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# **WOMEN AND THE LAW**

**REPORT OF PROCEEDINGS FROM TWO SEMINARS HELD IN  
SWAZILAND JANUARY AND JUNE 1983**

12N-5042

Edited by  
**Ronald Thandabantu Nhlapo**

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The idea to hold a national seminar on "Women and the Law in Swaziland" can be traced back to the growing realization during the course of 1982, by staff at the Family Life Association of Swaziland, that most of their clients (predominantly women) were not aware of their rights and entitlements under the present laws of the country. The bulk of the work of the Association consists in providing family planning advice and education, helping with fertility problems, giving pre-natal and post-natal guidance, individual and family counselling, and dispensing contraceptive devices. However, it became increasingly apparent that the women who availed themselves of the services provided by FLAS had concerns that went beyond family planning per se, and that these problems were very much of a legal nature. A woman seeking advice on how to avoid having more children may want to know whether she needs her husband's consent to do so; an unemployed mother of six may have been deserted by her husband and worried about her maintenance rights; a girl wishing to give her child up for adoption may be concerned about the law on the subject, and so on.

The project administrator as FLAS, Ms Fiona Duby, approached the Law Department of the University of Swaziland and the idea to invite women from various strata of Swazi society to discuss issues pertaining to their legal rights was born. Originally, only one seminar was envisaged, and it was conceived as a forum at which women would be supplied with information on specific aspects of the legal system so that they could discuss these and formulate recommendations for presentation to Government. Subject areas were identified and tentative requests were made to various people to prepare papers for presentation at the seminar.

Formal requests for funding were made to the United States Agency for International Development (USAID) and the Canadian International Development Agency (CIDA), both of whom reacted favourably. Two hundred invitations were then sent out to people (mainly women); an attempt was made, in drawing up the list of participants, to cover as many areas and as many shades of opinion as possible.

On the 14th of January 1983 the first "Women and the Law" seminar was formally opened by Senator Mary Mdziniso, President of Lutsango Lakangwane at the Yen Saan Hotel, Ezulwini. Mr. Justice Nathan, the Chief Justice of Swaziland, chaired the proceedings. Papers were delivered by Ms Thoko Ginindza, an anthropologist, Mr Thandabantu Nhlapo, a lecturer in law at UNISWA, Mr. Robert Nxumalo, Deputy Labour Commissioner and Ms Fikile Dlamini, crown counsel at the Attorney-General's Chambers. These papers covered, respectively, the traditional aspects of marriage law, the common law aspects of marriage law, the question of women in employment, and issues of property law.

The response was overwhelming: over 170 participants spent the day in spirited discussion of the issues raised. It was quite clear that such a get-together had been long overdue. It came as no surprise, therefore, when the first recommendation at the end of the day was that follow-up activity should commence the very next week. (Other recommendations were made, pertaining more directly to the subject matter of the deliberations but since

seminar, they do not appear as part of the proceedings at the Yen Saan). The University was chosen as the venue for the workshops, and the seminar ended on a high and optimistic note.

One week after the seminar over sixty women and some men met at the University to discuss the resolutions passed at the conference and to plan future action. It was at this stage that four main areas of concern were identified: Employment, Family Law, Health and National Machinery for Women. Accordingly, it was decided to divide into four working groups and deal with these topics in depth. The next formal workshop was held on the 12th March 1983, though members of the various groups continued to consult informally on the issues over a long period.

By this time it had become apparent that a follow-up seminar was a matter of necessity. The second meeting would be more reform-oriented, in contrast with the first, which had been purely descriptive. The two funding agencies were again approached, and again they rendered assistance and a date was set for "Women and the Law No. 2."

On the 3rd of June 1983 the seminar was opened at the Royal Swazi Spa Convention Centre by the Attorney-General, Mr. P. Makhanza, on behalf of the Minister of Justice who, unfortunately, could not attend. The proceedings were chaired by Dr. Fannie Friedman, former Permanent Secretary at the Ministry of Health. Papers were read by Mrs Moroesi Khoza (Women in Employment), Mr. T. Nhlapo (Family Law) and Dr. Veleleni Dlamini (Women and Health). Due to the non-arrival of the speaker who would have addressed the seminar on the workings of the Women's Bureau in Zambia and other African countries, Ms Rene Habedi representing the group that worked on the Women's Bureau idea presented the group's conclusions. Again the enthusiasm of the 131 participants was tremendous. At the end of the day, the house voted unanimously to adopt the proposals recommended by the presenters, with the qualification that more consultations between Lutsango and the Women's Bureau group were needed before concrete proposals could be advanced.

The papers collected here and the discussions stimulated by them reveal deep-seated and serious concerns about aspects of law which militate against particular interests of women as citizens of Swaziland. They are not frivolous. The participants were well aware of the national culture, the economic constraints and the political orientation of the country. That change has taken place cannot be denied: indeed the major premise underlying the deliberations was the belief that no one viewing present-day Swazi society would wish to deny the fact that over the years it has undergone a visible transformation. More and more women are participating in the economy as income-earners. Their needs, aspirations and life-styles bear no resemblance to those of their grandparents. To pretend that nothing has changed is to be deliberately blind to reality.

Laws, attitudes and arrangements that might have operated smoothly at a different time and which underpinned a different mode of production now jar with the role of the Swazi woman in the 1980s. The case for *some* readjustments needs no justification. On the face of it, a tax system that places a heavier burden on a woman than on a man in comparable circumstances *is*

inequities; marriage laws under which one party has all the duties and the other has all the rights *are* unfair; economic arrangements wherein equal work does not result in equal remuneration *are* outdated; criminal laws which do not take particular crimes against women seriously enough *do* need strengthening.

The recommendations made in these papers are well-considered and responsible. They emanate from the will of the people who have to live within the laws of the country; they are not inspired by agitators. As mentioned elsewhere in this collection, there is no intention to play with reform purely for its own sake.

It is now hoped that this Report will serve as a formal presentation of the recommendations of the seminar to Government officials, policy-makers, administrators, law-makers and all those in a position to do something about removing anomalies in the law which militate against the full integration of the women of Swaziland in the development process.

R.T NHLAPO  
JULY, 1983

## *Opening Address by Senator Mary Mdziniso*

I feel very privileged and honoured to have this opportunity to open today's conference on Women and the Law. The crucial single factor about this conference is that it is the first of its kind and thus a historical landmark in our struggle for women's rights. While I concede that this type of conference is long overdue, I also wish to commend the organizers for bringing about the realization of such an idea. This is a job well-conceived. Can I say how much I welcome the opportunity provided by the conference for the women of Swaziland to discuss the extent to which their changed role in society is reflected in the law.

Mr Chairman, everyone is aware that progress towards equal opportunity for women has been very slow indeed. Family Planning has now begun to affect the lives of more and more women. For the first time women are able to decide just when and how often they want children, which means that they have greater freedom to work and pursue careers outside the home: hence the need to involve them in our development programme. Previously we used a traditional way of Family Planning which was safe and clean. It is unfortunate that today's people do not follow it. In my opinion that was a very good custom, which should have been kept.

Government can no longer sit back and watch a vital development resource going to waste. Law and development are for the good of the country and both men and women must be involved. Let us recall the proclamation, by the United Nations Organization, of the Decade for Women in 1975. Laudable goals were set up under that proclamation.

Peace, equality and development were targets set to be attained by 1985. Women must be involved economically, socially, culturally and politically before one can talk about equal rights.

Mr. Chairman, this conference is part of the world-wide crusade for the integration of women in all forms of development. Law is one aspect that requires review. Many countries adhered to the United Nations resolution and overhauled national laws that discriminated against women. This country also joined with the rest of the world and promised to do something toward the development of women. However, one wonders what achievements have been made since 1975. The end of the decade is only two years away and women in Swaziland are still no better off. Perhaps this conference will provide practical information for our decision-makers on women and their legal rights. This is a step in the continuous struggle to emancipate our women.

Women have a major role to play in the struggle for development and there is a strong need for them to influence policymakers and administrators, to conceive new and better ways to achieve their due, to canvass and campaign for resources to promote the woman's cause, to persist in their call for review and to ensure that decisions are in fact taken and implemented. With these in mind, the future of Swazi women is bright.

Mr. Chairman, we are all aware of the laws, policies and practices which undercut the status of women. We live in a man-made society and it is men who have been responsible for the social framework within which we live. Our Parliamentary representatives, ministers and industrial leaders have

almost all been men. Our system of law derives its origin from the work of male judges and jurists. It is men who have traditionally held the senior posts in the civil service which is responsible for the administration of the laws.

A Review Commission we set up to look into the affairs of women but this was not effective: one wonders why. The time is now ripe for us to set up legislative commissions and relevant government departments which will examine all the laws and regulations which are biased against women with a view to modifying or repealing them. These are laws pertaining to marriage, divorce, property ownership, nationality of spouse, taxation, child custody, credit and finance and labour laws. We all know the hardships that have been brought about by these obsolete laws: they must be scrutinized and modified to keep up with the development that have taken place in Swaziland.

The national machinery for women that exists at present is not strong enough to cater for the recent development in women's affairs. There is every need to strengthen this machinery. Its immediate objectives should be to advise government on policy matters concerning Swazi women and to ensure that national development plans take into account the roles women can play; to conduct research and undertake studies on the legal position of women and children, and to enhance women's awareness in the political orientation and economic advancement of the Swazi nation. The development of women should not be viewed as a humanitarian cause but rather as an economic necessity.

Women in this country only contribute as child-bearers, farmers, traders, teachers and caretakers of families. They are used as cheap labour. Their average earnings are much less than those of men. While I observe that women are beginning to make their way into the civil service and some of the professions, I feel that they are still excluded from certain types of employment and from most posts that carry a high degree of responsibility. This country has more women than men but, alas, their participation is so disappointingly low. It is time we changed this patrilineal and male-dominated Swazi society.

Mr. Chairman, while I call on government to effect the necessary machinery for women, I want also to caution our women to wake up from their slumber and erase outdated values and practices that have suppressed their motivation, initiative and self-development. Our late beloved King Sobhuza said that we should merge relevant aspects of both Western and Swazi culture and leave out irrelevant ones.

This conference has a dual purpose. First, to help women to gain a useful knowledge of the law, traditions, rules and regulations which affect their rights and second, to adequately protect and extend these rights. However, it is not in all cases that reform of the law is required. In some cases the law is there but it is not observed due to either ignorance or misinterpretation. In these ways, women may fail to take advantage of existing laws. The struggle for the emancipation of women cannot be more successfully waged than by the women themselves. Let us know and realize our rights.

The programme of the conference is designed to simulate discussion on some of the main areas of women's concern. Law is too serious a matter to

Mr express on. I do not anticipate that this conference will, by itself, effect changes in the law, but its success will be judged by the extent to which it draws attention to those areas of law which need urgent reform.

We must thank our friends who have made this conference possible. To mention a few, the United States Agency for International Development and the Canadian Government for providing the material means which allow us to meet together today and discuss these important issues.

May I conclude by wishing all of you here fruitful deliberations. And now Mr Chairman, distinguished participants, I have the honour and pleasure to declare this conference open.

**Family Law:  
Traditional Aspects  
by  
Thoko Ginindza**

Ladies and gentlemen, this is a very difficult subject for me to deal with since it belongs to the legal field and next to me is a judge. So, I don't know what to think about it, but anyway this is what we are going to try and look at - hopefully there are quite a number of Swazi women around so they will know and they should be the ones to contribute to this.

Since law is such a difficult subject and I am in no way in the legal field, probably what I'll be giving you is some kind of ethnographic detail or a way of trying to see how we can identify those areas which seem to us to be a problem. I was asked to try and talk on the subject of marriage and there are two ways of talking or approaching the issue of marriage: the one that I have decided on is to try and only identify those areas which might be of importance to the topic of today. Now when, in the Swazi society we talk of marriage and we try to place the women it is not easy to abstract and just talk in isolation. One has to look at a number of complex factors. When you are talking about a traditional woman, some of the points you have to bear in mind are, for example, the level of the technology of the people at the time, which is, I think, what is meant by traditional.

Then in order to get a more comprehensive picture you have to look at the total social structure which is actually the main or underlying factor for this seminar. We are talking about bringing in change. And the position of the woman in the traditional society is tied down by the very basis of the foundations of this society. Now this society is organised along the male line. In marriage the two people - there is the man and the woman - so in terms of descent the Swazi has to follow the male line. We are not actually saying the female line is totally neglected but the main principle of organisation is to do with the emphasis that is laid on the male line. Now when you take that principle, it is the guiding principle throughout the kinship system, the political system, the economic system as well as the ritual and religious system. So we are not only talking in terms of monocausal effects, we are talking in terms of the complexity and multiplicity of facts when we are looking at the status of the woman in the Swazi society. You want to know and identify what the woman's rights are, you want to know what her status is, you want to know what her duties are. But, because of the underlying principle - the structural principle of Swazi social organisation - which is patrilineal, you are looking at the women already from a bias angle, from the male point of view.

Now, what *is* marriage? Of course, you know there is birth, there is marriage, there is death. Now, the reason that we start with marriage is because we are trying to deal with the family. It is the foundation or basis of the family. Now what type of family do we have? Marriage in the Swazi traditional system is very difficult to define in terms of the western sense. Marriage is closely linked with the kinship system. The kinship system is that you have lineages, which are male dominated. When a person gets married you want to know what actually happens. I'm not trying to talk *about* the

wec ing ceremony - you start off at home, there's a bridal party .... - but marriage is a rite of passage, you get into a certain stage. For example, when a child is born, if you christen him - you go and baptise the child - that is a rite of passage from being heathen - as it is written on my baptismal certificate - to christian. You are passing through a certain stage in life. This is how society has organised this. Now the ideology of Swazi marriage is basically that of procreation. You would like to have as many children as you can have. And the type of marriage you have was traditionally polygyny, that means that one man could take several wives. Now this does not mean that every man had to, by necessity, but this is what happened and maybe it was justified at the time; when the society was still small-scale and you needed more manpower; it was also one way of achieving prestige - the more wives you had the more important your status was.

Now what happens in marriage - I look at polygyny as an open ended type of marriage. In as far as the man can have any number of wives it is open ended. And this maybe is one of the areas of conflicts in the present social change in positions. But the fact is, what actually goes on in terms of the law is that a daughter belongs to her lineage and the husband also belongs to his lineage. Now when that daughter marries, what is actually happening is that before you get married, the person who has rights in you as a person - to distinguish between rights over persons or rights over things - And your rights belong to your lineage. At marriage, the two groups get together and the rights are transferred to the husband and his group. What the other lineage wants are the procreative powers in the woman, because, as I said, the ideology is that of procreation as they say "*umliba loya embili ngesiSwati*". The reason for this is difficult to pin down. There are complex factors into this whole business. First, we have as far as the religious system is concerned the ancestral belief. The ancestral belief cannot be maintained through time if you do not have descendants, and the more descendants you have, then perhaps the bigger your shrine will be. You need to be remembered. If you do not have any children then no one will remember you. So I was just trying to show how the religious system affects the whole concept of child bearing. If you see that is important.

It is also important to have female children. Now when you have female children what happens at marriage is you get an exchange of rights over this person.

Once you marry out it means there is a gap in the family and in actual fact, if you do attend a traditional wedding you find that the most important people in the two groups do not get together. Your father and mother do not attend your wedding, you go out with an intermediary and other representatives. When it comes to substituting that gap or filling that vacuum now what is used are cattle. I think the word "lobola" is common to most people. Now, what does "lobola" achieve? "Lobola" in one way fills up the vacuum that has been left because among the number of cattle that have been given there is one that is given to the mother. Which is called "*insulamnyembeti*". It is sad for the mother to cut with her daughter after all the suffering she has gone through.

Cattle, the lobola cattle, can be functionally looked upon as the "child price". If you have not paid your lobola you do not have any rights over

your children and once those cattle have been paid then you do, as a father, have rights over the children.

The operation of the patrilineal principle is that any individual that is born into the world in the Swazi society has to be integrated at two levels. There is the political-dual domain, which is the global society, there is also the domestic level. At the domestic level you have your family of whatever nature - whether monogamous or polygamous - than you have your lineage, for other people to decide. For any individual to be a legitimate member of the group, the parent must have been married and, ideally speaking, marriage preceded childbirth. As far as tradition was concerned, sex in its own was not a crime or anything wrong. But whenever procreation took place, pre-marital pregnancy, that is where your problem is. It was out of marriage. The problem is caused by the very fact that the people who hold rights over your sexual capacities before marriage are your father and the lineage, his brothers and all. This is one area that is being affected either by Christian beliefs or western styles of life in Swaziland. I'm not saying that it was sex for everybody else, but it was at a certain age level where it was permissible but without violating the principle of procreation because what the other group wants from the woman is her procreative powers, the powers of reproduction. These powers are transferred at marriage to the husband.

Since the lineage is a group and not an individual the rights that are acquired by the husband and his family over the woman are the rights in her as a mother, the rights in her, which are exclusively held by the husband during his time of survival, as a wife. That is why you have the custom of the levirate, if the husband dies a brother or someone else within the lineage is selected to "*kungena*" the wife. This custom of "*kungena*" keeps the woman in the group perpetually, almost. What I mean by that is until the person dies. You get married to your husband but indirectly you are married to all of them because if you lose your husband you automatically have a substitute. It may be correct but whether it is right or wrong, I'm not sure.

By the same token, if the woman is barren and lobola has been paid, then a sister has to be substituted. But all these things center around the ideology of having more and more children which closely ties in with the religious system of ancestral spirits. I wish women, too, were being remembered as ancestral spirits - they are not - it's only the men. And, as I said, this is a male dominated society.

Going back to the child who is born, this child has to be integrated into the family. The father and his lineage hold rights over the child. There are all kinds of rights, for example, you cannot, in fact, you do not have a name in this society, not unless it's that of your father. I'm talking about the clan name. This type of organisation is the core of everything else that goes on around marriage. This is why sometimes there is a problem with pre-marital pregnancy. I have been told, I don't know how far back the custom dates, that if a woman was pregnant initially and the man responsible for the pregnancy denied it, the father or the lineage would look around for another man and they would give you away in marriage. It was not a matter of just forcing or giving a woman away. It's a question of, when you come into this world, where do you belong? You must have a home, you must

you do not have a father, I mean if your physiological father denies paternity then you should have a sociological father and this is confirmed by the fact that, I think, this is what they say they used to do whenever a child was born. The first thing that you have to do is to recite (its so difficult to put this into English) "*uyambonga lomntswana ngesiSwati.*" You use the child's surname immediately when the child was born and if you refuse to do that, Mr. Chairman this is one way of checking on adultery, because the mother is not supposed to lie at childbirth, so the child already comes integrated as part of the society within the political-dual domain, he has got a surname. At the domestic level he is a member of a family. The people are supposed to take care of those children. I think we all know the upbringing rests with the woman most of the time. Does the father carry the baby, nurse the baby (audience response: No but it seems like the children take as much care of the other children, as the women. Specifically, you see that once boys get to be about 4 or 5 years old they go off with the older boys ranging up the age ladder and it seems like they more or less take care of each other.) Thoko speaking: WELL, at that level yes, but when you are talking in terms of basic subsistence, there is a household and the mother has to provide the food, the house to sleep. The father doesn't do the cooking, he's not bothered. All he does is allocate land for use by the mother to produce whatever they need. That is what I meant. When you talk in terms of babysitting and playing with peer groups, then you have the children together.

