the aid of her husband ... this very notion or concept is discriminatory of such women inasmuch as it applies to such class of women and not men.... A married man does not, under any circumstances, have to apply for such leave and therefore this common law requirement constitutes unfair discrimination.

Although the court made the above observation in the *Sihlongonyane* case, it did not, however, abolish in its entirety the common law position of marital power. The court declared that:

The common law concept of marital power insofar as and to the extent that it bars married women from suing and being sued without the assistance of their husbands is hereby declared to be inconsistent with sections 20 and 28 of our Constitution.⁶⁷

As things stood then, husbands retained their common law status as sole administrators of their matrimonial properties, until the *Sacolo* decision changed all this.

4.3 Challenge three: the last nail in the coffin of marital power

In a landmark decision of a full bench of the High Court of Eswatini on 30 August 2019 in *Makhosazane Eunice Sacolo (nee Dlamini) and Women and Law – Eswatini v Jukhi Justice Sacolo*,⁶⁸ the court declared that the⁶⁹

⁶⁴ Emphasis added.

⁶⁵ *Sihlongonyane* decision of July 2013 para 24.

⁶⁶ *Sihlongonyane* decision of July 2013 para 25.

⁶⁷ *Sihlongonyane* decision of September 2013 para 2(1).

⁶⁸ *Sacolo v Sacolo* (1403/2016) [2019] SZHC 166 (30 August 2019) (hereafter the *Sacolo* case).

⁶⁹ *Sacolo* case para 2.

... doctrine of marital power is discriminatory against married women and offends against the constitutional right to equality before the law and the right to dignity, and is therefore declared invalid.

In this case, the parties were husband and wife and were married in community of property in terms of the *Marriage Act* 67 of 1964. Mrs Sacolo sought an order for the abolition of the entire concept of marital power, which afforded husbands the sole right to administer matrimonial property. Mrs Sacolo had bought 10 cows and since she was married in terms of community of property by civil rites, the cows were registered in the husband's name in terms of his marital power, and he had sold a couple of the beasts without informing Mrs Sacolo and without sharing the proceeds. The husband had refused a number of requests by Mrs Sacolo to sell part of the livestock she had bought so that she could meet the children's academic needs as well as the family's needs with the proceeds. Mr Sacolo also made it impossible for Mrs Sacolo to deal with any of the livestock without his approval, despite having himself sold some of the cows and moved out of the matrimonial home. Mrs Sacolo sought the following orders:

- a) Declaring the common law doctrine of marital power to be unconstitutional in so far as it is inconsistent with Section 18, 20 and 28 of the *Constitution of Eswatini Act* 1 of 2005.
- b) Declaring that sections 24 and 25 of the *Marriage Act* of 1964 are unconstitutional and invalid in that they are inconsistent with section 20 and 28 of the Constitution of Eswatini.
- c) Declaring that spouses married in terms of the *Marriage Act* of 1964 and in community of property have equal capacity to administer marital property.
- d) That the applicant is authorised to administer the marital assets accruing to her marriage with the first respondent.

The court made mention of the two landmark cases⁷⁰ cited above in order to provide the "much-needed watershed"⁷¹ regarding women's rights in Eswatini. The court observed that these cases dealt with specific instances and did not address the main challenge, namely marital power vesting in men.

⁷⁰ *The Aphane* case and *Sihlongonyane* decision of July 2013.

⁷¹ *Sacolo* case para 10.

In a meaningful analysis the court discussed the prejudice women suffer, which included not being able to deal with the marital property despite having contributed to the common pool of assets. The court acknowledged that this practice had been abused over the years, was a source of tension in marital relations, and continued to be so.

The court decided that it "was not fair that women must put in place certain measures in order to attain equality"⁷² especially since husbands did not have to take this legal step to preserve their right to equality. The court ruled that this violated the right to dignity for women. With regard to the nature of "dignity", reference was made to "human value and the requirement to respect others".

