

KINGDOM OF SWAZILAND

**Swaziland's Joint NGO Submission to the United Nations
Universal Periodic Review.**

For 25th session April–May 2016

**This document is submitted jointly on behalf of the following
organizations:**

Rock of Hope (RoH). Swaziland

Iranti.Org. South Africa

Gender DynamiX. South Africa

Pan Africa ILGA. South Africa

INTRODUCTION

This shadow report is prepared on behalf the Rock of Hope (ROH) along with Pan Africa ILGA (PAI), Gender DynamiX and IRANTI.ORG. It follows the submission of Swaziland's Initial Report under the International Covenant on Civil and Political Rights (ICCPR) and the subsequent adoption of a list of issues on that report by the Human Rights Committee (HRC). The present report is focused on presenting more information with regard to the issues raised by the HRC in its list of issues.

This submission focuses primarily on violation of human rights based on actual or perceived sexual orientation, gender identity and expression, the discriminatory treatment of sexual and gender minorities by society and state actors especially in accessing health and other public services.

The Report is also submitted in memory of XOLILE S. MABUZA popularly known as MALUME¹, the Founder of Rock of Hope Swaziland who has been the anchor and rock of the very nascent Swaziland LGBTI movement. Malume died on September 14, 2015, may he rest in Peace!!

CONSTITUTIONAL AND LEGAL FRAMEWORK

Swaziland legal system is dualist in nature. This means that the applicability of treaty law in the country is conditional upon domestication. The International Covenant on Civil and Political Rights (ICCPR) has not been specifically incorporated into the domestic laws of Swaziland, however courts have sometimes referred to its provisions. The effect of a lack of domestication is that the provisions of the ICCPR cannot be invoked directly as founding a cause of action before the courts. Further there seems to be no clear Government strategy that outlines the measures that are in place to implement the Human Rights Committee's (HRC) recommendations from the 2011 review.

Section 252 of the Constitution provides for a dual legal system; section 252 (1) provides that "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;" Section 252 (2) provides that "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."

¹Malume. https://www.youtube.com/watch?t=32&v=Vh_i0ihSQkc

The Constitution, through the bill of rights in the Constitution, enshrines fundamental rights and freedoms of the individual, thereby setting the platform for the recognition, protection and promotion of the fundamental human rights and freedoms in Swaziland. This national standard is enhanced by the various international human rights instruments Swaziland has ratified such as, the African Charter on Human and People's Rights, International Covenant on Civil and Political Rights (ICCPR) and International Covenant on Economic, Social and Cultural Rights (ICESCR), the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) and the Convention on the Rights of the Child (CRC).

The Constitution also contains an equality clause that seeks to afford all persons equality before and under the law and prohibits discrimination on various grounds such as gender, race, birth, social or economic standing. The Constitution ensures broader enforcement of the protective provisions by allowing for litigants, who though not directly affected by an infringement of a right, belong to a group that may perceive its rights to have been infringed at that particular time.

The Government of Swaziland also adopted the National HIV/AIDS Policy and Second National Strategic and Action Plan (2006 – 2008). While vulnerable groups such as children, persons with disabilities and the elderly have constitutional protection, with Parliament being obligated to enact laws to enable these groups to enjoy their constitutional rights and freedoms, LGBTI group is yet to be recognized as a vulnerable population deserving equal protection.

PROMOTION AND PROTECTION OF HUMAN RIGHTS ON THE GROUND

1. Equality and Non Discrimination

The Constitution of Swaziland (2005) makes provision for equality and non-discrimination under section 20. Grounds of non-discrimination do not however include sexual orientation or gender identity. In spite of the existence of sections 20 and 28 in the Constitution of Swaziland, which provide for equality before and under the law and the protection of the rights and freedoms for all persons, respectively, the discrimination of LGBTI persons based on either actual or perceived sexual orientation and gender identity still persists in Swaziland.

Same-sex sexual conduct between male persons is still criminalized under the common law as sodomy. According to a report by IGLHRC Swaziland has retained colonial-era common law legislation that criminalizes same sex conduct, usually referred to as "sodomy".

“Sodomy - it is sexual intercourse per anus between two human males” - is prohibited as a common law offence... In 2005, the government proposed to include prohibitions of all male homosexual acts and lesbian acts in its revision of the Sexual Offences laws. The proposed penalties are imprisonment for a minimum period of two years, or a minimum fine of E5 000. It has, however, not been adopted as of publication of this report”²

The proposed Sexual Offences Bill mentions that consensual sex is between two partners, which if passed into law can address the current common law position that sex is between a male and a female. However, that does not cure the problems raised by the common law position making consensual adult same-sex conduct for males an offence, as it would expand this provision to include consensual adult female same-sex conduct. The passage of this legislation would further serve to legitimate the populist perception that same-sex conduct is ‘unnatural behavior’ and therefore wrong in the eyes of the Swazi people. The existing societal intolerances, stigmatization and discrimination against LGBTI would be continued.

2. Freedom of, Expression and Association

Sections 25 (1) and 25(2) of the Constitution of Swaziland, provide that “A person has the right to freedom of peaceful assembly and association;” and “A person shall not except with the free consent of that person be hindered in the enjoyment of the freedom of peaceful assembly and association, that is to say, the right to assemble peacefully and associate freely with other persons for the promotion or protection of the interests of that person,” respectively. Side by side with the Constitutional provisions, there exist legislation such as the Public Order Act 1963 and the Suppression of Terrorism Act 2009.