Now, even though we claim and it is a fact that you acquire all your rights through your father, what rights do you acquire? Residence is one right, your home is where your father is, your name, all your other rights is society as a whole. You all know that if a child does wrong, if a minor does wrong, it is the responsibility of the father to go and face the court. Now, when you say you acquire these rights automatically, the question, the burning question now in Swaziland, citizenship, comes in because that too, follows the male line. In the past maybe there weren't too many problems because society was still very small and maybe there were not too many people coming into the society as new citizens. Most of the citizens were already members through descent. Now these are some of the rights that a person acquires through the father.

We have been talking about all the rights on the father's side. Maybe we should find out what the rights and duties are on the female side. From what I have said it does not seem that the mother has much to offer you in terms of your public life as a member of the society. You do not take you mother's name. Your residence is that of you father. Your citizenship is that of your father, inheritance come down along the male line. Ritual is performed by the man, not by the woman and even if you are a child it starts off at birth.

"*Awunamuhhunyisela tinyamatane tingesito takubo.*" What I mean is there is a little ritual when a child is born, a protective ritual from whatever dangers can occur and these are strictly defined for each clan. If you were to do that from the mother's side the child, I was told (my grandmother used to tell me) that you would be a lunatic. But I'm not sure whether you are

is a very interesting structural feature that the woman is, technically speaking, a minor in perpetuity, which the Chief Justice said he agreed with. Chief Justice Nathan: "I don't think I said that."

Thus for anything, whether the woman is married or not, she is entirely and absolutely dependent on the male. But the most paradoxical part of the system is that for you (men) to acquire any status of social importance in the society, you acquire it through your mother. As we say in the Swazi custom, "A King is King by his mother and an heir is heir by his mother." So you see man is a little confused because he cannot be what he is without your (woman's) status. But again, the mother's status comes from the status of the father so we are almost in a vicious circle. But truly speaking, for a man to get higher up on the ladder he has got to have a very important mother - in terms of social status. But in any society you find all these structural contradictions. There is nothing that is very systematic. That is why, I'm not in the legal field, I do find laws very ambiguous. What does the principle of male domination truly mean in this society. It means I have a physiological father through whom I claim things. I can inherit and get everything through him. Brothers too are my fathers and on and on it goes. It becomes very wide.

What we are trying to say is what does mother mean? It means a number of things. When it comes to the question of married women owning property in the traditional system, the women do not seem to have owned property. *Liphakela* I think she (Senator Mdiniso) put it very rightly, was there. But if you married into a poor family what is it that they could dish out, *liphakela*, to you if they did not have the cattle so the woman had nothing. Among the lobola cattle there is insulamnyembeti, the beast, it is supposed to dry your tears. It is the only one which belongs to the mother of the bride, should they lobola. But when we look at it, I think it was a good thing in a way to have that, so it meant that being a woman, I would desire to have more daughters so that I could have 5 or ten, when they all got married, I would have 5 or 10 head of cattle.

But then if you consider this, the time when you do get that beast is the time when you are old and there is not much that you can do about it. So they had another rule, switched it around to male advantage, that best is the beast whose offspring the mother can use to help the last born son to pay his lobola with. So you still end up with nothing.

The way this shows itself in everyday life, you do not identify with you husband completely, you are never Mrs. Simelane so to say, you are the daughter of a Dlamini, Mr. Dlamini, so you

y structure. All that you do, you are supposed to get over there and bear children for that group. Not for your group. You have to observe various kinds of taboos and avoidances which are difficult to outline but some of you know them. You must respect your father-in-law, the eldest son in the family. There is a whole social network, a system of social relationship which you have to be aware of as a married woman and those observances. The woman, all she had was the right to use the land which was allocated to her in order to feed her family. There was nothing else. The kraal where the cattle are kept is the most religious place and you cannot go into the cattle byre. You go there only on the day of your wedding and that's it. If you need cow dung for your floors as a bride, you cannot go there because that is the ancestral shrine. As you know, amongst the cattle in a herd there is one for the ancestors. So the ancestral spirits are constantly there, and you being a woman and of course, their being male, you have to avoid them. Yet you are the one who is supposed to perpetuate the clan. Some of these facts make it, I think, very difficult today, because when you got married, it was to a group of people, so you had responsibilities to them. When you hlambisa it was actually an indication or demarcation of your duties to your in-laws. It shows you relationships with the people. You have got to know all of them, you must know, it defines the way you are supposed to respect them. At the same time it also imposes obligations on them to help and assist you whilst you are there.

Now should there be any witchcraft accusations in the homestead it is the woman who carries the witches. Witches are women and not men. I mean, the witchcraft accusations in this society, really do not come along the male line, yet the children belong to the man. If the child is supposed to be a witch then *weta nako ekhabonina*, it is supposed to be on the mother's side. Any bad qualities are attributed to the mother's side. Now the mother's side, I don't know what happens because the mother also comes from another male lineage. When it comes to ancestral spirits, on the mother's side these spirits are tender and motherly. They are the ones who protect you. Those on your father's side will be angry if you do wrong, they will punish you. But those on your mother's side will appease all the time. There is another contradiction.

When it comes to the role of women in politics, traditionally they had no say at all. I don't know if maybe they could talk to their husbands. But what I watched, whenever there was a case, the council comprised of men, and the judges were men. But the women, of course, they could be accused of whatever, but they never played a role. Maybe that is one reason why we don't have many women lawyers in this country. This is still the male domination. It is only when we are talking about the entire society that you speak of a dual monarchy. Where you have a King reigning together with his mother and not his wife, one of the Queens. Maybe the reason is simple, because, if you are talking about a polygamous group, which of the wives will you select. By selecting one of them to be the Queen, you will thereby be violating certain principles of succession, sewumbekile, when you really haven't. It is only at that level that you find women playing important roles. But even then, in most cases, it is dependent on the personality of the

King, as has been said in quite a number of cases that there have been very violent, short tempered Kings. Then the mother will come in to pacify.

But at the home the woman only becomes important (the mother only becomes important) when she has got sons who have married and then she has daughters in-law. Then she becomes the boss, not in the true sense of boss, but I mean, she is the advisor, she is the one who is supposed to see that things run normally around the homestead - that is, equal sharing of food, that everyone is properly housed, that sicknesses are taken care of, and she has to report. She does not make decisions, she has to see the general running and report these to the senior people. The senior person is the headman, who ever he is. Usually if the father is no longer there then you have the heir-holder, *indlalifa*.

## General Discussion

Ms Ginindza's presentation stimulated a great deal of interest from the audience. Doubts were expressed as to whether anything could be said in the 1980's to be purely traditional. Questioners wanted to know more about adoption, dissolution of a Swazi marriage, the position of women who could not bear children and pre-marital sex and pregnancy. Even at this early stage, the question of property (which was to become a major underlying theme throughout the whole seminar) was raised repeatedly.

Ms Ginindza stressed that her main concern had been to give an exposition of traditional society and that participants were free to use that as a basis for comparison if they thought they detected some changes in custom. She reiterated the philosophy underlying Swazi culture, which was that society is looked at in terms of groups, not individuals, and that marriage was conceived mainly in terms of procreation and perpetuating the family lineage. Once these are understood, she pointed out, the individual rules of custom are better appreciated.

**Women's Rights Under Swaziland's Family Law:  
Common Law and Statutory Aspects  
Thandabantu Nhlapo**

### **Introduction**

The Roman-Dutch law of persons recognises that all persons have rights and duties, but these are not identical for everybody. This brings us to the question of status, which is one's overall legal position in relation to one's fellow-man and the community; the aggregate of one's various rights and duties and capacities. It has been suggested by writers in this area that the only person of *full* capacity is an adult, male, single, sane, legitimate, solvent citizen with no criminal record. Any departure from even a single one of these attributes means a derogation, a subtraction, from one's status as a person of full capacity. Some of these factors of differentiation are less important than others: the difference between the citizen and the non-citizen may be negligible, having to do with a few acts that the former can perform in public law e.g. casting a vote at a national election, which the other cannot. The difference too, in the law's treatment of the legitimate and illegitimate person has a drastically reduced significance in modern law.

It is fair to suggest, though, that some of these factors of differentiation are important and that among the most important are minority (as opposed to adulthood), and sex (i.e. being female rather than male). It may be possible to argue that sex per se, in the sense of gender, is not too significant if both parties are single and that is, by and large, true. Where it becomes quite clear that our law has not yet achieved that ideal of equality that one hears about from various constitutions, bills of rights and international covenants, is when one examines the position of a woman in marriage.

Family Law is of course mainly the law of husband and wife and the law of parent and child. It is proposed in this paper to start with the situation as it obtains in marriage, and then pick up the remaining pieces by dealing with the position of the single woman.

### **Marriage in Swaziland: Preliminaries and Formalities**

As everybody is no doubt aware, there are two methods by which one can contract a valid marriage in Swaziland. One can marry under the *Marriage Act, No. 47 of 1964* after due publication of banns or on the obtaining of a special licence in lieu of banns. One will then be said to have contracted a marriage by civil rites, or simply, a civil marriage. Alternatively, a person can marry under Swazi Law and custom after the fulfilment of all the requisite traditional ceremonies and rituals.

A marriage is preceded by a contract to marry sometimes known as an engagement. It is important to realize that here we are not necessarily talking of a formal engagement, though of course a formal ceremony (e.g. an engagement party) is the clearest proof that a contract to marry has been entered into. Marriage requires the consent of both parties, and whenever the stage is reached, formally or informally, when the intention to marry is

acknowledge by both parties, an engagement comes into being. Enforceable rights and duties on the part of the two parties arise, including the duty to proceed towards marriage on the date chosen - or, if no date has been set, within a reasonable time. It would be unnecessary to deal with engagements, were it not for the fact that the consequences of not knowing about this contract may be serious. Anybody can be sued for breach of promise (an action in which, usually, substantial damages are payable) if they repudiate or refuse to fulfil the contract, without good cause, or if by their improper conduct they cause the other party to cancel the contract. To be fair, it must be pointed out that courts of law are reluctant to award damages against a woman, though in theory men and women are both capable of breaching a contract of engagement. This might result from the fact that the courts have found, in their experience, that it is men who invariably let women down, or it might be a carry-over from the days when it was inconceivable for a woman to promise marriage and then change her mind. Whatever the reasons, this inequality of treatment extends also to the assessment of the damages to be awarded once a breach has been proved.

Though the action if founded on contract, it has a delictual element because in addition to damage for actual monetary loss, the plaintiff can also be awarded damages for "injuria" (injury or insult). The courts, which have a wide discretion in this matter, will take into account the monetary loss which the plaintiff has suffered, the financial position of the defendant, the social position of the parties and the extent to which the plaintiff's "feelings" have been hurt. There has been some judicial controversy about whether it is correct to assume that every woman who is promised marriage and then has that promise withdrawn is thereby necessarily insulted. The modern view seems to be that she has to prove insult specifically, in addition to whatever financial loss she may have incurred.<sup>1</sup> Thus, a woman can receive damages for actual monetary loss or expenditure incurred in contemplation of the marriage (e.g. if she has bought a wedding dress, and other goods, if she has paid for her travel to join her fiancé, if she has given up a good job etc). In addition, she can be awarded substantial damages for the loss of the benefits she would have enjoyed had the marriage taken place. It appears here that the court will not necessarily try to put her in exactly the same position she would have been if the marriage had taken place, but it will take into account the fact that, had the marriage gone through, she would have become a rich woman. Finally, she may of course receive a large sum for hurt feelings.

The Marriage Act lays down certain formalities that must be followed in order to contract a valid civil marriage. Generally speaking, the Act provides that all non-customary marriages should be solemnized by a marriage officer, who is usually either an administrative or district officer, or minister of religion who has been gazetted as a marriage officer. It appears from section 16 of the Act that failure to employ a properly-appointed marriage officer renders the attempted marriage invalid ("No marriage *shall be valid* unless solemnized by a marriage officer"). The statute further provides for certain preliminaries e.g. the publication of banns in church<sup>2</sup> or the issue of a special licence as an alternative to banns.<sup>3</sup> People lacking the capacity to marry are listed: thus, one cannot marry if one is a girl under the age of 16,

so.

If the prospective partners are over these respective ages, but still under 21 they require the permission of their parents or guardians. In addition, one cannot marry if one is insane,<sup>5</sup> related to the intended within the prohibited degrees of relationship<sup>6</sup> or if one has another marriage (to someone else) still in existence.<sup>7</sup>

### **Bigamy: Problems of the Dual System**

This latter point always deserves further explanation because our common law recognises the crime of bigamy, which is committed by anyone who attempts to enter into a marriage with someone else while he or she has another marriage subsisting. Marriage, under the common law, is the legally recognised voluntary union for life in common of one man and one woman to the exclusion of all others while it lasts.<sup>8</sup> From this definition, it is clear that the civil marriage is necessarily monogamous. Section 7 of the Marriage Act merely puts the matter beyond any shadow of doubt. Sub-section (1) reads:

“No person already legally married may marry in terms of this Act during the subsistence of the marriage, irrespective of whether that previous marriage was in accordance with Swazi law and custom or civil rites and any person who purports to enter into such a marriage shall be deemed to have committed the offence of bigamy ....”

And sub-section (2) provides for the converse, in the words:

“No person married in terms of this Act shall, during the subsistence of the marriage, purport to contract a legally recognised ceremony of marriage with any person other than the lawful spouse of the first - named person.”

This language is so clear that there would be no need for a discussion of it at all, were it not for the special problems posed by the dual system of laws which operates in Swaziland. Clearly, it is allowable to marry the same person under both systems of law: section 7(2) expressly so provides. However, even that simple act is not without problems. It often happens that a man who is married under custom eventually gets prevailed upon to go through a church ceremony, sometimes after the passage of many years.

The converse is also true. Someone married in church may succumb to pressure and go through the traditional ceremony as well. The reasons why people do this are not really important - it might be a result of pressure from the church, or from the old people back home. (Though pulling in opposite directions, both camps would be saying in effect, “Do the right thing and go through the ceremony we recognise”). Or it might be that the woman feels that entering into a civil marriage will strengthen her legal rights, or

will commit her husband to monogamy.<sup>9</sup> What is clear is that it is well-nigh impossible to answer with any degree of precision questions about the juridical nature of these dual marriages.

One possibility is that the South African approach is to be adopted in terms of which the civil marriage always predominates, overriding and absorbing any prior customary marriage. The difficulty with this approach is that in South Africa customary marriages are not recognised fully anyway: in Swaziland they are valid marriages and there is no reason, in the absence of statutory authority, for the arbitrary decision to elevate the civil marriage.

Another possibility is to argue that the first marriage should predominate because it is the only valid marriage, with the second being no more than a blessing or confirmation of the first. There is some judicial authority for this approach, mainly in cases decided in East Africa. The result of its application in Swaziland would be that the situation described above (i.e. a customary marriage followed by a civil one) would amount to no more than a customary marriage, and customary courts would have jurisdiction over it. Not only that, the husband would be able to take another wife with impunity under customary law, a result that would be extremely surprising in view of the fact that in most cases the whole point of going through a civil ceremony when you are already man and wife by custom, is to commit yourselves to monogamy.

A third possibility is the reverse of the one just discussed, namely that the decisive ceremony should be the second because it has converted the nature of the marriage from one type to another. However, the failure to dissolve the first marriage by the appropriate processes makes the lawyer reluctant to accept that it is no longer of any force and effect (though entered into deliberately by consenting adults in their full senses) simply because another ceremony has been gone through.

Problems such as these will be with us for a long time, until the legislature intervenes with provisions which *discourage* people from mixing the two systems. As presently framed, the proviso to section 7(1) and the latter part of section 7(2) positively encourage such mixing, and it is respectfully submitted that amendments to these provisions would conduce to a greater clarity in our marriage law.

In case it appears that the problems outlined above are merely academic, one should hasten to add that these issues can be extremely practical. A couple married under both systems may want to know, in real life, whether the husband is within his rights in taking another wife and, if so, what remedies, if any, are available to the first wife. An even more realistic problem is the situation where parties to a dual marriage are granted a divorce in the Magistrate's court on one of the grounds recognised by the common law. What is the wife's remedy if the husband turns round and says: "The Magistrate dissolved only the civil marriage; you are still my wife under custom"? This will have repercussions on whether she can remarry; it will affect questions of the custody of her children, and even whether she can choose where and how to live. Again here, there are no easy yes-or-no answers, except to urge that in any future legislative arrangements we might embark upon, the principle of separating the two ceremonies, of avoiding the

dangers of mixing, should be paramount.

It might be useful to add here that as far as bigamy is concerned, the language of section 7 is clear. No one should marry two different people under the Act or one spouse under the Act and the other by custom, regardless of the order in which the ceremonies follow each other. It appears further from general principle that the remedy for a woman married under the Act, whose husband takes another wife, is to sue the husband for divorce on the ground of adultery if he cohabits with the second wife.

There is some judicial authority from Lesotho which suggests that if she consented (either expressly or impliedly) to his marriage, she loses the right of action just discussed.<sup>10</sup> The position of a woman who unknowingly marries under the Act when the man already has a wife by custom presents a bigger problem. It seems unsavoury to grant her a divorce action on the ground of the man's adultery with his *first* wife. However, whatever the situation as regards divorce might be, the marriage under the Act is in any case bigamous, and there seems to be no obstacle to her obtaining an annulment.

Apart from these impediments just discussed which effectively prevent someone from getting married, an attempted marriage can also be set aside (i.e. declared void) if consent on the part of one of the partners was lacking at the time of the ceremony. Duress, for instance can render a marriage liable to be set aside at the instance of the coerced party. Similarly, a genuine mistake as to the nature of the ceremony or the identity of the other party will render a marriage liable to be set aside. But not all kinds of mistake render a marriage void or voidable. A mistake as to the other party's qualities or attributes, for instance, does not affect the marriage. Thus if one finds that one was mistaken as to the partner's age, name, race, religion, previous marital status, social or financial standing there is nothing one can do about it. The only exceptions to this rule seem to be the cases in which (1) the woman was pregnant by another man at the time of the marriage - the husband can have the marriage annulled ; and (2) where the man was impotent at the time of the marriage - either party can annul. So much for the formation of a marriage.

### **Consequences of Marriage <sup>11</sup>**

The consequences of civil marriage are broadly divided into two categories, invariable and variable. The invariable consequences are the ones that cannot be excluded by ante-nuptial contract (i.e. an agreement entered into by the prospective partners, before the marriage, making certain arrangements about the marriage relationship).

#### ***Invariable***

Invariable consequences tend to be personal in nature and they include status, consortium and the duty of support.