Mlangeni J further asserted that:⁷³

... life without dignity is like a sound which cannot be heard. Dignity speaks ... It is a combination of thought and feeling ... It has to be borne in mind that dignity of all is a sacrosanct human right and sans dignity, human life loses its substantial meaning.

The court made the following orders:

1. Common law marital power is hereby declared unconstitutional on the basis of being discriminatory against married women.
2. Spouses married in terms of the *Marriage Act* 1964 and in community of property have equal capacity and authority to administer marital property.

Before the 2019 decision, the two earlier cases paved the way for the *Sacolo* decision.⁷⁴ These cases related to property registration and standing before court unassisted.

5 Conclusion

The *Sacolo* case is a landmark case for women's emancipation in Eswatini, especially women married in community of property. However, after over a century of subjugation and domination, one cannot assume that women will immediately begin to reap the full fruits of their emancipation. This is particularly so because research has shown that women in Eswatini have internalised their subservient role and position in society.⁷⁵ The ratification

⁷² *Sacolo* case para 15.

⁷³ In the *Sacolo* case para 16, the learned judge quoted Leburu J in *Letsweletse Motshidie Mang v Attorney General* (unreported) case number MAHGB -000591-16 of 11 June 2019.

⁷⁴ *Sacolo* case.

⁷⁵ WLSA *Multiple Jeopardy* 10 and 33-35.

of international instruments on the rights of women by Eswatini failed to provide married women with equality on account of the lack of adequate implementation after their domestication. For instance, the *Convention on the Elimination of All Discrimination against Women (CEDAW)*⁷⁶ was ratified by Eswatini in 2004 and the *Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa* as early as 2013.⁷⁷ Article 1 of CEDAW provides a definition of discrimination against women that covers all aspects of human rights and fundamental freedoms.⁷⁸

Discrimination against women shall mean 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.

The African Women's Protocol prohibits discrimination against women. It defines discrimination against women as⁷⁹

... any distinction, exclusion or restriction or any differential treatment based on sex and whose objectives or effects compromise or destroy the recognition, enjoyment or the exercise by women, regardless of their marital status, of human rights and fundamental freedoms in all spheres of life.

The two instruments which provide a blueprint for addressing discrimination against women did not yield the anticipated results due to the lack of adequate implementation. Therefore, much still needs to be done to sensitise women about their rights. It is incumbent on advocacy groups in Eswatini to give effect to women's empowerment and their new status in society in order for their dignity to be restored.

Fortunately, Eswatini has established a Department of Gender Coordination and Family Issues in the Deputy Prime Minister's Office, which has the mandate to mainstream gender into all government policies, programmes and activities. This institution, with the cooperation of Civil Society Organisations (CSOs) and international partners should ensure the continuation of studies on discriminatory practices against women as well as the carrying out of sensitisation and awareness-raising meetings and dialogue with traditional leaders, community leaders, community members, students, women and the society at large on women's rights and gender equality. This is because a gender-balanced society benefits both men and women.

⁷⁶ Article 27(1) of CEDAW.

⁷⁷ The Maputo Protocol.

⁷⁸ Article 1 of CEDAW.

⁷⁹ Article 1(f) of the Maputo Protocol.

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List of Abbreviations

Africa	Africa: Journal of the International African Institute
ACHPR	African Charter on Human and Peoples' Rights
CEDAW	Convention on the Elimination of all Forms of Discrimination against Women
CSOs	Civil Society Organisations
HIV	Human immunodeficiency virus
ICCPR	International Covenant on Civil and Political Rights

ICESCR	International Covenant on Economic, Social and Cultural Rights
J Fam Econ Issues	Journal of Family and Economic Issues
SADC	Southern African Development Community
UDHR	Universal Declaration of Human Rights
UN	United Nations
UNDP	United Nations Development Programme
UPR	Universal Periodic Review
WLSA	Women and Law in Southern Africa