Owing to the existence of the laws combined with social stigma and prejudices, LGBTI organisations are not able to register and operate freely. As a result, the few organisations that seek to advance the rights and welfare of LGBTI people, such as House of Our Pride and Rock of Hope³, are forced to operate under a fiscal sponsor, usually a larger organisation dealing with HIV/AIDS or gender issues to avoid official scrutiny. Rock of Hope which has been successful at acquiring formal registration did so under a cloud of fear to fully disclose their full mandate and nature of their beneficiaries being LGBTI persons whose existence is denied and prohibited by the state.

² International Lesbian, Gay, Bisexual, Trans and Intersex Association (May2012) State-sponsored Homophobia: A world survey of laws criminalising same-sex sexual acts between consenting adults <http://www.unhcr.org/refworld/pdfid/50ae380e2.pdf> (Accessed August 25, 2015)

³ RoH was registered as group representing marginalized populations.

3. Right to Life, Health, and Security of the Person

Swaziland was seriously affected by HIV/AIDS with one of the highest infection rates in the world⁴. In response the government of Swaziland has taken measures to ensure that there is universal access to care and treatment with special focus on vulnerable groups such as women. However these HIV strategies have not been holistic in addressing all vulnerable populations, such that the LGBTI (a globally acknowledged vulnerable group) population has been left in the fringes with little or no targeted programmes.

In Swaziland sexual health rights of LGBTI are not protected. There is inequality in the access to general health care, gender affirming health care as opposed to sex affirming health care and sexual reproductive health care and rights of these persons. HIV prevention, testing, treatment and care services continue to be hetero-normative in nature only providing for specific care for men born as male and women born as female, thereby leaving out trans* men and women as an unprotected population which continues to render the state's efforts at addressing the spread and incidence of HIV within general society futile.

For instance, there is no public availability and distribution of dental dam and finger condoms yet heterosexuals are provided with free condoms countrywide. This therefore means that their right to health is infringed as they are exposed to infections including HIV/AIDS and the State is not taking any steps to ensure the protection of such people.

Swaziland does not provide a protective environment for persons belonging to the lesbian, gay, bi-sexual, transgendered and inter-sexed (LGBTI) sector. The Constitution does not protect LGBTIs; it only prohibits discrimination on the basis of gender. LGBTIs are discriminated and condemned openly by society. This is manifest in negative statements uttered by influential people in society e.g., religious, traditional and political leaders. Traditionalists and conservative Christians view LGBTIs as against Swazi tradition and religion. There have been several incidents where traditionalists and religious leaders have issued negative statements about lesbians.

Human rights abuses and violations against members of the lesbian, gay, bisexual, transgender and intersex population continue to go undocumented, unreported, unprosecuted and not addressed. These violations are perpetrated by state and non-state actors in a legal environment that does accord the LGBTI community equal recognition and protection under the law as mainstream society. Acknowledging the ignorance of state and non-state actors of the difference between sexual (LGB) and gender minorities (TI) in the LGBTI community, the state needs to provide adequate measure to enable safe transitioning. By medical necessity transgender persons require state

⁴ [Swaziland, Mortality Country Fact Sheet 2006](#)" WHO. Archived from [the original](#) (PDF) on 5 August 2009.

supported medical health care that is gender affirming so as to afford them the necessary transition related medical care. This would include health policies that are non-discriminatory.

In light of HIV prevention, testing, treatment and care, it is important that health policies begin to be transformed to be gender affirming so as to encourage more and more trans* and greater LGBTI persons to access and remain consistent with the above services.

There is no legislation recognizing LGBTIs or protecting the right to a non-heterosexual orientation and gender identity and as a result LGBTI cannot be open about their orientation or gender identity for fear of rejection and discrimination. For example, the Marriage Act, only recognizes a marriage or a union between a man and a woman. Because of the absence of a law allowing homosexuals to conclude neither marriage nor civil unions, same-sex partners cannot adopt children in Swaziland.

Although the change of names is allowed under the law the same protection has not been afforded to individual to change their names or gender markers because of their transgender or intersex status.

RECOMMENDATIONS

In order to comply with international human rights obligations and commitments to protect and promote the rights of LGBTI persons, civil society recommends that Swaziland should take action to:

1. Evaluate and review the laws that undermine LGBTI persons' rights in particular and human rights in general especially as they conflict with the Constitution.
2. Condemn utterances and other forms of hate speech that is made by politicians and public officials from time to time.
3. Allow the registration of organizations of marginalized group including LGBTIs.
4. Ensure prosecution of State agents who commit human rights violations against LGBTI individuals and their organizations.
5. Ensure that discriminatory and invasive customary laws are abrogated, undertake civic education on human rights in general, and sexual and reproductive rights in particular.
6. Adopt legislative and other measures to eliminate uncertainty of the status of transgender and intersex persons' identity and expression.
7. Ensure equal access to general health care and HIV/AIDS prevention, testing, treatment and care services on a public domain for LGBTI persons.
8. Work to make transition related and gender affirming health care accessible and affordable for transgender and intersex persons.