Briefly questions of status involve matters such as the fact that the

woman assumes her husband's rank and dignities (if he's a Duke she becomes a Duchess, etc.) She may also assume his surname, though it appears she is not obliged to do so. If the parties were minors before the marriage (i.e. under 21 years) they become majors and if the marriage is dissolved before they reach 21 they still remain majors and do not go back under the power of their natural guardians. However, in the case of a woman this depends on whether the marriage was with an ante-nuptial contract excluding the husband's marital power or not. If the husband's marital power is excluded by ante-nuptial contract, she has the same legal capacity as if she were unmarried and of age. If the marriage is without ante-nuptial contract, we get that situation that some writers have described as the perpetual minority of women - where she passes straight from the power of her parents to the power of her husband. Nevertheless, if the marriage is dissolved before she reaches 21, the majority that her marriage gave her remains intact. She does not revert to the parental power, does not require a guardian, she may contract a new marriage without her former guardian's assistance and she herself can be appointed guardian to her own minor children. However, if the marriage is *annulled* before she reaches 21 (i.e. meaning that there never was a marriage) she does revert into her parent's guardianship.

Another invariable consequence of marriage is that the husband will have the decisive say in matters concerning the common life of the spouses. He chooses where they will live, and the style and standard of living the family will follow. This power cannot be excluded by ante-nuptial contract. The only safeguard for the wife is the requirement that, in the exercise of this power the husband should not act unreasonably. Thus if he fixes a standard of life that, considering their finances, is too extravagant and likely to make the family destitute, she can have him interdicted as a prodigal.

(This refers to several remedies open to the wife, through which she can get a court to stop him from dealing with their joint property, or to order that their joint property be separated, or even to order that the family's affairs be run by someone else more responsible). Similarly, if through miserliness, he fixes a standard of living that is too low when the money is there, she can force an improvement by suing him for support.

Consortium, another invariable consequence, simply refers to the moral and spiritual community of life created by the marriage. This includes the duties of cohabitation (actually living together), loyalty, faithfulness, mutual assistance and support. Married people are thus under a duty to live together, to afford each other what the law calls marital privileges and to be faithful. A husband is obliged to provide a suitable home for the wife; the wife is obliged to live in it. It is not possible for the parties to sign an agreement contracting out of some or all of these duties.

A more subtle feature of consortium is to be found in the fact that the common law strives to protect confidentiality within a marriage. Thus in civil as well as criminal proceedings a spouse cannot be compelled to disclose what the other party said to him or her during the marriage. This privilege continues even if such proceedings take place when the parties are no longer married. In the law of evidence, for instance, a wife cannot be compelled to testify for the prosecution against her husband, unless he is

facing charges of violence against her and the children of the family.<sup>12</sup>

If one party breaches his/her conjugal (i.e. marital) duties the proper remedy is for the other party to sue for divorce or judicial separation. A spouse is not allowed to take the law into his hands. For instance, a husband may not lock up his wife in order to prevent her from keeping an appointment with her lover, or drag her back by force if she leaves. Similarly a wife cannot get a court to enforce the duty to live together against the husband, e.g. by an interdict restraining him from meeting his mistress. Some duties, however, can be enforced at law. Court orders to husbands to support their wives are commonplace, and a wife's right to live in the matrimonial home may be enforced.

Under the Roman-Dutch law a husband who compels his wife by force to have sex with him does not commit rape.

A husband has a duty to support the wife and children, by providing accommodation, food, clothes, medical and dental attention and whatever else they may reasonably require.

The marriage relationship is protected further by granting certain remedies against parties who destroy either the consortium (the love, companionship and sexual privileges,) or the material support that one spouse was rendering.

### *Variable*

The variable consequences are those that can be altered by contract, and they usually affect the property rather than the person of the spouses. These include community of property and of profit and loss, and the husband's marital power.

As a general rule, in the Roman-Dutch common law, community of property is the normal matrimonial regime. That is to say, when a couple marry, they are automatically married in community unless they sign a prenuptial contract excluding community. This is certainly the case in South Africa. In Swaziland however, section 24 of the Marriage Act says that if both parties to the marriage are Swazis "the marital power of the husband and the proprietary rights of the spouses shall be governed by Swazi law and custom."

This means that a couple might marry under the Act, intending the consequences of *their* marriage to be non-customary, only to find that, if they are both Swazi, their intention has not been fully achieved, at least as far as the marital power and the property are concerned. The only way to achieve full common law consequences is to agree prior to the marriage that they want the common law to govern their marriage, and to have marriage officer, under section 25, to endorse such agreement on the marriage register. A reading of these sections thus reveals that community of property does *not* automatically apply in Swaziland to Swazi spouses - they have to do something extra to get themselves out of the ambit of customary law - i.e. sign an agreement to that effect.

If the parties are Swazi, what in fact applies automatically to them is the customary-law approach to property. This argument is based, of course on

the assumption that community of property and of profit and loss is not a feature of the customary law of property.

It is to be fervently hoped that marriage officers do in fact bring this difficulty to the attention of prospective spouses before they commit themselves to a marriage whose consequences they are not absolutely clear about.

### **The Marital Power**

The marital power of the husband, is perhaps the most significant of the variable consequences of marriage. If the parties do not enter into an ante-nuptial contract excluding the marital power, then the husband on marriage acquires this power over his wife, who then is reduced to a position similar to that of a minor under guardianship. This is true even if the husband is himself a minor under 21 because, as we have seen, marriage makes him a major. There are three aspects to the marital power:

1. The husband's power as head of the family and his decisive say in matters concerning the common life of the family. As we have seen, this aspect of the marital power cannot be altered or excluded by ante-nuptial contract.
2. The husband's power over the person of his wife, including the power to represent her in legal proceedings.
3. The husband's power over the property of the wife. This is the power that entitles him to administer the joint estate if the marriage is in community of property and her separate estate if the marriage is out of community but the marital power is not excluded.

These last two aspects of the marital power can be excluded by ante-nuptial contract. In old law they could not be excluded, but that was because the husband had the marital power as a consequence of the belief that women were inferior to men in character and judgement.

Today the husband has the marital power because the wife has agreed, expressly or impliedly, that he should have it. If the marital power is excluded (over both person and property) the wife attains the same position in law as if she were unmarried.

The husband's power over the wife's person is often misunderstood. That is perhaps because of the differences between the position as it was in old law, and the situation that obtains today in modern Roman-Dutch law. In old law this power was vast: a husband could demand the wife's obedience and submission; he could control her life and conduct; he could inflict moderate chastisement upon her if (in the words of Prof. Hahlo) she failed to obey her lord and master; and of course he had the right to represent her in court. Today the only remaining element of this power is the right to represent or assist the wife in court in civil actions. The right to punish her is outdated and he is not entitled to interfere with her personal freedom, restrict her movements, choose her friends or prescribe her mode of dress or

personal habits. (Is it possible that the "leniency" of this list explains the motive behind the enactment of section 24, where the marital power is supposed to be governed by Swazi law and custom?).

A husband cannot compel his wife, against her will, to undergo a medical examination and an operation upon her requires her own consent - the husband's consent is not essential. If she is unconscious or otherwise unable to consent, hospitals are generally satisfied with the husband's consent, but again here it is not strictly necessary since under the common law they can go ahead and operate without any one's consent, on the principle of "negotiorum gestio."

A husband without the marital power cannot prevent his wife from taking up employment, and he has no right to open her mail.

Quite clearly, given our dual system, these rules are on a collision course with those of customary law. A hospital may be operating according to the common law in performing surgery on a woman without her husband's consent and the husband may be just as certain of his right under customary law to insist that such consent should have been obtained. This happens quite frequently in the country, not only in cases of normal ailments but more particularly in those cases where the procreative faculties are sought to be tampered with. Doctors are reluctant to perform, say, a sterilization or even to prescribe contraceptives for a woman without the permission of the husband, even when in their professional opinion the woman's life is at stake. Of course, under general principle, where a husband withholds his consent in bad faith or unreasonably, such consent can be replaced by the authority of the court, but in a real emergency this process would not really assist the victim. As a matter of public policy it seems quite unwarranted to insist on the acquiescence of the husband when it is in fact the wife who is suffering the symptoms. It is respectfully submitted here that in cases where there is a danger to life, a doctor or nurse or other practitioner should do what is necessary, content with the consent of the patient and no one else's.

The husband's power over his wife's property refers to the fact that he administers the joint estate if the marriage is in community, and the wife's separate estate if the marriage is out of community. The right of administration entitles him to deal in various ways with the joint property (or her separate estate) without consulting her.

A woman married under the marital power also suffers a number of disabilities, mainly with regard to her inability to enter into binding contracts without her husband's consent.

There are several limitations to the marital power, and several safeguards against abuse of this power, the most important of which is perhaps the wife's right to bind her husband's credit for household necessities. This can happen irrespective of whether they are married in or out of community.

If two conditions are fulfilled, i.e. the existence of a lawful marriage and the existence of a common household, a wife may bind her husband to a contract she makes on his behalf by buying necessities for the household on credit. Because of her authority as manageress of the joint household, a married woman may purchase food, clothes and small pieces of furniture, she may consult doctors and dentists, engage plumbers, carpenters, electricians to repair things. Similarly, she can acquire pots, pans, linen, cutlery,

magazines, stationery etc for cash or on credit and in the case of the latter, the husband will be liable.

## JUDICIAL SEPARATION

Judicial separation is a half-way house between marriage and divorce. It does not dissolve the marriage, but merely suspends its personal consequences. A court will grant a decree of judicial separation but only if the applicant shows good cause why it should be granted. It is not granted simply because both parties are agreed that they should separate nor will a court grant it merely because incompatibility of temperament has rendered married life unhappy.

To be successful the plaintiff must prove two elements:-

- a) that further cohabitation with the other spouse has become dangerous or intolerable, and
- b) that this state of affairs was brought about by his or her unlawful conduct.

“Unlawful” here does not necessarily mean that the conduct complained of must amount to a crime. It is enough if the guilty spouse has committed some matrimonial offence or a breach of the conditions underlying the status of marriage.

In practice actions for judicial separation are usually based on mental or physical cruelty i.e. “any conduct calculated to hurt or injure, mentally or physically, which does injure or hurt, seriously, having regard to the type of person concerned.”<sup>13</sup>

A wife will thus be granted a judicial separation if her husband beats her or threatens her with physical violence; if he refuses to have intercourse where no good reason exists or conversely, if he insists on intercourse when some good reason exists why it should not take place (e.g. if she is unwell, or if he has a communicable venereal disease: also, if he makes excessive sexual demands upon her). It is also a good ground for separation if he is a habitual drunkard, particularly when drunkenness is accompanied by the commission of these other offences. In addition, if he fails to support her and the children, if he nags her persistently trying to reshape her into the ideal woman, if he refuses to treat her as his wife or treats her contemptuously in public, if he boasts about his extra-marital affairs, if he has an unduly intimate relationship with another woman even if it does not lead to adultery - all these can be grounds for separation. Similarly, if he ill-treats the children regardless of whether he is their father or they are hers by a previous marriage. Extreme miserliness, or obsessive and extremist preaching of religious or political doctrines for her to follow will also be good grounds for separation. The same is true if any of the above-mentioned offences are committed by the woman.

The question in each case will be whether the court is satisfied that the behaviour goes beyond anything the other spouse should have reasonably

sional outbursts of temper and sheer silliness will not normally be good grounds. The court will want to be satisfied that she is being asked to tolerate behaviour that goes beyond "the ordinary wear and tear of married life."

Once a separation has been granted the important thing to realize is that the parties are still married: they are not divorced. They must continue to be faithful - intercourse with another person is adultery and a ground for divorce. All that is suspended are the personal consequences and so, for example, they are no longer under a duty to live together. The motive behind this is of course the law's hope that they will eventually be reconciled; a motive that has been discarded in other countries (e.g. in England)

Judicial separation terminates if the spouses are reconciled, if the order is revoked by the court or if the spouses proceed to divorce, or one of them dies.

## Divorce

Divorce ends the marriage. Under the Roman-Dutch common law there are two grounds for divorce: adultery and malicious desertion. Through extensive interpretation adultery has come to include sodomy and bestiality, while malicious desertion now includes lifelong imprisonment. In South Africa two additional grounds have been introduced by statute: incurable insanity and a lengthy imprisonment (5 years).

It is important to state at the outset that ours is a conservative divorce law. It still seeks to grant a divorce only if someone commits a matrimonial offence: hence all this talk about the "guilty" party and the "innocent" party. Our law still bases divorce actions on guilt and not on breakdown. In most West European legal systems the concept of the matrimonial offence is being replaced by the marriage breakdown principle as a ground for divorce. Botswana too has adopted the breakdown principle in their *Matrimonial Causes Act of 1972* which provides that the sole ground for divorce in that country shall be that the marriage has irretrievably broken down.

In our case, our adherence to the guilt principle explains why a divorce will not normally be granted where *both* parties have committed adultery, even though commonsense tells us that in such a case there is even less prospect of mending the marriage.

As mentioned earlier, the Roman-Dutch system is a conservative one and public policy is construed as being against dissolving a marriage lightly, on the argument that it involves status and the interests of the children.

However, the other side of the coin should be examined too. It might be true to say that there is a social interest in the preservation of marriage, but there is also a social interest in not insisting upon the continuance of a marriage which has hopelessly broken down. (see Hahlo, page 363). The common law grounds for divorce will now be taken in turn.

Adultery is voluntary sexual intercourse between a spouse and a person other than that spouse's husband or wife. A rape committed by a husband on another woman is adultery. On the other hand, a woman who is raped has not committed adultery. Intercourse which does not result in at least partial penetration does not amount to adultery. Adultery now also includes perverted forms of sexual intercourse such as sodomy or bestiality but not necessarily all forms of sexual perversion, nor does it include an unnatural offence committed by the husband on the wife. (If it was by force, it might be a ground for judicial separation or divorce for malicious desertion).

Although there are no legal decisions on the point, a judicial controversy has raged for some time on whether a woman who submits to artificial insemination by donor (A.I.D.) without her husband's consent can be sued for divorce on the ground of adultery. It is quite clear that the behaviour is a grave breach of the marriage contract — if it leads to conception an unwanted child might be forced upon the husband. On the other hand, the procedure for artificial insemination is so far removed from the normal act of intercourse that it is difficult to imagine why a court would call it adultery. In a Scottish case in 1958 the judges took the latter view, while a Canadian court years earlier had arrived at the opposite view.<sup>15</sup> It appears that the answer will depend on whether emphasis is laid on the act or on the result.

### Defences

Apart from mere denial, the defendant to an action for divorce on the ground of adultery can plead the following defences:

- a) Insanity
- b) Mistake
- c) Plaintiff's own adultery
- d) Condonation
- e) Connivance
- f) Collusion

### Malicious Desertion

The second common law ground for divorce is malicious desertion, which occurs if a spouse deserts the other out of malice in order to put an end to the marriage. The offence is made up of two elements:

- a) the *fact* of desertion - i.e. conduct by the defendant amounting to a desertion on the plaintiff or some other serious breach of the obligations of marriage, and
- b) the *intention* to desert - i.e. the defendant must have acted without good cause and with the fixed and settled intention to bring the

### Malicious Desertion can take four forms:

- a) Actual physical desertion, where the defendant actually leaves the matrimonial home with the intention not to return. Variations of this are where the husband fails to establish or maintain a matrimonial home though he is able to do so; where the wife, for no good reason, refuses to join her husband in the place he has chosen as their matrimonial home; or where one of the spouses simply withdraws from life in common even though the parties continue to live under the same roof
- b) Constructive desertion, where it is the *innocent* spouse who leaves the matrimonial home as a result of the conduct of the defendant who, with the intention of ending the marriage, makes life dangerous or intolerable. Any form of cruelty or neglect along the lines of the conduct which can ground an action for judicial separation, is also a ground for divorce on the basis of constructive desertion, provided the defendant acted with the intention to put an end to the marriage. It is important to note this. Without such intention being proved, the conduct mentioned earlier can only ground a judicial separation. Cruelty and neglect on their own are *not* grounds for divorce in our law. To fall under constructive desertion, they must be accompanied by a fixed intention to end the marriage.
- c) Refusal of marital privileges is also a form of desertion. "It makes little difference whether a husband reduces his wife to a state like that of widowhood in presence or in absence" say the Roman-Dutch jurist *Voet (24.2.7)*. Of course, one is not compelled to comply with sexual demands which due to one's age or state of health are excessive or unreasonable. In some cases, refusal to have children may be desertion.
- d) Sentence of death or life imprisonment, used to be desertion in old law but it is uncertain whether this is still the case. In Swaziland, where no statute has interfered in this area, it may be that the older authorities would be followed.

### The Legal consequences of Divorce

#### Custody

Where divorce or judicial separation makes it necessary for the court to decide which parent is to have custody of a child, the father has no better claim than the mother. Nor is the spouse who was innocent in the dispute necessarily to be preferred above the guilty one. The paramount consideration for the court will be the best interests of the child. It might take into account the fact that the behaviour of the guilty spouse makes him unlikely to

father while custody is given to the mother. The non-custodian parent has of course a right of access to the child.

Under normal circumstances where there has been no divorce or judicial separation, natural guardianship is shared by both parents, although the rights of the father are superior to those of the mother who, however, must share with the father in the custody of the child's person and the control of his daily life. Thus it is the father who in his capacity as natural guardian acts on the child's behalf, administering his property and assisting him in legal acts. On his death, the mother acquires full parental powers over the child.

Custody is that portion of the parental powers which pertains to the personal life of the child. Spouses who live together share custody.

More interesting for our purposes is the question of the dual system and how it affects matters of custody and guardianship. Conflicts have been known to occur in this area because of the rule in Swazi law and custom that a man always has the right to "get his child back" whenever he is prepared to hand over the requisite number of cattle to "buy" that child. There have been cases where this right has clashed with a High Court order giving custody to the mother in circumstances where the parties are not married. Certainly the conflict here is inevitable because under the common law, the natural guardian and custodian of an illegitimate child is the mother.

This traditional right has also caused difficulty in cases of adoption, where it is an inhibiting factor to prospective adoptive parents to know that the child may be claimed by its natural father at any time. One can only say that this is a right that perhaps requires circumscribing, for two reasons: first, its existence possibly offends against section 11 (a) of the *Swazi Courts Act* which provides that customary law shall be applied insofar as it is not repugnant to natural justice or morality or inconsistent with the provisions of any law in force in Swaziland.

It seems possible to argue that an unlimited right to claim a child, at any time without regard to its best interests, is framed a shade too widely to accord with the dictates of natural justice. (It might possibly even be inconsistent with the provisions of laws in force in Swaziland, unless it assumed that by "laws in force" the legislature intended to refer only to statute). Secondly, it seems unfair for a father who has shown not the slightest interest in the child or its welfare for years, to emerge at the last minute and claim the child, extinguishing whatever vested interests and rights which might have in the meantime accrued to the child and to third parties.

For these reasons, decisions by the High Court which have suggested time limits on the exercise of this right are to be applauded:<sup>16</sup> the same goes for similar recent decisions of the Judicial Commissioner.

## Conclusion

As usual in papers of this nature, it is not possible to do more than provide a general outline of the law as it stands, and the problems that exist.

audience has been shortchanged. Certainly, topics such as community of property, the wife's legal disabilities, effects of divorce or separation on status and on custody of children, and annulment always deserve a fuller treatment which, sadly, they can never receive in a work of this scope.

The overriding concern in this particular presentation was to direct attention to the single most visible problem in Swaziland's family law: the interaction, and indeed, incompatibility, of the two legal traditions that form the elements of our dual system. It can only be hoped that what has been said has been enough to stimulate thought, and that issues left unaddressed will be raised during the general discussions.

1. *Guggenheim v. Rosenbaum* 1961 (4) SA 21 (W)
2. section 10
3. section 14
4. section 3
5. section 4
6. section 6
7. section 7
8. *Hyde v. Hyde and Woodmansee* (1866) LR 1 P & D 130
9. The writer is indebted to Poulter, *Legal Dualism in Lesotho*, Morija 1979 pp. 34-41 for the ideas underlying the arguments which follow
10. *Rakhoabe v. Rakhoabe* H.C. Civ./T/11/1968; *Nthunya v. Nthunya* H.C. Civ./T/34/1968, cited in Poulter, supra.
11. See generally, Hahlo, *The South African Law of Husband and Wife*, Juta 1975, 4th ed, on which the following discussion of the Roman-Dutch common law on the subject is based.
12. Per Gardner AJ, in *Renison v. Renison* 1939 EDL 229 at 232
13. *Criminal Procedure and Evidence Act No. 67 of 1938*, s. 215(1) and (2).
14. Per Asquith LJ, in *Buchler v. Buchler* (1947) All ER 319 at 326
15. *Orford v. Orford* (1921) 58 DLR 251 (Ont. SC); *MacLennan v. MacLennan* 1958 SC 105
16. *Ndlangamandla v. Dlamini* 1970-76 SLR 212; *Dlamini v. Nhlengethwa* 1977-78 SLR 79.

Participants wanted further clarification over various rights that women could claim in the marriage situation. They wanted to know more about marriage consequences, maintenance, divorce and dual marriages. In particular, questions were raised about the rights of a husband in the so-called dual marriage, with the fear being expressed that men invariably prefer to enforce the customary aspect of the marriage to the exclusion of the common law portion.

A lively discussion on the issue of matrimonial property ensued, with speakers indentifying this as the biggest problem for the wage-earning woman, regardless of whether she was married under custom or by civil rites. Virtual dispossession of the widow by the deceased husbands's family was condemned by speaker after speaker.

In reply, Mr Nhlapo conceded that a dual marriage is a dead-end for the woman, because of the ability of the man to acknowledge only those aspects of the marriage which suited him. He suggested that in this area of the law the legislature's intervention was required as a matter of urgency, and urged that in the meantime marriage officers had a duty to warn intending couples about the country's complicated regulations regarding marriage consequences.

by  
**Robert Nxumalo**

Ladies and Gentleman I have been given the topic which relates to women in employment. I think it is a very exciting title but unfortunately if we are to deal with it as it stands, so much can't be done. For instance, we would have to go back to a couple of hundred years ago, think of the plight of women at that time, think of moves taken by women and also by males to get women employed, think of the emergence of women into the working class, think of the recruitment of women into certain types of industries, especially textile mills, etc, think of the advantages and disadvantages of the involvement of women in such societies.

Fortunately, my task has been given - what I am going to deal with today is the legislation in Swaziland affecting female workers. Swaziland has been a member of the ILO since the 1960's but only as an ex-officio member. In 1975 we became a full member of the ILO. In becoming a full member of the ILO we had to meet certain commitments. A major commitment was to look into all ILO conventions and recommendations and see which of those conventions and recommendations we could ratify in Swaziland. With regard to those affecting female employees, we chose a few that we thought we could be better able to ratify and also back up with legislation.

The first we ratified was Convention 45 "Underground Work (Women)". This convention accepts the employment of women underground, but of course there has to be limits somewhere. There had to be exemptions. If you are a woman, you expect to be given all the chances available and all the benefits that are being enjoyed by men but at the same time taking into account your physical build and physical condition. For instance, under this particular convention females exempted were those: a) holding managerial posts but who do not perform mining work; b) those employed in health and welfare services, for instance, if some sort of catastrophe happened underground, nurses would just have to go underground and see what to do;

c) those who have to spend some time underground doing studies, for instance if you are doing a thesis or preparing some paper which would involve the conditions of people working underground, then you would be allowed to go underground; and

d) those who may have to go underground for non-manual occupations, in this regard once you become a sectional manager you could be working on the surface but, from time to time to widen your understanding of the work involved, you would want to go underground and see what happens because in future you may expect to be promoted to an even higher position of management where you would have to have all the knowledge you require.

The second is Convention 89 - "Night Work (women)" 1948. This discourages the employment of women at night in mines, quarries, industrial concerns, building and construction and civil engineering. This is to protect women because of their nature. It is believed and I think everyone is going to agree (!) that naturally females are a little bit weaker than males.

we have had problems over this one for quite a number of years. Where you find a man and a woman doing the same jobs but receiving different earnings. It was such a bone of contention that eventually most countries today decided to ratify this convention and get away from it all. We know how sharp you people are tongue wise.

Last of all is Convention 111 - "Discrimination in Respect of Employment and Occupation", 1958. This convention lays down amongst other things, that there shall be no discrimination on the basis of sex. Very easy to apply, I suppose, but very difficult to prove if this is not enforced.

The ratification of every convention or recommendation needs to be supported by legislation, or in the absence of legislation, national practice. It's no news and in fact you'd be putting your country in very great trouble if you notified the ILO that you had ratified convention so and so, if you didn't have the legal backing, towards the implementation. You'd find yours If answering questions left and right to the ILO standards, applicational standards committee where people really do sweat and sweat. Some of us here have attended a session of the committee.

The first 2 conventions mentioned are supported under the Employment Act of 1980, section 101. This section states that female employees shall not work between 10pm and 6am unless the employer obtains a certificate from the Commissioner of Labour. Before issuing such a certificate, the Commissioner must be satisfied that there are adequate transport facilities to and from work, that there are sufficient rest rooms and eating facilities and that the employees are accorded adequate opportunities for rest and meals in between working hours. This particular convention is also catered for here in Swaziland by the provisions of the Manufacturing and Processing Industry Wage Regulation Act. The order states that no female employee shall be called upon the work after 6pm in summer and 5pm in winter or before 6am in summer and 7am in winter. There is, of course, a special provision under this order which specifies that no female employee shall be called upon to do heavy manual work unsuited for her sex.

As we all know the government of the Kingdom of Swaziland did away with the, I think it was the 5 days rota, sometime in 1973 or 1974, I'm not sure. All the wages regulation orders we had in the country do not differentiate the earnings of males and those of females. Enforcing the provision of Convention 111 is not a very easy task. All the employers in this country, will definitely say "we do not discriminate between men and women where job opportunities arise" but we have had so many complaints.

We will go to maternity protection which is provided for under sections 102-106 of the Employment Act. It reads, "a female employee who has been employed continuously for 12 months (under the same employer that is) or longer is entitled to at least 6 weeks maternity leave before delivery and 6 weeks maternity leave after confinement." There may be cases where a woman contracts some sort of illness arising out of confinement, in which case, if her medical practitioner recommends a longer period may be given along with maternity leave. But before an employer can release a female employee for maternity leave, there must be a certificate signed by a medical

ner or a m e.

Once the employee returns to work, after the 6 weeks or after confinement, she must go back to her original job or, if circumstances do not agree, she may be given a job similar to the job she was doing before she went away. However, under the Employment Act, if a female employee goes on maternity leave there is no compulsion for the payment of her salary or wages for that period. The provisions of the act are only meant for the protection of her job. The alternative laid down in the law for instance, if section 102 is contravened (this section is the one that allows you the period of maternity leave, 6 weeks before and 6 weeks after) and also section 104 (which allows you additional maternity leave) if those are contravened by the employer there is a fine of E250 or 3 months in jail.

A few Wages Regulation Orders also provide for maternity leave. Where the conditions in a particular Wages Regulation Order are inferior to those contained in the Principal act - the Employment Act - then those of the Act will apply, but if those of the Order are superior, then it is vice versa, i.e. those of the Order apply. For instance, under Watching and Protective Order, every employee irrespective of the period of employment would qualify for 5 months unpaid leave if she fell pregnant and when she returns to work she has to be given back her original job.

Under the Domestic Workers Order, a female employee is entitled, after 9 months continuous service with the same employer to 15 calendar days maternity leave on full pay and 15 days without pay. Now what would happen there, she is entitled under the main Act to 6 weeks before and 6 weeks after, unpaid. But here she would be entitled to 15 days of the 6 weeks, on full pay and the balance without pay. After confinement the total balance of 6 weeks without pay.

Under the Mining and Quarrying Order she would be entitled to 30 days leave on full pay in each period of 12 months continuous service, which means you could get pregnant every year and still receive: Or the employer may decide to opt and in opting, he will provide her with free pre-natal medical care, free hospitalization with free food, free medical treatment including all medicines prescribed, in addition 3 weeks unpaid leave.

## **General Discussion**

The main concern here appeared to be a suspicion that laws made ostensibly for the protection of women have the effect of reserving the better-paying jobs for men. The prohibition on underground and night work for women was cited as an example. Further, speakers from the audience doubted if these laws were applied consistently in any case, in view of the fact that women doctors, nurses and police officers did work at night.

Mr Nxumalo drew a distinction between industry and other types of employment, and said that the protection under discussion applied only in industrial activity.

**Introduction:**

This paper attempts to analyse women's rights to own land and to inherit property under the property laws of Swaziland in very broad and general terms. It purports to do no more than that for the time being. It should be pointed out that the paper concentrates on the situation of married women as they are the ones who suffer more legal disabilities in these areas of the law.

Also, to be noted, is the fact that Swaziland recognises two "legal" systems. There is, on the one hand, Swazi Law & Custom and on the other, Common or Civil Law. That being so, this paper purports to analyse women's rights under both systems of law. By so doing, the writer hopes that this shall not mislead the people present here into thinking that these two legal systems are on an equal footing, that is not the case.

**Property Law — Definition**

The concept of property law has its immediate origin in the very nature of man. Man (as a universal creature) has always sought (and is still seeking) to reduce and control the world around him, to assert himself around and over it. This assertion is thus manifested in what man has successfully reduced to his control, to the exclusion of all other creatures (be they fellow man or otherwise)

"According to Grotius, all things originally, were *res nullius*. But man in society came to a division of things by agreement ... Thus things came to be subject to individual control. A complete power of disposition was deduced from this individual control .... and this power of disposition furnished the basis for acquisition from others whose titles rested directly or indirectly upon the natural foundation of the original division by agreement ... Thus a complete system of natural rights of property was made to rest mediately or immediately upon a postulated original division by agreement or occupation"

A. UNDER SWAZI LAW & CUSTOM

In orthodox traditional Swazi Society women have always had absolute rights to movable property. But such movables were always scanty and fragmentary and consisted in the main of things like household utensils, personal belongings, etc. As regards property (land) women enjoyed practically no rights. They acquired limited interests in land by allocation from the heads of their families (fathers in the case of unmarried women and husbands in the case of married women). But it appears there never was any need for women to "own" land in their own rights according to the views of the Swazi ancients. Outside the fact that it was (and still is) a man's world, the reasons for such discrimination were not far to seek. It was considered unwise to allow daughters to succeed to such property as land for fear that upon marriage, the property might be taken over by the new husband or left to be fallow if the husbands were from a place distant from the land in question.

It should be pointed out that the "ownership" referred to here should be regarded in the light of the Swazi concept of ownership of land. Under Swazi law and custom, land is owned by the nation as a whole and is invested in the King-in-trust for the Swazi Nation. However, what can be "owned" is the "right of use" over the land. Unlike women, men have this right in perpetuity.

As regards women's property rights under inheritance if the woman was unmarried upon her death, her estate is inherited by her father or his heirs if he has predeceased her. If the woman was married upon her death, her estate consisting in the main of the following articles:

- (1) the liphakelo beast - (a beast given to a married woman as a present by her in laws)

... have acquired as a result of her own efforts (eg trading and earnings)

(3) Personal possessions;

will be inherited by the heir to her house. But this property will remain in the custody of her husband during his lifetime. The only other property she seems to have been able to deal with as she liked are the "insulamnyembeti" beasts which would ordinarily devolve upon her youngest son on her death, but she could make a donation of these to the contrary during her lifetime.

The position is different upon the death of a husband. Inheritance according to Swazi law and custom is patrilineal (in the male line). Thus, upon the death of a husband, his estate is inherited by his eldest son (heir) and in the absence of any male issue, the estate reverts to the husband's brothers. All that the wife inherits are personal rights like the right to be maintained and supported. Under such a system of inheritance, it became necessary therefore for a wife, upon the death of her husband, to be actually ranked with the rest of his estate to be inherited by the man's blood relations (kungenana)\*

The immediate glaring effect of the patrilineal mode of devolution is that it virtually disinherits daughters, for, even where there are no male issues, the whole estate devolves upon a relation outside the mediate family unit.

## B. Under Common/Civil Law

As pointed out in the introduction, this section of the paper will deal almost exclusively with married women. However, a general exception of the urban single or unmarried woman who is emerging as a class of her own, has to be made. This woman has become emancipated with respect to the acquisition of property in her own right and she can dispose of it as she wishes upon her death. As to the property she can acquire, the sky is the limit. And of course, as a result of contact with Western civilization (maybe) fathers are now known to bequeath land to their daughters, vesting in them full rights over that land.

### Martimonial Property

Generally speaking, the form of marriage contracted by the parties in Swaziland, looms large in, and supplied the *indicia* for the devolution of an estate. And we are already seen that a woman married under Swazi Law & Custom has no rights of succession in respect of her husband's estate.

The law governing Civil marriages in Swaziland is the *Marriage Act No. 47 of 1964* and section 24 thereof provides:

... "The consequence flowing from a marriage in terms of this Act shall be in accordance with the common 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 property rights of the spouses shall be

from a marriage under the Act by agreeing prior to the solemnizing of the marriage, that the consequences flowing from their marriage shall be governed by common law and such agreement has to be endorsed on the marriage certificate.<sup>5</sup>

It is common knowledge that parties in Swaziland (both being Africans) have contracted a civil rites marriage thinking that automatically the marriage will be governed by common law, only to discover at a later stage that in fact that is not the case. This means that upon the death of a husband (who dies intestate) the situation reverts back to customary law where a wife has no right of inheritance. There is therefore a need for Government to regularize this anomalous situation. *The Government could introduce a more comprehensive scheme of inheritance* applicable to all and, above all, not linked with the form of *marriage of the parties* e.g. in Malawi, in 1967, the Wills and Inheritance Act was passed which provided, inter alia, that a man's heirs are his children and wife or wives no matter the form of marriage and they take between one half and three fifths of the estate.<sup>6</sup> *Also, it might be a good idea to formulate a rule obliging the marriage officer to warn intending spouses about the effects of section 24 of the Act.*

As regards married women's property rights under common law, the situation differs depending on whether the marriage is in community of property; out of community of property but including the husband's marital power; or out of community and excluding the husband's marital power.<sup>7</sup>

Where the marriage is in community of property; the wife cannot acquire any property in her own right or without the husband's assistance and consent. In fact, her legal status becomes the same as that of a minor child and the husband becomes the sole administrator of the joint estate. He can deal with the joint estate as he pleases - subject of course to a few limitations which are outside the scope of this paper.

However, the husband is precluded from disposing of the woman's half of the estate by will upon his death. So, upon her death, she can dispose of her half of the estate as she pleases.

Where the marriage is out of community of property but including the husband's marital power, he still remains the administrator of the whole estate (i.e. entitled to deal with it as he pleases)<sup>8</sup>

Whether a woman is married in or out of community of property but including the marital power of her husband, and property acquired by her before the marriage or bequeathed to her during the marriage and *expressly* excluded from the joint estate, she acquires absolute rights over this property and can deal with it as she pleases.<sup>9</sup>

Where a woman is married out of community of property and the husband's marital power is excluded by antenuptial contract, she enjoys the status of a full major and can acquire property in her own right, dispose of it as she pleases. But this pertains to her half of the joint estate.

Even though it is possible under common law for a women to acquire full legal status by executing an antenuptial contract, thereby excluding the husband's marital power, an examination of records in the Registrar General's office show that very few women have opted for this kind of marriage.

*interviews with intending spouses to warn them about the different kinds of marriage e.g. a marriage out of community of property and excluding the husband's marital power or in community etc and the consequences flowing from each.*

As regards inheritance under common law, a husband cannot disinherit a wife. How much she will actually inherit will depend largely on whether the husband dies testate or intestate. Where he dies testate, she shall inherit the portion expressly bequeathed to her in the will plus her original half of the estate whether married in or out of community of property. If the husband died intestate, how much the wife inherits will depend on whether the marriage was in community of property or not and whether or not there are any descendants. The rules pertaining to intestate succession are rather complex and outside the scope of this paper. But, in general, it can be said that under intestestacy, a married woman can actually come out for the better, e.g.

- (1) where there are no descendants and no blood relations of the husband, she gets the whole estate.
- (2) where the marriage was in community of property, she gets her half of the estate plus a child's share etc.

### **Conclusion**

**We** have already seen how, to a large extent the property and inheritance laws of this country militate against the interests and rights of women. To acknowledge this is not a genuflection toward current fashion, but rather a recognition of fact and a need for reform. How can the laws be reformed? The best reform in the laws of any country comes through the legislature, but sometimes there also has to be a certain amount of lobbying from the people, using whatever machinery is available particularly the judiciary, to help speed up the process of reform.

It is commonly known that law will always lag behind social change and in Swaziland, the situation is complicated by the fact that there are two legal systems; with no indication as to how each relates to the other in present day Swaziland.

### **Some Examples**

1. Common today is the situation where a man marries two women; one by civil rites and the other by customary rites. Strictly speaking, in terms of the marriage Act 1964 (Section 7 thereof), the second marriage (which ever it is) is bigamous and therefore null and void. Also, the proprietary consequences flowing from each kind of marriage are in conflict. What is the legal status therefore of such dual marriages bearing in mind that under Swazi Law and Custom one is free to marry

, women could not khonta in their own rights, yet today there are some women who have khontaed and been allocated pieces of land. What are their rights over such land? Can their children inherit that piece of land or will their occupation be disturbed at a later date just because it was the mother who held that piece of land?

3. Customary law precludes women from inheriting from their husbands and merely offers them "personal rights". In a situation where a woman was the major earner or contributor in the joint estate, why should she suddenly find herself a dependant upon the death of a husband? There is nothing in the law as it is today which guarantees her even those basic personal rights as she had under orthodox Swazi society. Widows are today known to end up quite destitute upon the death of a husband.

Some other African countries have already started legislating on the property and inheritance laws of their countries to remove some of these anomalies. We have already seen the example of Malawi. In the R.S.A., they have the matrimonial Affairs Act No. 37 of 1953 which varies the position under common law particularly with respect to the husband's marital powers and gives the wife certain exercisable rights over the property in the joint estate. "

This paper has endeavoured to identify some of the "problem" areas in our laws as pertaining to women vis-a-vis property and inheritance with the hope that any recommendations arising from this will receive due consideration by the relevant authorities in the country.

#### Foot Notes

1. SILBERBERG: The Law of Property pg 400
2. FANNIN J.M.A. Preliminary Notes on Principles of Swazi Customary Law: LOZITHA, 1967
3. Ibid
4. Ibid
5. MARRIAGE ACT NO: 47 of 1964
6. ROBERTS: The Malawi Law of Succession (1968) Vol. XII Journal of African Law at page 81
7. ODULAMA JUSTINE What every Woman in Swaziland Should Know (1981) Kenya
8. HAHLO H.R. The South African Law of Husband & Wife (4th Ed) 1975 pg 188
9. Deeds Registry Act No. 37 of 1968
10. GIBSON J T R Principles of South African Law (6th Ed) 1970 pg 259 et seq
11. HAHLO: supra note 8 at pg 187 et seq

## **General Discussion**

Again the issue of the property of the married woman was raised, this time more directly. The question of taxation, too, was aired quite extensively, with speakers criticizing the anomalies in the tax structure. Fortunately, the Legal Advisor to the Department of Income Tax, Mr Gulan Tambiah, was in the audience and he made many useful contributions.

For her part, Ms Dlamini agreed that the proprietary position of the woman, under both custom and the common law, was unsatisfactory. She proposed a number of legislative reforms.

## Women and the Law

(Summary of Opening Address by: MR. D.P. MAKANZA  
ATTORNEY GENERAL)

There are very few countries in the world today in which tradition is so deeply rooted as in Swaziland. On the other hand, Swaziland - like so many other developing countries - is a dynamic State which has had its inevitable share of external influence through modern economic development and Western culture - factors which we dare not lightly ignore whenever we discuss development in its widest sense.

This interaction of forces contains the potential ingredients for cultural friction, moral contradictions, religious conflicts and competing values. Nevertheless, it would be unwise not to admit that even in the face of such contending forces, there exists a field of harmony - some potential common ground - which could be usefully exploited for national development.

The Chairperson has so ably and convincingly spoken about "the head and the neck" of the family to illustrate the inevitable complementarity of husband and wife in a family that I find myself unable to resist the temptation to use a similarly moving analogy on this occasion: "the book and the drum": - the book representing modernism and Western influence, while the drum represents traditional culture and values.

It is my humble expectation that throughout your deliberations at this conference and similar gatherings you will be able to contend successfully with the ever-present problems of striving to strike a proper balance between "the book" and "the drum." The contradictions and conflicts arising from the interaction of different cultures and values are not always easy to resolve, but I hope that at the end of the day you will have shed some light - and, understandably, some heat - on the problems connected with these situations so that you are able to come up with acceptable and lasting solutions.

To the underscoring mind, the theme of your conference - "Women and the Law" - would, at first sight, appear to be unduly narrow. It does, perhaps unwittingly, conjure up connotations of an indictment of the legal system as if the law alone is the instrument by which the lot of the world's women will be alleviated or aggravated. I would therefore wish to appeal to you to infuse into your discussions a broader perspective; for when we speak of "women's rights" we are in essence speaking of human rights - the human rights of a particular section of society.

The law is only one aspect, undeniably important, of the wide spectrum of things you will have to take into account. You will, no doubt, wish to give due weight also to the political, social and economic considerations relevant to the issues before you in order to arrive at substantially acceptable proposals and solutions in the context of Swaziland's development.

For this reason, I believe that the best results can be achieved by basing your deliberations on a philosophy which is geared towards development: a philosophy which takes into account the development needs of the Nation as a whole and not only the needs of the educated few.

I hope therefore that your discussions today and in the future will also

ings, the needs and the aspirations of the unseen majority of women who toil in the fields, who are not as educated and enlightened as we are but who, in reality, are the inconspicuous pillars of our social structure. To leave them out of your thinking would be to betray the trust and confidence that the nation has placed in you as leaders in your various professional fields.

Since this is a symposium on women and the law, allow me to dwell briefly - by way of illustration - on some recent legal developments which indicate the healthy concern of the Government for the welfare of women.

In this regard, the Employment Act is an outstanding example. Based on various International Labour Organisation Conventions, the Act seeks to safeguard the particular interests and welfare of women as workers - by prohibiting the employment of women at night, by guaranteeing equal pay for equal work and by outlawing discrimination based on sex in all employment situations. Furthermore, the Act does confer on women the right to maternity leave irrespective of their marital status.

In my opinion, there is a deliberate effort on the part of Government to improve the lot of women and I am sure this trend will continue gradually into other fields. However, much as the law may be of help, there is also a need for social attitudes to change in order to facilitate the full and practical realisation of women's rights.

While appreciating that some of the disadvantages of women are natural and others are - shall we say - "man-made", I am sure that a little reeducation of both the "male chauvinists" and their female antagonists could assist in considerably reducing the artificial and attitudinal differences. It is in this context that an institutionalised system (like the Women's Bureau which is on your agenda) would be of immense value. It could very well be the right time for the establishment of such a Bureau.

Finally, on behalf of all of us, I would like to express our most sincere gratitude for the generosity of the organisations and individuals who have facilitated the holding of this conference and who, we hope, will continue to assist in future conferences. Among these, I would like to pay particular tribute to the United States Agency for International Development (USAID) who, I understand, are the financial godfather, the Law Faculty of the University of Swaziland which has provided the intellectual support, the Family Life Association of Swaziland which I believe has supplied the inspiration and moral backing and, not least, the management of the Royal Swazi Convention Centre who have been gracious enough to provide us with such a pleasant venue in which to conduct our deliberations.

While I wish this conference the best of success, may I once again remind you of "the book" and "the drum."

## Women and Employment in Swaziland

### Moroesi Khoza

#### A. Background

The total labour force in Swaziland is estimated as being 239,733 persons. Of these, only 90,662 are considered employed in the money sector. Less than one third of these employees are women. The estimate here is that there are 14,413 women employed in the private sector 5,617 in the public sector. This leaves just over 100,000 women who are considered members of the active labour force unaccounted for. We are led to assume that these women form the bulk of what are considered, "unpaid family" workers or what has been called "the working poor."

In the broadest sense of the word though, we could consider that all women are workers. Take women in the non-formal sector for instance. They are care givers as they bear, and raise the young; and nurture their families. They are managers of their households. They are major agents of food production, initiating the process at the field preparation stage up to the processing of foodstuffs in readiness for consumption. They ensure a constant supply of water in the home, drawing it physically from the nearest source which may not be so near. They ensure that there is fuel in the home through the time and energy consuming process of wood gathering. They are the health workers providing home nursing or serving the community, depending on how specialised their knowledge is. They participate in construction of the home up to landscaping. Excess items from home products are sold off to generate some extra income for the home. Eventually they become courts of appeal in the event of family disputes. Through memory they keep a record of family assets and procedures of succession.

It can be seen from the above therefore that whether it be in management, processing, health, business, construction, agriculture or law, women have participated fully. Women have thus not been dependants but they have been depended upon to make ends meet.

In the formal sector women have participated at all levels of the economy - from the professional and technical levels down to the unskilled jobs. A closer analysis of this participation shows however that the majority participate at the low paying unskilled levels. Of the 14,000 employees in the private sector, 11,290 are registered as unskilled. Only 75 are considered skilled, and 182 are in the administrative or professional ranks. Comparison with male participation shows that managerial and professional ranks are dominated by men. In areas where traditionally females have been concentrated e.g. the clerical cadre, women and men participate equally.

With this kind of distribution it is hardly surprising that the average earnings of males are much higher than those of females in the labour force, even comparing workers from common job categories. Comparing average earning for professional and technical workers in 1981, males earned E910 against E365 for women. At unskilled levels males earned on average E108 and women, E79. A note should be made in passing about the mining industry. Here, women are barred by protective legislation from participating in underground work. The average earnings for professionals and tech-

nicians in industry are E1,397. There is no legislation however against women inspaning oxen or loading cement bricks onto trolleys.

The majority of women are employed in agriculture, manufacturing, distribution, social services and clerical cadres. Of these listed as professionals in the public sector, most are teachers and nurses. Even with the low levels of participation of women in the economy, there is the problem of concentration in areas of low level of skill or traditional social service and clerical jobs.

## **B. Factors favouring greater participation of women in Employment**

1. Recent legal provisions notably the Employment Act 1980 and the Industrial Relations Act 1982 augur well for greater participation of women in the work force. The Employment Act provided specifically that there shall be no discrimination in contracts of employment on grounds of sex. Furthermore, there shall be equal pay for equal work. The Industrial Relations Act provides for the representation of workers in works councils, associations and unions. It guarantees the right to associate and seeks to protect the worker from victimisation because of union involvement. In a recent issue of the *Times* of Swaziland, the Federation of Trade Unions has announced the registration of 5 Trade Unions. Indeed this should be hailed as a step forward.

In practice it could be said that there is discrimination in employment in so far as equal access to jobs is concerned. A glaring example here is within government ranks for instance. Since Independence in 1968 there hasn't been a single women minister in Cabinet. There was one Permanent Secretary whose token presence was reversed ostensibly because her skills were needed more at professional level. In the private sector in private companies and parastatals there isn't a single local female Managing Director. Increasingly however there is a growing number of department heads who are women.

In a sense, limited access to employment opportunities may be a self-imposed condition. There has been no objections to girls enrolling at SCOT for technician training. Very few girls have however aspired and applied for this form of training.

2. General Education has been a big factor in catapulting women into the labour force. The demands of a developing society on manpower has led to utilisation of all available resources especially where these were scarce. Obtaining a suitable qualification in a field where specific skills were in demand assures women of certain employment. As soon as women are qualified as engineers, technicians, architects, pilots, accountants there will be nothing stopping them being employed in these fields except perhaps their lack of self-confidence and the prejudice of the employer.

3. Education has had another positive effect in enabling women to participate in the labour force. Women have become more aware of possibilities of family planning and have taken advantage of available facilities. Education together with economic realities have proved to be strong forms of contraception. With a well spaced out family the woman has been able to take on a job in addition to her responsibilities as a mother. Family planning programs of the Ministry of Health as well as efforts of

organisations like Family Life Association have all contributed to this awareness of the need for responsible parenthood.

4. The Extended family system is yet another factor that contributes to women's ability to participate in the workforce. In many cases, relatives will be on hand when the newborn arrives. Grandmother, younger sister or older child will help with minding the infant if the mother has to be back at work. Sometimes this arrangement does not work well. It is not uncommon to find a six year old with a baby strapped to her back whilst the mother is away many hours at work. Unless there is an older responsible person in the household, such a child may suffer from undernourishment and be susceptible to infant disease. The possibility exists of hired help but the average worker might not be able to afford the minimum wages stipulated by the wages proclamation. Alternatively, the hired helper might be willing to settle for less than the stipulated wage - glad to receive any remuneration at all in these days of rampant unemployment.

### **C. Issues militating against full participation of women in employment**

1. The normal child bearing function of women is often taken to be an impediment in the way of full participation in employment. No matter how healthy a woman has been during her pregnancy there comes a time when she has to stop work. The law provides that her entitlement will be maternity leave for a period of not less than 12 weeks. If the full leave period were claimed it would mean that a woman who falls pregnant would be available for work only 9 months in a year. The Act stipulates however that the employer is not obliged to pay the worker any wage during this period. This often forces the worker to reduce the length of leave in order to pick up the wage that is much needed at this time. Workers often use their paid accumulated annual leave as paid maternity leave. The result of anxiety to get back to work is that babies of working mothers are prematurely taken off the breast and put on the bottle. The Motshabi study in peri urban Mbabane 1982 confirms that employment dramatically reduced breast feeding. Employers tolerate absence because of maternity but they will not entertain the idea of paid maternity leave. The law also protects the worker from loss of tenure or seniority on grounds of maternity. The child bearing function will often be used as an argument against employing women.

2. Related to maternity leave is the issue of child care. Many reported absences during this period will be related to the responsibilities of motherhood. The child is unwell, there is nobody to look after him, the baby sitter did not turn up. The absence of child care facilities at places of work often means the choice between absenteeism or child neglect. Employers are reluctant to provide child care facilities as this is considered as raising overheads.

3. Employers and investors in Swaziland are anxious to keep their overheads down at all cost. There is a tightness in the economy if not a definite slump. There isn't the willingness on the part of investors to start new projects or expand existing ones - instead there is a tendency to retrenchment and at worst, total pullouts. Maximisation of profits is the investors

major aim and do appear to make special extra spending demands may be looked at with a wary eye especially if these workers could not be depended upon to be available for work for the full working year. The need for stringency in spending is further imposed by the fact that Swaziland has to compete with nearby affluent South Africa whose incentives for new investors are highly attractive. These include payment of 95% of the investor's wage bill in the homelands. Swaziland cannot offer anything as near attractive. If any section of the labour force seems to increase the cost of operations, the possibility of flight of capital is brought closer. The uncertain political future of South Africa may encourage investors to stay in Swaziland, adopting a wait-and-see attitude assuming of course that Swaziland herself will be stable.

4. A lot of the fears about losses incurred by employing women may be grossly exaggerated. There are also persistent and prevalent attitudes about female inferiority and stereotypes of female incapacity. This has led to hiring practices and patterns as are observed in the labour force. The highest paying jobs are held by men. Men dominate the boards that control appointments. Men make the laws that govern the land as can be seen by their preponderance in parliament. There are no women in the civil Service Board, in promotions boards, in parastatal Boards of Directors, in wages councils. Women participation at crucial decision making levels is minimal. The saddest part of the picture is when women themselves accept and promote this view of their incapacity.

5. Whilst the law provides for non discrimination in conditions of service, there are still some areas where differential treatment is exercised. Female officers for instance in the civil service are not automatically entitled to accommodation as their male counterparts, even if there are families to consider. If a married female officer has to go on some professional training, the written consent of the husband is sought by government. If a male officer goes on training, the views of the wife are not conditional to his participation.

The Income Tax schedules have been revised during the past year with notable improvements particularly for married women. There is still a yawning gap between male and female married rates. Equal pay for equal work is undone by unequal tax deductions. The simple formula of equal tax for equal pay may be well worth considering for the not too distant future. In that way income tax considerations would not influence decisions on whether to marry or not, divorce or not.

6. It is possible than even under existing conditions, women may be satisfied with less than their entitlements because of ignorance of what these entitlements are. Some women employees may in addition not be literate. Understanding the details on their pay slips especially if some of these are in foreign languages may be a problem. Unscrupulous employers may want to take advantage of this lack of awareness and under pay. Payments due on termination of service may not be according to what the law subscribes.

7. Such ignorance and lack of awareness may be due to women's limited participation in worker organisations one of whose major functions is to educate the worker on their rights and responsibilities. Whilst works councils do exist in different establishments these deal with issues local to that

part of the process of employment. At present there is no machinery that exists to deal specifically with women related issues across the board. There is no coordinated and sustained research that is being carried out on the conditions and status of women at work. Even in the existing works councils referred to above, majority representation is male, except perhaps for those establishments that employ mainly women. Fortunately, the Swaziland Federation of Trade Unions has announced the formal registration of five new unions. These will organise workers in fields such as commerce, manufacturing and agriculture.

#### **D. Recommendations**

1. There is a tendency in our society to look on women's issues as being incidental or peripheral. At best the attitude is of tolerant amusement, at worst is that of aggression as towards an impertinent child. When we consider however that we are talking of a just over 50% of our population, it is clear that issues raised within this sector need to be addressed seriously. Women should be looked upon as a hardly tapped national resource that needs to be given free rein in contributing to national development. Integration of women in the development process means involving them at policy making, management and implementation levels of all spheres of national life. It means accepting women in our thinking as responsible adult members of our community. Raising community awareness to issues relating to women is a responsibility laid squarely on the shoulders of women themselves. An agency such as a bureau responsible for women's affairs could spearhead community at large on matters affecting the role of women in development. Specific issues such as employment could be focused on as part of the total effort of conscientisation.

2. Employment related issues can best be handled by an organisation whose sole aim is to look after the interests of its members collectively. Fortunately parliament has approved the existence of worker associations which will play a major role in improving conditions of work of members. This will only be possible if there is significant participation in such associations or unions. It will be up to the women to use the opportunity that has been provided to address issues that are of major concern to them. Fortunately the Labour Department also has an open door policy that makes them available to the public to discuss the provisions of the law as they stand. There is also the newly constituted industrial court that will adjudicate in case of labour disputes sent on appeal.

3. If it is accepted that women are both efficient productive workers as well as nurturers of the future generation of workers it would seem that a national effort would be made to ensure that women were well provided to carry out these functions well. Provision of child care facilities should be the joint responsibility of Employers, Government and non-governmental organisations. If we want a disease-free strong future generation, we need to provide facilities and time during which nursing mothers can breast feed providing all the nourishment and love whilst reducing the chances of infants being attacked by infant diseases.

4. Similarly, female workers need to be provided with the security of pay during their maternity leave to enable them to attend to their children adequately in their infancy. A special unemployment insurance fund could be established by the government to make this a reality. Some African countries are already paying maternity leave to their female workers and providing for breast feeding time during the workday.

5. Women will be able to participate more fully in the workforce if they have had training in a wider range of skills than at present our training programmes should be seen to eliminate sex bias especially in the technical field. Aptitude and interest should be the determinant factors in choice of training to break out of their restrictive frame of reference which limits their choices to a few familiar traditional job areas. Women will need to be more aggressive in their bid to participate more actively at all levels of the economy. Our aculturation disposes us to wait quietly until we are noticed. Oftentimes we get conveniently overlooked. One is not advocating banging tables here but rather the presentation of women as a well qualified and interested resource to be utilised and involved at all levels.

6. Perhaps there is a need for all members of our families to become more involved in wider range of family responsibility recognising the various roles that they have to play as home makers, parents and workers. More shared responsibility would take some of the pressure of the working, child bearing woman. This might eventually extend to arrangements like paid maternity leave. If this sounds like walking on the moon the consolation is that this too was a dream that did become reality.

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The following table purports to show the estimated available workforce in Swaziland and its components in the years 1976 and 1981

### Estimate of Labour Force in Swaziland 1976 and 1981

Component	1976	Estimate from	
		76 Census	Employment Survey
		1981	1981
Employed <sup>1</sup>	90 920	112 464	90 191
Irregular Employees <sup>2</sup>	17 317	19 631	—
Unemployed <sup>3</sup>	131 496	149 065	—
Labour Force <sup>4</sup>	239 733	281 160	N/A

1. Includes fully employed and self employed
2. Includes Seasonal, mine and other spasmodic workers
3. Includes subsistence agriculture workers and other non-cash earning workers
4. Excludes 431 unpaid family workers - see table 1

#### Assumptions

The following assumptions were used in making the above estimates:

1. The population aged 15 - 64 years is equal to the population size in labour force in Swaziland.
2. The total resident population in Swaziland increased at a constant rate of growth 3.1% between the years, 1976 and 1981.
3. The crude economic activity rate in overall population remained constant over the 5 year period 1976 to 1981.
4. Percentage employed in the labour force experienced a slight increase because of rapid increase in economic activity between 1976 and 1981 and increased intake of female labour in employment.

PAID EMPLOYMENT IN THE PRIVATE SECTOR BY INDUSTRY AND SEX - 1981

	<u>MALE</u>	<u>FEMALE</u>	<u>TOTAL</u>
- Agriculture	13,277	5,635	18,912
- Forestry	4,404	739	5,143
- Mining and Auarrying	2,541	39	2,580
- Manufacturing	10,332	3,548	13,880
- Construction	4,256	89	4,345
- Distribution	3,525	2,337	5,862
- Transport and Storage	1,415	95	1,510
- Finance	1,288	822	2,110
- Social Service	1,792	1,109	2,901
	<u>          </u>	<u>          </u>	<u>          </u>
Total	<u>42,830</u>	<u>14,413</u>	<u>57,243</u>

EMPLOYMENT BY LEVEL OF SKILL CITIZENSHIP AND SEX - 1981

<u>LEVEL OF SKILL</u>	<u>SWAZI CITIZEN</u>		<u>NON-CITIZEN</u>		<u>TOTAL</u>	
	<u>MALE</u>	<u>FEMALE</u>	<u>MALE</u>	<u>FEMALE</u>	<u>MALE</u>	<u>FEMALE</u>
- Professional and Technical	401	309	593	76	994	385
- Administrative and Managerial	710	128	578	54	1,288	182
- Clerical and related	2,052	1,913	33	102	2,085	2,015
- Skilled	1,511	70	473	6	1,984	76
- Semi Skilled	5,836	464	151	1	5,987	465
- Unskilled	30,264	11,145	228	45	30,492	11,290
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<b>Total</b>	<b>40,774</b>	<b>14,129</b>	<b>2,056</b>	<b>284</b>	<b>42,830</b>	<b>14,413</b>

AVERAGE EARNINGS OF FEMALES BY INDUSTRY AND SKILL (PRIVATE SECTOR)

INDUSTRY	Professional & Technical		Administrative & Managerial		Clerical & Related		Skilled		Semi-skilled		Unskilled	
	1980	1981	1980	1981	1980	1981	1980	1981	1980	1981	1980	1981
110 Agriculture	181	326	465	433	159	259	-	297	127	96	96	61
120 Forestry	112	128	1421	1161	308	291	-	-	106	115	51	58
200 Mining	-	-	-	-	266	298	-	-	152	134	116	132
300 Manufacturing	521	567	518	613	242	255	133	224	119	101	96	104
500 Construction	270	467	286	504	142	184	-	-	117	94	69	88
600 Distribution	159	489	347	411	172	190	188	169	82	94	41	95
700 Transport	391	349	315	477	226	237	-	-	370	166	62	62
800 Finance	700	371	639	519	324	396	475	-	70	93	67	94
900 Social Services	309	341	390	376	180	203	134	205	177	109	73	85
<b>Total</b>	<b>353</b>	<b>365</b>	<b>410</b>	<b>462</b>	<b>238</b>	<b>275</b>	<b>159</b>	<b>211</b>	<b>111</b>	<b>100</b>	<b>69</b>	<b>79</b>

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AVERAGE EARNINGS OF MALES BY INDUSTRY AND SKILL (PRIVATE SECTOR)

INDUSTRY	Professional & Technical		Administrative & Managerial		Clerical & Related		Skilled		Semi-Skilled		Unskilled	
	1980	1981	1980	1981	1980	1981	1980	1981	1980	1981	1980	1981
110 Agriculture	528	911	706	964	153	206	394	497	109	140	79	86
120 Forestry	942	1107	880	1062	272	258	660	641	147	155	105	112
200 Mining	1138	1397	1218	1678	243	273	640	742	181	209	151	181
300 Manufacturing	1113	1121	864	996	258	302	445	607	153	177	118	127
500 Construction	862	1166	782	1044	194	276	409	404	201	240	94	101
600 Distribution	516	833	610	711	217	212	251	377	120	204	41	120
700 Transport	858	883	825	780	182	140	405	380	224	194	94	84
800 Finance	780	744	990	1150	365	390	683	277	233	239	99	102
900 Social Services	599	740	505	697	196	218	236	325	157	167	98	109
<b>Total</b>	<b>808</b>	<b>910</b>	<b>767</b>	<b>928</b>	<b>264</b>	<b>269</b>	<b>358</b>	<b>515</b>	<b>168</b>	<b>184</b>	<b>100</b>	<b>108</b>

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AVERAGE EARNINGS OF FEMALES BY INDUSTRY AND SKILL (PUBLIC SECTOR)

INDUSTRY	Professional & Technical		Administrative & Managerial		Clerical & Related		Skilled		Semi-skilled		Unskill	
	1980	1981	1980	1981	1980	1981	1980	1981	1980	1981	1980	1981
110 Agriculture	284	320	680	-	220	195	92	125	95	97	106	
120 Forestry	-	-	-	-	170	141	-	-	-	-	30	
400 Electricity & Water	376	438	471	998	239	239	481	-	242	-	91	
500 Construction	144	145	-	-	85	109	-	-	162	162	75	
710 Transport	350	226	-	-	257	212	-	-	136	133	28	
720 Communication	-	-	314	485	125	175	200	-	-	-	-	
832 Business Serv.	-	490	-	300	-	150	-	-	-	-	-	
900 Social Services	242	223	868	-	186	246	361	305	121	204	106	
<b>Average all Industries</b>	<b>243</b>	<b>288</b>	<b>672</b>	<b>655</b>	<b>163</b>	<b>218</b>	<b>349</b>	<b>290</b>	<b>125</b>	<b>201</b>	<b>102</b>	<b>120</b>

AVERAGE EARNINGS OF MALES BY INDUSTRY AND SKILL (PUBLIC SECTOR)

INDUSTRY	Professional & Technical		Administrative & Managerial		Clerical & Related		Skilled		Semi-skilled		Unskilled	
	1980	1981	1980	1981	1980	1981	1980	1981	1980	1981	1980	1981
110 Agriculture	611	245	1030	564	394	211	792	339	181	166	60	7
120 Forestry	319	375	-	-	-	-	-	625	118	160	62	10
400 Electricity & Water	939	799	666	762	143	275	187	329	284	258	62	10
500 Construction	225	349	458	445	145	187	195	341	154	229	79	9
710 Transport	881	693	532	709	278	277	307	249	212	177	140	13
720 Communication	412	461	466	346	104	127	211	516	-	-	91	6
832 Business Serv.	-	500	-	300	-	150	-	-	-	-	-	9
900 Social Services	339	342	483	714	234	346	189	396	184	278	108	12
<b>Average all Industry</b>	<b>370</b>	<b>343</b>	<b>949</b>	<b>614</b>	<b>214</b>	<b>283</b>	<b>265</b>	<b>340</b>	<b>196</b>	<b>251</b>	<b>93</b>	<b>97</b>

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**Thandabantu Nhlapo**

This short paper will attempt to discuss some ways in which laws affecting family matters in Swaziland can be improved to achieve a more equitable distribution of rights, entitlements, duties and obligations as between men and women. It is necessarily a brief paper because it is based on the assumption that, in view of the deliberations at the first seminar, there is no need at this stage to give a full account of the law as it stands. It is proposed therefore to go straight into the law as it might be in the future if some of these proposals are found to be acceptable.

It should be mentioned at the outset that the difficulties of using law to effect social change, and the problems of law reform in general, are fully appreciated. We subscribe to the view that law *can* be employed, together with other devices, as an instrument of change, particularly when the case for the desirability of such change has been made out carefully and reasonably. There is no intention to propose reform purely for its own sake.

It might be remembered that after the first seminar several workshops were held at the University of Swaziland and that participants split up into working groups, each dealing with a particular topic. The following proposals emanate from the work of the Family Law group.

In family law, more than in any other area, the major source of problems is the conflict between customary law and the common law. It is usually here (and perhaps in the field of succession as well) where the dual system reveals itself to be fraught with pitfalls. The common law has a comprehensive, well-defined and highly-developed set of rules and regulations governing family matters; it is also in this area that customary law (in private law, at least) has the most comprehensive, well-defined and highly developed set of rules and regulations. The rules of one system are often just simply incompatible with the rules of the other. (For example: a man's adultery is a ground for divorce at the suit of his wife under the common law; under customary law it is not).

Even where no direct clash of rules occurs, we may find that the general attitudes of the two systems differ. (In dealing with child custody, for instance, the Western law may be motivated by the need to serve the interests of the child, while the customary law on the same subject is motivated by considerations such as the need to protect the rights of the father). The question of attitude is important in another respect: a right might be granted by a statute, but it may be administered by officials who disapprove of the policy of the statute.

These differences are inevitable; even understandable. The two systems were developed in different places, against the background of different social structures and cultures, and were intended to serve quite different needs. Nevertheless, both systems are law in Swaziland and out of them we must try to fashion some rational rules for guiding human conduct.

The problem areas will now be discussed in turn:

## Property

There was no hesitation in identifying this as the major problem area. Discussions at the last seminar, further discussions at several workshops since the last seminar, and experience gained at the Manzini legal aid office leave one in no doubt that the question of the property rights of the married woman is the single most important issue in the minds of people who are concerned about family law rights and entitlements in Swaziland.

If one may be allowed to recapitulate, very briefly: in this country there are three possible marital property regimes:

- (i) Community of property
- (ii) Ante-nuptial contract excluding community
- (iii) Swazi law and custom

### Community of property

"The basis of community is the notion that whatever spouses acquire during the marriage they do by reason of their combined but specialized efforts"<sup>1</sup>. It results in an economic partnership of the spouses, with the husband as the senior, and the wife as the junior, partner. All the assets and liabilities of the spouses are merged in a joint estate, in which both spouses, irrespective of the value of their financial contributions, hold equal shares.<sup>2</sup>

It is now accepted that community is a type of co-ownership. The spouses own the assets in equal undivided shares. Neither may dispose of his or her half-share in the joint estate except by will effective after his or her death.

By virtue of the marital power, the husband is the administrator of the joint estate and he binds himself and his wife by his contracts and other transactions. Certain types of property are excluded from the community.

### Ante-nuptial contract excluding community

An antenuptial contract is an agreement between the intending spouses as to the terms and conditions by which their marriage is to be governed<sup>3</sup>. It may be used to modify or exclude community of property (and of profit and loss) and the husband's marital power; or to arrange marriage settlements either between the spouses or between the spouses and a third party. Once the marriage has taken place the contract cannot be cancelled or varied by agreement between the parties. An antenuptial contract excluding community *and* the husband's marital power leaves the wife in a position of legal independence analogous to that of her husband. The invariable consequences remain, though: e.g. the husbands' decisive say in matters concerning the common life of the spouses or his position as head of the family). The important point here is that their properties, including their incomes, are separate and any arrangements to pool or use these assets jointly must be specifically agreed upon.

Subject to some minor exceptions that are outside the scope of this paper, a woman married under Swazi law and custom has no real property rights.<sup>4</sup>

With the exception of marriage with ante-nuptial contract, these marital property regimes all give the man the decisive say in property. The problem becomes obvious: the modern Swazi woman is an earner, an important partner in the family's economic processes. In many cases her earnings go towards the establishment, and the upkeep, of the family home and the support of the children, while the husband uses *his* earnings for various forms or personal satisfaction. There are documented cases where the family house was built by her (but is registered in his name) and she is the one indebted to the bank, in attempts to raise loans for the school fees of the children.

Even where the husband is a responsible person, the estate built up by their joint efforts is still liable to be out of reach of the wife upon the death of the man. If she had the foresight to make some arrangements under the common law, and she does actually inherit the property, the victory might still be a hollow one, given the resultant friction between herself and given the resultant friction between her self and her in-laws and in some cases, her own son, who might be persuaded to believe that he would have had a better deal under custom.

There is no better testimony to the magnitude of the problem of reconciling tradition and Western thinking in family matters, than the complexity of some of the arrangements that some enlightened Swazis have made to secure their spouses' position and still retain good relations with their own parents. The writer is reliably informed that it is now common for the Westernised Swazi man to marry under custom, thus ensuring full acceptance of his wife by his family. If he is Christian (or the wife is), they then go to church but only to have the marriage *blessed*. This satisfies the aspirations of the parties, and is not a dual marriage. The next step is to set up a trust in which the wife will be both a trustee and a beneficiary. The children are also made beneficiaries of the trust and this satisfies his parents desire to see his property remain in the family lineage. The final step is then to make a will leaving his property to the trust in the event of his death.

This arrangement, though obviously open to a few educated and relatively well-off Swazis, proves beyond doubt the problems involved in attempting to navigate through not only the country's dual system of laws but the conflict of attitudes and cultures as well. If such ingenuity is required simply to have a reasonably trouble-free marriage and to have one's wife (and her entitlement to one's property) fully accepted by one's family, then clearly the laws are long overdue for change.

It is also worth reminding advocates of custom that the present position might be detrimental to the very traditions it is sought to uphold. The modern woman may well increasingly feel the pressure to contract a "Western" marriage, or not marry at all, as long as she feels that to marry under custom is to abandon her right to share in the property she helps to create for the family. The result is that the customary marriage gets undermined when in fact popular feeling in the country is to work towards the enhancement of traditional institutions. It is our contention that the enactment of laws allowing for a more equitable distribution of matrimonial property would *enhance*, not destroy, the customary marriage. It would make it (in view of its other obvious cultural advantages) once again the more attractive union to enter into.

Several approaches can be tried:

There is already a *Wills Act* which gives everybody over the age of sixteen the right to bequeath property by will. In a customary setting (or in dual marriage) this right does not, as we have seen, really avail the wife, even if she brought property into, and continues to generate wealth for, the family. Also, there is usually no incentive for the husband to make a will - he is secure in the knowledge that customary succession will solve the problem.

In her paper at the last seminar, Ms Fikile Dlamini pointed out the need for a comprehensive *Inheritance Act* applicable to everyone regardless of the type of marriage they may have entered into. We would endorse this proposal.

It would also be possible to include in such an Act a clause insisting that any estate (again without regard to the form of marriage contracted by the parties) valued at a certain amount and over be dealt with by the Master of the High Court, even perhaps with the advice of the family council.

#### **(b) Married Women's Property Act**

The need for an Act of this nature is overwhelming. We already have an example, enacted in Botswana in 1970. Such an Act would allow spouses contemplating a *civil* marriage to agree beforehand as to what should belong to whom. Community of property would not arise automatically: the parties would have to import it specifically into their marriage (as they currently have to do under Section 24 of the Marriage Act). Under the enabling provisions of such an act, a woman would find both a legal and a moral base from which to negotiate for a separate banking account, the registration of certain property in her own name, and so on. Into such a statute could also be incorporated certain provisions protecting the wife's property against her husband's control, even if the marriage was in community, e.g. her salary, her savings, or compensation she receives for personal injuries.

#### **(c) Dissolution of African Marriage (Disposal of Property) Act**

If sections 24 and 25 of the Marriage Act are retained and African spouses have their property dealt with under custom unless they specifically opt out of these provisions, then there might be some merit in introducing a law which allows those who did not opt out to have a second chance to have common law apply to their estates. Here the court would, on application, look at the parties' *actions* during the subsistence of the marriage, to decide whether their mode of life and their general dealings with property indicated an intention to be bound by the common law. It appears fair to say that sending an estate for customary distribution when the people who amassed it never considered themselves subjects of customary law is unjust and inequitable.

Second only to property in importance, is the problem of the wife who struggles to raise a family, not because she is widowed but because the husband neglects her and the children. There is a link between this problem and the issue of property discussed above in that the neglected woman might well have a ground for divorce but, as in the case of property doubts, she decides to live with the problem than break up the family. This tends to be the case whether she is married by civil rites (where the issue of divorce is prominent) or is a party to the so-called dual marriage (where to be honest, her position is quite hopeless).

It is difficult to explain this phenomenon. We might suggest that perhaps cultural attitudes play a more important part here than people realize. It is easy, viewing the situation from a Westernized perch, to say in exasperation: "Why does she put up with it?" but, in truth, the answer may involve a complex mixture of attitudes, fears and beliefs about the nature, function and responsibilities of matrimony, which defy simple categorization. For the moment it might be wiser to steer clear of this sociological minefield and rush on to the more purely legal matters.

There are several things a woman who is not being maintained adequately can do:

- (a) If she married under custom, one is authoritatively advised that, as always, the proper approach is to report the husband's abandonment of his duties to her in-laws.  
This activates the standard customary procedures of dispute settlement within the family.
- (b) Under the common law:
  - (i) She can take him to court to enforce the duty of support, provided he has the means
  - (ii) If she is married in community and he is wasting the joint assets on riotous living, or a mistress, she can get a court order separating their property or restraining him from administering it, and various types of interdicts.
  - (iii) Whether or not the marriage is in community, she retains her right as manageress of the joint household to bind him by her contracts for household necessities such as food, clothing and medical expenses for the family.
  - (iv) And of course if any of this neglect develops into or is coupled with, an actual matrimonial offence (i.e. if he is actually in desertion of her, or is living in adultery with someone else) she can sue him for divorce or judicial separation. In either case, the court can make an order for maintenance for herself and the children.

The *Maintenance Act of 1970* makes provision for anyone who is not being supported by someone who should be supporting, to have the court enforce her rights to be supported.

What all this means is that there is no shortage of law in the area of maintenance. The problem appears to be the delay in the despatch of cases by maintenance officers. In the absence of any concrete information as to why these delays occur, one is not in a position to make a positive recommendation. The real problem seems again to be the superimposition of customary attitudes onto a statute whose provisions were intended to apply equally to everyone. For example, a father who has paid cattle to "buy" his child often refuses to pay maintenance, while the child remains with its mother, even after being ordered to do so by the court.

### 3. Marriage consequences

While parties in Swaziland have a choice of marrying either under the customary law or under the *Marriage Act, No. 47 of 1964* there is one glaring problem associated with the latter. Two sections in the Act, obviously conceived as an attempt to import certain aspects of traditional culture into a civil marriage between Swazis, have been a source of confusion, and frustration, for many years. They are significant enough to reproduce in full:

"S. 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, 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."

Note that this section refers only to the "marital power of the husband and the proprietary rights of the spouses" as the areas to be governed by custom.

"Section 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 to them unless prior to the solemnization of the marriage the parties agree that the consequences following from the marriage shall be governed by the common law."

Here the language is wider: custom will govern "the consequences flowing from the marriage" - generally.

"(2) - If the parties agree that the consequences flowing from the marriage shall be governed by the common law, the marriage officer shall endorse on the original marriage register the fact of the agreement; and the production of a marriage certificate, original marriage register

evidence of that fact unless the contrary is proved."

The problem is that the specificity of section 24 (marital power and proprietary rights) seems to be overridden by the generality of the later section (consequences of the marriage generally). If this is true, is a marriage of Africans under the Act not simply a customary marriage by another name? Can the husband for instance, take another wife? The answer to this latter question is definitely in the negative. Section 7, the bigamy clause, is clear: a marriage under the Act cannot co-exist with any other, whether civil or customary.

But, polygamy aside, what about the *other* "consequences flowing from the marriage"? If they are to be governed by custom, would this import into a civil marriage the question of adultery *not* being a ground for divorce, for instance? The same could be asked about dispute settlement in general - could conflicts arising within the marriage be referred to a Swazi court? That this was *not* the intention of the legislature can be implied from section 9(b) of the *Swazi Courts Act No. 80 of 1950* which excludes matters in connection with a non-customary marriage from the jurisdiction of the Swazi Courts, except where the case involves lobola. Thus we can infer, arguing indirectly, that the generality of the language of section 25 does not really mean that a civil marriage between Africans is no more than a customary marriage.

However, even if we concentrate only on the more specific terms of section 24 that still means that the property of African spouses is held, and shall devolve, according to custom if the parties do not specifically opt for common law consequences. As we have seen, customary arrangements relating to property do not include the wife. This means that even if she is the creator of the family's wealth, she owns nothing and the problems discussed earlier loom as large as ever.

We can suggest a two-fold solution:

- (a) If no amendment to the statute is contemplated, one approach would be to place a positive duty upon marriage officers to warn intending spouses about the consequences of section 24 and 25 and to insist that the partners know what they are getting into before they sign anything. This could be assisted by the use of a form or questionnaire through which the intentions of the partners can be clearly brought out.

(There also appears to be nothing in principle preventing the hiring of women as marriage officers in some cases. The nation might be pleasantly surprised to discover, as a lot of major cities have done in the case of women taxi drivers, that the ladies actually do the job better and with more patience than the men!)

The importance of stressing the role of officers charged with administering the law needs no justification. The attitude of the official behind the desk can sometimes be the single most significant factor determining the direction the law takes and whether or not the intention

very encouraging moves in this regard already: the new Births, Marriages and Deaths Registration Bill has passed through its stages in Parliament. Under the new arrangements contained in this legislation, customary marriages have been getting registered since the 1st of January 1983, with a marriage certificate being issued. More importantly, the legislation introduces the concept of District Registrar, who shall perform various specialized functions under the Act (thus relieving the pressure on District Commissioners and District Officers) and the office of the Registrar General in Mbabane appears committed to the ideal of sharpening the expertise of these District Registrars in the performance of their duties, which will include the registration of marriages. Indeed, intensive courses are being planned for marriage and maintenance officers.

- (b) A second solution would be to amend the *Marriage Act* itself. This would require a deliberate, and somewhat brave, decision by the legislature to free the Act from any attempts to apply brakes on the full importation of common law consequences by superimposing customary law rules when the parties are Africans. According to this approach Sections 24 and 25 would simply be deleted and our Marriage Act would be, as it were, "colour-blind" - catering fully for anyone who wanted to contract a non-customary Marriage and have his or her affairs governed by the common law.

That this is not a particularly radical suggestion can be readily seen when one looks at other areas of the law. Our Mercantile the Law of Evidence, Law of Delict etc do not make exceptions for Africans. Our law of Contract recognizes the binding nature of a promise, and does not add "unless the parties are Africans, in which case their promises are more (or less) binding" than those of others. The law does not compel a person to enter into a contract, but when he does he should expect to take his chances with the rules that apply in the law under which he has contracted.

Of course, matters such as family law and inheritance may be special cases in that the customary law has its own, fully developed, system of rules regarding these, and also in that these areas are seen as being crucial to the well-being of society. It might even be argued that sections 24 and 25 enable parties to pause on the brink, as it were, and seriously consider what they are about to do thus ensuring that they do not throw off their traditional heritage too lightly.

This is why care should be taken in deciding whether to maintain customary law restrictions on what is essentially a common law contract, or to remove them. If the competing interests are the aspirations of a large section of the community, on the one hand, and the maintenance of traditional values, on the other, it might be useful to realize that leaning too far in favour of one may defeat the very purpose for which that one interest was originally perceived as crucial. Let it suffice to say that if the need was felt to enact a statute to allow those who wanted to marry "Western-style" to do so, then that need is frustrated if the law exhibits a reluctance to allow those deliberately-chosen "Western-style" consequences to be fully operative.

Divorce law reform is a delicate subject. Marriage, being the union that is the basis of the family unit, is regarded by society, and by the law, as an institution that must be preserved at all costs. It is the "at all costs" that worries anybody who is aware that at times those costs may be too high a price to pay in terms of human suffering and the oppression of the spirit. We can only say, with Prof Hahlo, that although society has an interest in the preservation of marriage, society gains nothing by insisting upon the continuance of a marriage which has hopelessly broken down. In very many ways society is the loser in that process.

The question of divorce is delicate because of the varied attitudes people have towards it, based on culture, religion, or just personal philosophy. Lawyers tend to take it as accepted that the Roman-Dutch Law is relatively conservative on divorce: It is available only on two grounds (adultery and malicious desertion) and we have not gone the route taken by other countries, including neighbouring ones, towards having "marriage breakdown" as a ground for divorce.

It comes as a shock, therefore, to hear the protest that our law is already too liberal on divorce! One discernible advantage in being the last to change is that we can take our time, look at the mistakes and successes of others, and come up with comprehensive and carefully-considered rules. It is in this context that we hope the possibility enacting a proper, comprehensive *Matrimonial Causes Act* in Swaziland will now be looked into as a matter of urgency. Such an Act would deal with grounds for divorce or separation, the respective rights of the spouses and custody of children. It would be our hope that in addition to the present common-law grounds for divorce, the concept would be expanded to cover cases where cohabitation has become intolerable even though the defaulting party is not technically in desertion, as when a husband financially abandons or abuses his family but does not actually leave the matrimonial home.

We would hope also that the Act would make provision for the dual marriage by, possibly, making a ruling on the final validity of a divorce order even though the marriage is a dual one. This would provide some sort of redress for a woman who is suffering hardship from a husband who insists on enforcing the customary half of the marriage, to the exclusion of the civil part.

## **5. Dual Marriages**

Where the same couple marry first under one system of laws and then under the other, problems of uncommon complexity arise. These problems were discussed fully at the first seminar. Trying to decide which legal system actually governs the marriage is a hurdle that is virtually insurmountable. Neither personal researches nor group discussions have unearthed even the glimmer of a solution.

Only a few tentative suggestions can be put forward:

ner system, and *actively discourage* them from going through the planned ceremony. However, this is possible only if the parties are already married under custom and are contemplating a ceremony under the Act. There would be no control over parties already married under the Act who want to go through a traditional wedding. Perhaps under the newly-introduced registration of customary marriages the Registrar could simply refuse to register the marriage or to issue a certificate, but this seems futile if the parties have already gone through a valid second ceremony and consider themselves to have acquired the status of a customary couple.

- (b) The choice of law could be made by the couple themselves if they were given the opportunity voluntarily to register the marriage regime by which they want to be governed. In this case a "one certificate per couple" rule would have to be introduced.
- (c) The legislature could intervene with a statute declaring choice-of-law guidelines in cases of dual marriage, to indicate which system should govern the marriage.
- (d) The proviso to section 7(1) of the *Marriage Act* and the latter part of section 7(2) would in any case have to be deleted. As they stand, they actively encourage the mixing of the two systems by suggesting it almost as an alternative to bigamy.
- (e) In view of the new registration procedure, the legislature may have to devise some machinery for a couple to voluntarily *alter* their marriage from a civil to a customary one. (It appears from tentative researches that there is a significant number of couples who entered into a civil marriage in order to obtain a certificate, because none was available under custom. With certificates now being issued for customary marriages a number may want a fresh opportunity to indicate a preference).

## 5. Adoption

Again here, the legislature has intervened - with the *Adoption Act*. The perceived problem here was that the procedure for adoption in the statute were too onerous, involving the Ministry etc. These could be made less complicated while retaining the safeguards that are necessary to ensure that children find stable homes.

As usual, the bigger problem arises from the dual system. The father's traditional right to claim his child at any time is a disincentive to prospective parents wishing to adopt. We would encourage the trend set by recent court decisions which suggest that this right is not as absolute as it was once thought to be.

In matters of custody, too, the clash between custom and the common law is apparent. The traditional right of the father, mentioned above, is incompatible with the principle of the common law that custody and guardianship of an illegitimate child belong to the mother. In cases where the mother's rights have been upheld by the High Court, predictable conflicts occur.

It may be that the nation is unwilling to countenance the growth of the "single-parent family", comprising a woman and her illegitimate offspring. It is also true, however, that in many cases it is only under such an arrangement that the child can be adequately cared for in terms of food, clothing, medical attention and schooling. Where the father simply claims the right, but does not perform any of the correlative duties of fatherhood, it appears unfair that the mother should struggle to raise the child while looking over her shoulder in mortal fear of the father's eventual exercise of his right. Perhaps some way could be devised to confirm a mother right, in those cases where the father, appears, by his actions, to have no interest in the child.

#### Notes

1. Per Van den Heever JA, in *Edelstein v. Edelstein No 1952 (3) SAI AD at 14*
2. See generally Hahlo, *The South African Law of Husband and Wife*, Juta 1975, 4th ed. at p.214 et seq.
3. Grotius 2.12.3.
4. Lively discussion at the last seminar over the proprietary rights of the customary wife revealed that all of her entitlements are with regard to various types of traditional property, such as household utensils or the *liphakele* beast (a cow settled on her by her in-laws for the exclusive use of herself and her household). This does not even begin to address the problem of the modern Swazi woman who invariably is no less active than the husband in generating wealth for the family and whose earnings are, in many cases, the more significant factor in the family's day-to-day support.
5. In fact, to the knowledge of the present writer, the people who have employed the scheme, or variations of it, are all not surprisingly, practising attorneys.
6. There are, of course, standard difficulties with the mode of life test, not the least of which is the problem of deciding what factors to take into account as indicating a particular style of life. And of course the test is unhelpful when the parties have followed a mixed style of life, part-traditional and part-Westernized. However, in some clear cases the test is useful because it facilitates the drawing of inferences as to the parties' *expectations* regarding the law that should govern their affairs.
7. Hahlo, *supra*, p. 362

## Veleleni V. Dlamini

The first objective of this paper is to outline those areas of the Law in Swaziland related to the health of women, with special reference to those aspects of the law which are either contrary to the promotion of good health in our women or so commonly misunderstood by our Society as produce effects similar to those of the laws which are detrimental to health.

Health for the purposes of our discussion shall be defined as a "a State of well being of a person or a community and not the absence of disease". This is the internationally accepted definition of Health as proclaimed by the World Health Organization (1)

The second objective is to make recommendations with the view to amending those laws that time has shown to be detrimental to the health of Swazi women and to promoting education of all Swazi people on aspects of health that have medicolegal overtones. It is hoped that by so doing the public will not only be aware of their rights but also be able to tell what in fact is legal and illegal.

The Health Issues Group of the Women and the Law work force has defined four areas in which the law and the women's health in Swaziland do not seem to synchronise, and some cases have been defined where the law is in fact encouraging though indirectly to deterioration in some aspects of health in women. Certain areas where the women believe they are restricted by a Law which in fact does not exist or where the law is so misunderstood as to produce behaviour which is so destructive to good health were also defined. The subjects of contraception, pregnancy, abortion and rape, are examples of areas fraught with doubt as to their present legal status in the minds of both men and women in Swaziland and will be a major part of this discussion.

I will also briefly include the subject of laws governing informed consent for surgical operations on women as this subject is a cause of much concern and frustration on the part of the medical doctors in this country.

### **Contraception and the Swazi Women and the Law:**

In 1966 the United Nations issued the following Declaration on population "The size of the Family should be the free choice of each individual family" (2)

In 1968 a resolution stating that:  
"Couples have a basic human right to decide freely and responsibly on the number and spacing of their children - and the right to adequate education in this respect" was unanimously adopted by delegates attending the UN Conference on Human Rights held in Teheran (2).

The Declarations which are evidence of UN involvement and concern over population trends are believed to have both heightened interest in contraception and population control and encouraged a large number of member nations including Swaziland to use the law to introduce comprehensive Family Planning Methods.

planning is a basic human right has introduced family planning Units all over the country. The Ministry of Health sees itself as a service Ministry whose major objective is to promote health and Family Planning is part of the service it provides. The issue of whether or not a woman requiring contraception requires consent from a husband or parent before a health worker can offer her the services was and continues to be a cause of concern to many women and to some health workers in Swaziland even though the Ministry of Health did in (1978) circulate a memorandum to the effect that no consent either from a husband or parent is required prior to a request for contraception.

All that the medical profession requires is an interview with the client during which the client is educated on all aspects of contraception, the methods available to her and their side effects. The method of contraception used is determined by the choice of the patient weighed against its possible side effects on her as detected by the compulsory medical examination carried out on all clients prior to prescription.

I suppose some of you will wonder why a subject that appears so clearcut and above the law should even be mentioned in a seminar of his nature. But you will recall that I did mention areas of the law that are so mis understood by some sections of the population as to produce behaviour which is destructive to health. Contraception and the law governing consent prior to use is one such case. Because women and girls in Swaziland are not aware of the fact that every woman has a basic human right to plan for her pregnancy, they do not go openly to Family Planning Clinics where they will get correct medical advice with their contraceptives. They resort to contraceptive methods advised by friends or salesladies over chemist counters. These methods often prove useless, as many women sadly find out too late or harmful as many users of quinine and essence of life will testify. The result of this form of cloak and dagger contraception advice and sale will invariably be an unwanted pregnancy with its resultant complications. Experience has shown that the girls or woman who seek contraception from friends and shops will go back and get advice on abortion. The result is higher doses of quinine and essence of life with attended chloroquine poisoning. In short the lady reaches a state of ill health.

#### **Health Issues Group Recommendations on Contraception and the Law:**

As the basic problem in this area appears to be lack of information intensification of present health education methods and education on the legal position seems to be the answer. Education should cover the whole population and not just those people living in towns and should not be confined to women.

The following is a suggested guideline on improving the information system:

areas

- b) Involvement of the Swazi Traditional Hierarchy in the Community so that the Chiefs and Indvunas know and understand both the objectives of family planning and the legal positions and are better able to advise people under them.
- c) Encourage Parent/Teachers associations to discuss the subject freely so as to allow health educators to come to the schools and give talks to students. It is recommended that family life education be started early as experience has shown that in countries where children have sex education as early as in primary school the children have a healthier view towards sex (3)
- d) Nurses should again be told that the Ministry of Health Policy on contraception is "no consent is required" as many cases report that nurses in certain Clinics refuse to offer family planning services and action should be taken in cases where proof of refusal by a health worker on the basis on consent is found.
- e) Husbands should be encouraged to participate in contraceptive information dissemination and in contraceptive decisions, but the legal position of equality of sexes before the law should be clearly explained.

#### **Termination of Pregnancy and the Swazi Woman and the Law:**

*Termination of Pregnancy (Top)* is the deliberate interruption of pregnancy at such a time and by such means that the embryo or fetus will not survive (4). Other terms, elective abortion, induced or artificial abortion, interruption of pregnancy and Therapeutic abortion are used to describe the same procedure.

*Abortion* defined in the medical sense refers to the termination of pregnancy before 24 weeks of gestation or before the fetus is viable (4); a viable fetus being defined as one that is capable of surviving outside the mother's body. Whether the foetus at 24 weeks and below is expelled spontaneously or by interference is differentiated by prefixing the terms "spontaneous" or "induced". When a fetus is expelled after 24 weeks of gestation at a time when it is capable of surviving outside the uterus the terms premature delivery or miscarriage are used.

*Abortion* defined in the Legal sense consists in unlawfully and intentionally killing and causing expulsion from the uterus of a human fetus (5)

The essential elements of the legal definition are (a) Unlawfully (b) intentionally (c) killing and causing expulsion from the uterus (d) of a human fetus. In other words if one or more of these essential elements is missing from the act it does not constitute abortion in the legal sense.

The law on abortion in Swaziland has become a subject of great concern

among health workers in the country. As it becomes clear that the average Swazi woman has not been adequately educated on contraception and that all contraceptive methods have a certain failure rate it has now dawned on the health worker that more and more women and young girls are using abortion as a birth control method at one time or another in their lives. Methods used to terminate unwanted pregnancy range from sharp weapons, knives, knitting needles and coathangers to poisons such as caustic soda, permanganate, quinine, iodine, dettol and jeyes fluid, depending on the extent of desperation of the pregnant woman and the callousness of the abortionist.

Experience has shown the women will do anything to terminate an unwanted pregnancy and world-wide figures show that approximately 30-50% of women who die during pregnancy and childbirth - the so called maternal deaths - die as a result of septic abortion often due to illegal abortion. The situation in Swaziland today is no different. Our present figures indicate that at the R.F.M. Hospital alone + 15 incomplete abortions are admitted per week and at least one patient is admitted a month having aborted at home or in the back street. The medical officers recorded 20 Dilatation and Curettage cases with incomplete abortions in March 1983 and 26 such cases in April 1983. A very rough study conducted by Dr Wildmer at the R.F.M. Hospital in 1980/81 where he closely questioned all patients who came in one stage of abortion or another produced astounding results. 75% of the patients admitted that they had initiated the abortion. Most of these cases are admitted into hospital in shock - they require very specialised gynaecological and surgical care which might save their lives but some of them come in too late and die. Usually they die before they even name their killers and the abortionist is free to find another victim.

For those of us who work closely with death none seems so senseless as that of a girl who out of desperation entrusted her life into the hands of a backstreet abortionist. The death is even heavier on the mind of the doctor who is initially requested by the victim to terminate her pregnancy and who in accordance with the law refused to perform an operation he or she was taught to do safely and skillfully in medical school.

Most countries that have introduced legal reforms to the Laws of abortion have been compelled by the need to reduce death due to illegal abortions (6) (7) (8). Illegal abortions performed by untrained personnel in unsanitary and ill-equipped facilities cause many post-abort complications such as perforation of the uterus, haemorrhage, infections which may necessitate hysterectomy and lead to sterilization, whereas termination of pregnancy done legally by a qualified doctor under sanitary conditions carries less risk than continuing pregnancy to term or removing your tonsils.

The present legal position in Swaziland is such that TOP is unlawful unless the doctor believes that continuation of the pregnancy may endanger the mother's life, in which case the doctor has to refer the case to the Director of Medical Services who can then authorise the TOP. Mental Health of the mother is not specifically mentioned in the present law and is therefore presumed by doctors not to be an indication for TOP in Swaziland. The Law therefore requires that even the insane carry their pregnancy to term. Humanitarian reasons are also not an aspect of the law, so that the rape vic-

tim has according to our present law to carry her pregnancy to term and deliver the rapists's baby. The Law also says nothing of Eugenic reasons for TOP so that the Swazi Woman who is carrying a child expected to suffer from serious mental or physical defects or deformities inherited or otherwise, even if the diagnosis is made early in pregnancy, has to carry her pregnancy to term (9).

Most countries where reforms in the Law on abortion have been considered since 1968 have got laws which, though conditional, have included Eugenic and humanitarian reasons as grounds for a legal abortion. The present Law in South Africa uses these grounds as bases for legal TOP. It is the strong recommendation of the Health Issues Group on Women and the Law that Swaziland should consider legal reforms in this direction. And it is my hope that the fact that Eugenic and Humanitarian reasons are not mentioned as ground for legal abortion in our law is just an oversight. For I refuse to believe that someone up there where they make the laws sincerely believes Swazi Women should bear and love their rapist's children and that they deserve the harrowing experience of nursing a mentally or physically defective baby.

What I consider as controversial are social grounds for termination of pregnancy. As has already been said a woman carrying an unwanted pregnancy will go to any lengths to terminate the pregnancy. The figures I have quoted of patients who illegally attempt to terminate their pregnancies are those of women who fall out of the medical, Eugenic nor humanitarian reasons I have mentioned. In other words these are perfectly normal healthy females who feel they are not ready for that particular pregnancy. Thus amending our laws to include Eugenic and humanitarian grounds will not significantly alter the morbidity and mortality in women of childbearing age.

Serious consideration has to be given to legalization of TOP for social reasons. Here we immediately get into an area of our so-called moral standards. "Thou shalt not kill" is the commandment that will immediately spring into our minds. And I have to agree that on the surface and with our law on abortion as it stands we do appear as a morally upright society. But while we are saying "if the woman has been silly enough to get pregnant let her bear the consequences" are we aware that the consequences we now speak of are her death? And are we being morally upright as a Society in condemning the children we failed to bring up properly to death.

A doctor is requested to terminate a pregnancy in a woman who desperately does not want the pregnancy. Society is not aware of these requests. The doctor outlines the legal position to the patient and refuses to help. Three weeks later the woman is admitted in a state of septic shock secondary to septic abortion and dies. Where does that put the doctor morally? Your duty is to save life and in trying to save a probable life of a fetus whose humanity and soul is only imaginary you have lost both the life of a probable human being and that of a fully grown productive human being who it was within your power to save.

My last recommendation to you on the subject of abortion is: think of all the doctors in this country and try putting yourself in their shoes. Then find out how many women you would be prepared to watch die. Don't you think

tors' shoulders.

## **Rape the Woman and the Law in Swaziland**

Rape is legally defined as consisting of intentional unlawful sexual intercourse with a woman without consent.

The essential elements of the crime are intentional (b) unlawful (c) sexual intercourse with a woman (d) without consent.

Rape is the one crime that can only be perpetrated against a woman by a man and never vice versa. You will also observe that the essential elements of the crime and therefore its punishment as defined by our local authorities overlooks quite significantly the element of impairing a woman's dignitas - that violation of self respect, mental tranquility and privacy - which I believe is a crime on its own - *crimen injuria*

### **Crimen Injuria:**

Forcible entry into an unwilling human being is per se a form of enslaving a human being. It comprises impairment of that valued and serene condition in her social or individual life which is violated when a person is either publicly or privately subjected by another to offensive and degrading treatment or when she is exposed to ill-will, disesteem or contempt. The rapist is one individual who succeeds at the awful task of depersonalization, dehumanization and destruction of pride and dignity of all women. He in a space of a few minutes accomplishes the one crime demonstrably worse than murder, that of reducing a human being into a chattel, and a play thing to satisfy his lust and this is the crime that the law must seek to atone. It is for all women in this country to come together and decide the fate of such people, for it is not possible for any man, no matter how imaginative or intelligent, to fathom the depth of this form of degradation. And the sentences are given to these criminals based only on the so-called essential elements which are intentional, unlawful, sexual intercourse with a woman without consent, to the exclusion of all the other forces which come together to shape the life of the victim for the rest of her life.

At the risk of appearing to be a stickler for gruesome details, but with the hope that as of today all of us here will think in the right perspective when we hear the word rape, I will now outline some of the common consequences of rape. A few of these perhaps reach our courtroom but I have no doubt that most of them are never mentioned let alone considered on passing judgement on rapists.

3. Injuries

4. Pregnancy

### **Immediate**

1. Contusions and laceration of vulva.
2. Deep laceration of perineum
3. Vaginal tear
4. Injury to bladder
5. Injury to rectum
6. Perforation of post-vaginal culdesac peritonium
7. Perforation of uterus
8. Haemorrhage and death can result from any of the above

### **Delayed**

1. Necrosis of lacerated perineum vagina if surgical repair fails, leading to vagino-vesical fistulae or rectovaginal fistula
2. Infection to any of the pelvic organs affected
3. Scarring or cicatrization of pelvic organs leading to narrowing of vagina rectum intuin leading to dispareunia or
4. Surgical repair when the girl is older - with attendant revival of memory of nightmare.
5. Mental trauma - abnormal sexual behaviour in adult life

### **Medical Consequences of Rape on the Post Menarcheal Girl or Adult**

#### **Immediate**

1. Contusion and laceration of vulva.
2. Laceration of vagina
3. Injuries to bladder, rectum
4. Pregnancy

#### **Delayed**

1. Psychiatric disorders resulting from feeling of degradation and shame
2. Effects and complication of abortion
3. Venereal disease with resultant sterility if not properly treated
4. Abnormal sexual behaviour

## Consequences of Rape on the Victim

For our purposes I have grouped these consequences into two categories viz :-

1. The consequences of rape on the premenarcheal Victim - That is a girl before she commences her menstrual periods, and:
2. Consequences of rape on the post pubertal victim and on adults. I have further subdivided these two categories into immediate and delayed effects of rape; to better illustrate the fact that for the victim the ordeal does not end when the rapist finishes his three year term of imprisonment, but continues for a life time.

Any one or more of the above can happen in a victim of rape. And the importance of educating our society on the actual process and consequences can not be overemphasized. But I feel three groups of people present here should specifically be mentioned. The first is all women who have girls to bring up, so that your child is aware of the presence of this crime and is aware that if it does happen to her she should report immediately.

The second group is our representatives and enforcers of our laws. My message to this group is consider your sentences on convicted rapists. Does the sentence take into consideration the crime of violation of a woman's dignity?

Does the sentence take into consideration the cost of medical treatment of the Delay Consequences of rape i.e. The plastic surgical procedures and psychiatric treatment?

Who is responsible for maintenance of the victim if the psychiatric complications do not respond to treatment?

If your present sentence and punishment does not take these things into consideration then we ask you now to consider alteration of the sentence given to a man convicted of a charge of rape.

The third group is the members of the medical profession. This is the level at which most evidence against a rapist goes down the drain literally. The medical profession teaches personal hygiene, we strongly advise our patients to wash and present themselves at the clinic at their best. We sadly forget to give our patients the exception: Do not wash the rape victim. Do not change her clothing. The first reaction of a parent on seeing her little girl covered with blood, mud and possibly tree leaves and on hearing that "uncle so and so did something to me" is to rip the torn, dirty clothes off the baby girl and wash her, unless a parent knows that the dirty blood-stained clothing and any stain on the victim is evidence.

Doctors are taught at medical school to give a full description of all contusions, lacerations and bruises and the need to photograph these injuries if possible is emphasized prior to vaginal examination, to prevent the accused's lawyer from arguing that hymenal tear or contusion might have occurred during examination.

Doctors are also taught to take vaginal fluid for microscopic studies to identify spermatozoa:

Seminal fluid found in the vaginal canal !:-

Doctors also know that the azospermic male can be a rapist with no spermatozoa in his seminal fluid and therefore there is a need for an acid phosphatase test to demonstrate the presence of seminal fluid in the vagina or stains.

How many doctors in this country have centrifused washings from a victim's perineum or clothing to try and identify seminal fluid or spermatozoa?

Do we still remember the procedure of handling clothing of a rape victim and its hand-over to the police? If not how many rape victims have we set free to walk our streets and rape again?

Ladies and gentlemen this seminar on the law is supposed to raise such questions in our minds. And by coming together I hope we will cover the loopholes that are making this crime on women an everyday occurrence.

### **Recommendations**

In consideration of this case the Health Issues group of the Women and the Law Seminar came up with the following recommendations.

1. The Royal Swazi Police publicize the fact that rape victims are supposed to report to female police officers. It is felt that the major reason for failure to report cases of rape is the indignity of having to report to a male police officer and the attitudes of said police.
2. The public should be made aware of the fact that rape and assault forms are circulated to clinics so that rape victims who report directly to clinics and hospital will be able to use the evidence in court and that the doctor attending the case should call the police immediately.
3. Special training should be provided for police officers who handle rape.
4. Rape cases should be held in camera and only the identity of the rapist but not of the victim should be publicised.
5. Persons convicted of rape should be made to pay damages for injuries and if they are under-age, parents should be made to take responsibility for any settlement the court allows the victim.
6. Teachers should inform the police of cases of children who are under 16 and are pregnant, so as to place a charge of statutory rape on the father.

### ***Legal Discrimination against pregnant women***

Two areas of concern were raised of the issue of pregnancy and the law in Swaziland. The laws affect female teachers and female students.

Teachers are civil servants and human beings like all other working women. Women in other sectors who get pregnant continue to work until they get their maternity leave and go back to work after delivery even if they are single. But teachers who fall pregnant outside marriage are required to leave teaching. The reasons for this appears to be that teachers are said to be custodians of our children's morals and must therefore be morally upright. It is my contention that every citizen, be he teacher, politician, doctor or secretary has a moral duty to conduct himself or herself in a manner that is exemplary to his children and to society. We cannot expect teachers alone to do this. If it is immoral to get pregnant out of wedlock for the teacher it is just as immoral for the secretary. A recommendation is made that punishment for behaviour believed to be immoral should apply to all cadres of the civil service. If parents of school children are morally upright and have brought their child up properly, the child is not likely to copy the teacher.

Lastly, school girls who get pregnant at school now get to be expelled and usually no punishment is given to the schoolboy anymore. In addition to the recommendation of informing the police of the case of statutory rape if the girl is under 16 years, the health issues group recommend a more tolerant attitude to the present one of expulsion. The feeling of the community is that pregnancy is punishment enough on a child and she needs help to pick up the pieces of her work when she returns to school.

A period of rustication when she goes off to deliver need be the only punishment.

### ***Surgical Procedures and Women and the Law***

***All adults who are lucid can give consent for operations on their persons. Legally no husband's consent is necessary.***

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## **Establishment of Swaziland Women's National Machinery**

### **International Background and Justification**

The need to establish national machineries to assure the participation of women in development in African countries has been recognized and consistently recommended by several Conferences of Africa. To cite but some of these Conferences:

- (a) In 1964, The Seminar on the Status of Women in Family Law, held in Lome (Togo).
- (b) The Seminar on Civic and Political Education of Women, held in Accra (Ghana) in 1968.
- (c) The Regional Conference on Education, Training and Work Opportunities for Girls, held in Rabat (Morocco) in 1971.
- (d) The World Plan of Action for the Implementation of the Objectives of the International Women's Year held in Mexico in 1975.
- (e) The ECA Conference of Ministers (269X11) held in 1975 also invited member States which had not already done so "to establish national commissions and women's bureaux. or similar government machinery, to assure the integration of women in national development".
- (f) Finally the African Regional Conference on the Implementation of National, Regional and World Plans of Action for the Integration of Women in Development held in Nougchott (Mauritania) in 1977 reiterated the call to Governments to create or strengthen national machineries.
- (g) Lately, the Fifth Conference of Ministers held in Rabat, 20-28 March 1979 requested member States which have not already done so "to take the necessary action to set up national commissions for women with the task of outlining national strategies to achieve the full integration of women in development".
- (h) Follow-up World Conference of the United Nations Decade for Women was also held in Copenhagen (Sweden) in 14 - 30 July 1980.
- (i) The Subregional Conference on Women in Development in Zambia Lusaka in 1981.

In ECA's report prepared in 1977, *National Machinery for the Integration of Women in Development in African Countries*. It was found that some 26 African countries had established national machineries for women in

with or without permanent secretariat, and women's wings of the ruling political party.

Since its inception one of the major projects of United Nations Economic Commission for Africa and its Research Centre for Women has been the encouragement of the establishment of national machineries for the integration of women in development. Once established the emphasis is on the strengthening the technical competence of national machineries, realizing the importance of research as a sound base for developing projects and formulating policy, seminars on the utilization of research have been held.

### **National Background and Justification**

Swaziland's National Women's Organization since its inception in 1967 was operating as "Lutsango Lwakangwane" performing the following activities:

- (a) Mobilise and stimulate communities in self-help projects according to the communities felt needs.
- (b) To coordinate the activities of women's organization to avoid duplication and overlapping.
- (c) To enable Swazi women to get to know one another to express their views and to discuss matters affecting women and children, and
- (d) to encourage mothers, girls and children in their duties of citizenship, national service and to promote patriotism.

The above activities are being achieved through informal women's groups and skill training at Thokoza Girls Training Centre including the primary school in the peri-urban area. Funds are allocated by Swaziland Government and also through fund raising activities by Lutsango Lwakangwane. The aims and objective of Lutsango have not been achieved as desired because:

- (a) Lack of well defined administrative structure by Government.
- (b) Lack of clear cut policy on women's affairs.
- (c) The not assigning of responsibility centre to Lutsango for financial allocation and personnel recruitment purposes, and
- (d) Lack of physical infrastructure.

From past experiences of Lutsango Lwakangwane, the president and her executive, and taking into consideration the international calls for the establishment of national machineries, believe that a Mother Body in a new national structure and a well defined policy on women should be set up to perform the below-mentioned objectives.

### **Objectives**

**The overall objectives of the envisaged national machinery of Swaziland will be:**

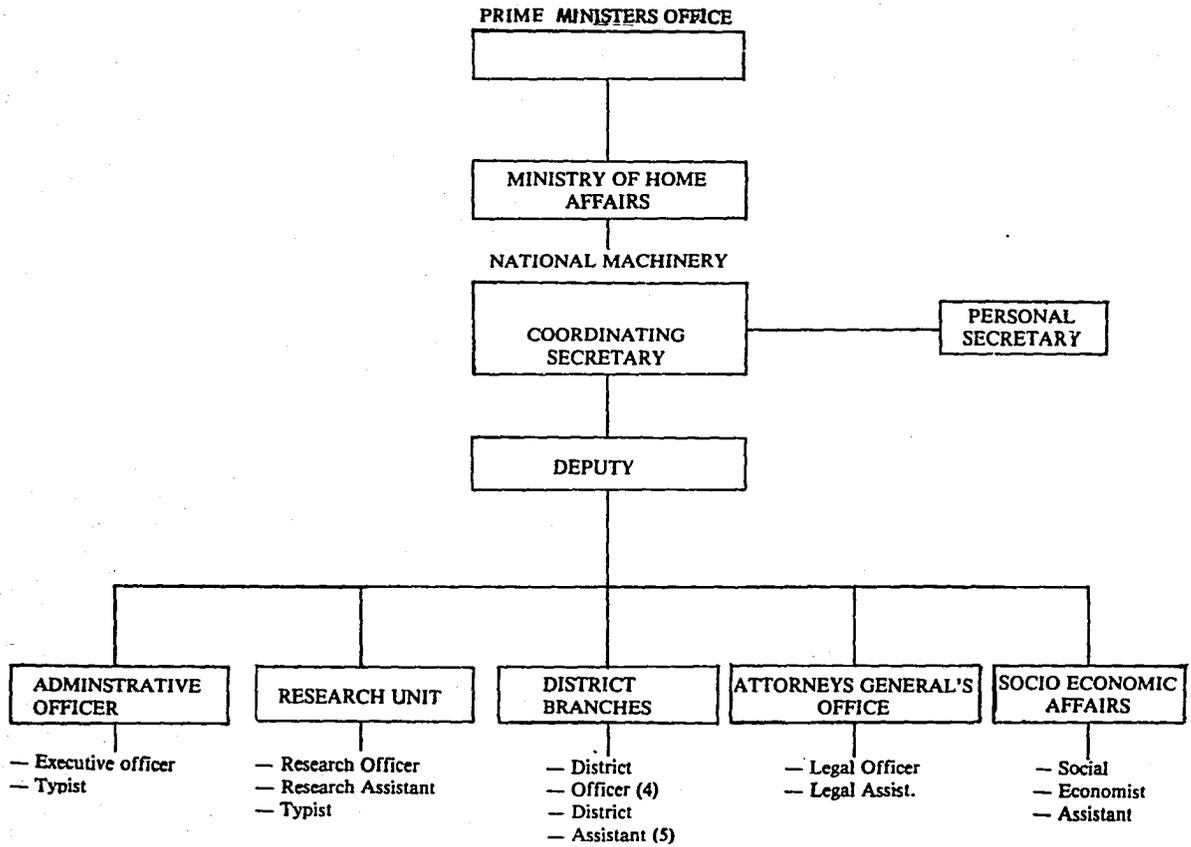
- (1) To advise Government on policy matters concerning Swazi women, and ensure that national development plans take into account the roles and needs of women,**
- (2) To conduct socio-economic research on policy regarding women's affairs, and to undertake studies on legal status of women and children,**
- (3) To enhance women's awareness in political orientation and economic development of the Swazi Nation, and**
- (4) To coordinate women's affairs, programmes and development projects under the network of the Mother Body.**

### **Organizational Structure**

In order to effectively achieve the above-mentioned objectives, it is recommended that:

- (a) The Mother Body should be under a higher Government Body,**
- (b) That a Coordinating Secretary, an Economist, a sociologist, a researcher, and field officers be made available,**
- (c) That the necessary support staff such as executive officer, typist, drivers, etc., be provided.**
- (d) That a request by Government to ECA be initiated to provide a short-term consultant in setting up the national machinery,**
- (e) Considering that the Fourth National Development Plan has already been submitted, but not finalized, it is further recommended that a clear policy and estimated budget for the national machinery be included,**

(g) For further details see also the attached organizational structure in ANNEX II.



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Since participants at this second seminar had been presented with concrete proposals for reform, discussion centred mainly around methods of implementation. Thus, there was not much discussion of Mr. Nhlapo's and Mrs Khoza' presentations. Quite clearly, the reason was that both the topics of Marriage and Employment had been dealt with extensively at the first seminar, and participants were content merely to ask for clarifications or contribute amendments to the proposals. The proposals in these two papers were generally acceptable.

Dr. Dlamini's paper stimulated a great deal of interest, since the issue of health had not been aired at the first seminar. Some members of the audience wondered if it would not be going too far to accept abortions for social reasons. There was lively discussion of traditional morality, with particular reference to abortions, contraception and pre-marital pregnancy. This last point was particularly controversial when it was tied to issues relating to teachers, with sections of the house feeling that sanctions against pregnant unmarried teachers were justified because teachers were in a special category. Other participants felt very strongly that such discrimination was unjust. The question of rape also raised a spirited debate. In the end, though, there was general agreement with Dr. Dlamini's proposals.

By far the most controversial issue of the day was the proposal for the formation of a Woman's Bureau in Swaziland. Very quickly the house divided into those who thought that a Woman's Bureau (or some other type of national machinery for women) would give new impetus to the women's cause, and those who felt very strongly that there was no need for any new machinery since the national women's organization, "Lutsango Lakangwane" already existed. Views expressed from the floor included the suggestion that (i) Lutsango did not represent the modern Swazi woman, (ii) that the organisation did not have resources and facilities to conduct research into women's problems, and (iii) that, in any case, their activities (workshops on home industries, handicrafts etc) did not address the real issues of women's inequality. In response, Lutsango supporters charged that the organisation could be representative if more women came to meetings (which are open to all) to find out what was being done and to help strengthen the movement. Also, it was pointed out that a "Ministry" (or Bureau) for women would hurt rather than advance the women's cause because male administrators would lose the incentive to deal with the problem of women as equal citizens, and would simply refer them to their own machinery.

After a long debate it was eventually resolved that there was no real conflict between Lutsango and the proposed machinery, and that, as a matter of convenience, the latter should work within Lutsango to achieve the aims of all women in the country.

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