

Submission on Swaziland to the Commonwealth Ministerial Action Group (CMAG)

ACTSA is the successor to the Anti-Apartheid Movement and is a democratic, member-led, campaigning organisation. We write to you as an organisation that is committed to supporting the Commonwealth in the realisation of its core values. As such, we outline our deep concerns with the failure of the Government of Swaziland to uphold Commonwealth principles in relation to human rights, democracy and the rule of law. We support the increasing calls of Swazi civil society for the Commonwealth and wider international community to take robust action in relation to the serious and persistent violations of Commonwealth values, and the ongoing violations of internationally recognised human rights principles, which is resulting in the subordination of the vast majority of the 1.2 million Swazi population.

We submit that the Commonwealth Ministerial Action Group (CMAG) should hold Swaziland to account for its serious breaches of the Commonwealth Charter. The allegations that Swaziland must address include: compromised institutions of democracy; a weakened judiciary; restrictions on the participation of political parties in the democratic process including a clampdown on the freedoms of association, assembly and expression; abuses of women's rights; and systemic governance problems leading to endemic poverty.

There are documented weaknesses in Swaziland's response to previous recommendations¹ made by the Commonwealth. In addition, while we welcomed the appointment in 2014 of former President of Malawi Dr Bakili Muluzi as the Commonwealth Secretary-General's Special Envoy to Swaziland, King Mswati III has refused to meet with Swazi civil society and work in good faith with a broad range of Swazi citizens.² The CMAG has clear criteria to guide its work.³ ***We are of the view that the situation in Swaziland triggers urgent CMAG attention.*** There is growing internal criticism of the Government of Swaziland, including demands for a transformation of the political system. We believe that internal pressure for reform can be bolstered by external pressure, and to this end we urge the CMAG to act.

1. Compromised on Democratic Principles

Swaziland is Africa's only and last remaining absolute monarchy. It became a member of the Commonwealth following independence in 1968. By 1973, King Sobhuza had repealed the constitution and abolished parliament and all political parties. The current monarch, King Mswati III, came to the throne in 1986. It was not until a decade later, in 1996, that a Constitutional Review Commission was set up, and this only following a number of strikes and with growing pressure from the opposition. The Commission's findings were never published but the report was presented to the king in 2001. Regardless of the report, in 2001, the Chair of the Commission announced that the king's powers were to be enlarged. Following this the king set up a new commission

to draft a new constitution, the draft of which was released in 2003 and then adopted in 2005, coming into force in 2006.

The provisions of the new constitution place the king above the law, allowing him to retain powers to appoint 10 of the 65 MPs and, crucially, control two-thirds of the appointments to the Senate. Of the remaining 55 MPs, these are indirectly selected/elected under the Tinkhundla system, which allows local chiefs (appointed by the king) to vet nominated candidates before they compete at popular elections at the chiefdom level. At every instance, the king has scope to influence the make-up of the majority of the parliament. Furthermore, the ban on political parties has remained in place since 1973. The most recent constitutional review in 2005 has left the current position of political parties unchanged - political parties are unable to contest elections. The main party, the Peoples United Democratic Movement (PUDEMO), has been banned and its leadership are subject to repeated arrests and intimidation. Consequently, the 2013 elections evidenced the practical ban on candidates standing on the basis of a political mandate espoused by a party. The king's extensive powers, including the ability to appoint the prime minister, ministers of government and members of the judiciary, as well as the authority to veto legislation, challenge the principle of the separation of powers, and does not demonstrate adherence to the Latimer House Principles⁴ on the separation of the three branches of government.

In 2012, the African Commission on Human and People's Rights issued a resolution⁵ on the human rights situation in the Kingdom of Swaziland that stated its deep concern regarding allegations of the violation of the rights to freedom of expression, assembly and association, which would likely affect the conduct of free, fair and credible elections in 2013. Indeed, the 2013 elections were subject to criticism from many international observers and failed to meet many of the Southern African Development Community (SADC) principles for the conduct of democratic elections. Further, the Commonwealth Observer Mission sent to monitor the 2013 elections recommended that the constitution be re-visited by way of a 'fully inclusive, consultative process with all Swazi political organisations and civil society'⁶ with the aim of harmonising conflicting provisions to allow for political parties. To date, there is no indication that any steps have been taken by the Government of Swaziland to action these recommendations.

In short, Swaziland fails to adequately provide for democratic processes and demonstrates persistent and serious violations of the Commonwealth's shared principles. While the Commonwealth in its charter recognises that 'governments, political parties ... are responsible for upholding and promoting democratic culture and practices',⁷ the government of Swaziland continues to act contrary to the charter. We submit that the CMAG must act to persuade Swaziland to address the issue of its shortcomings in democracy and reconcile itself with shared Commonwealth values.

2. Attack on Human Rights

Members of the Commonwealth have bound themselves to Human Rights. The Commonwealth Charter includes a commitment to the Universal Declaration of Human Rights and to '...equality and respect for the protection of civil, political, economic, social and cultural rights...' and '... noting that these rights are universal, indivisible, interdependent ... and cannot be implemented selectively'.⁸ Despite a voluntary commitment by Swaziland to these principles, threats to the freedom of expression, association and assembly continue to be perpetrated by Swazi government agents, with the king increasingly reliant on security forces to maintain control. Since 1993,

Swaziland has been annually reviewed and rated as 'Not Free', the least free rating given by Freedom House⁹ and compared to other members of the Southern African Customs Union, Swaziland has a dire rating on human rights, with women being disproportionately affected. Women are marginalised in government and in society, and gender equality is strongly curtailed. In 2015, the International Trade Union Confederation¹⁰ awarded Swaziland a Global Rights Index Rating of 5, thus classifying it as a country where there is no guarantee of rights and as one of the 10 worst countries in the world to work in.

In 2009, a Swaziland Commission on Human Rights and Public Administration (SCHRPA) was appointed but thus far its effectiveness is highly questionable. In 2011, the SCHRPA was described as a sham after it came to light that women were denied access to the SCHRPA offices if they wore trousers or were in mourning. Swazi traditional law and custom was used as the excuse for this discriminatory practice. This limit on the access of women to the SCHRPA is despite constitutional rights that enshrine equal opportunities for women and grant the right to women to ignore traditional Swazi law and custom if they wish.

More recently, the SCHRPA 2013-2017 Strategic Plan¹¹ identified that the mission of the SCHRPA would remain elusive unless it was empowered with the necessary resources to develop a fully functioning Commission. The plan highlighted the absence of a fully operational Human Rights Commission and the lack of a sufficient legal aid system and claimant process. These examples are indicative of Swaziland's limited commitment to the implementation of effective protection for the human rights of its citizens and demonstrate persistent and serious violations of the Commonwealth's shared principles.

2.1 Freedom of Speech

A cornerstone of any State seeking to demonstrate its dedication to human rights is the ability of its citizens to exercise freedom of speech. In Swaziland, freedom of speech is denied.

A key instrument used to curtail freedom of expression in Swaziland is the Suppression of Terrorism Act 2008 (STA). The STA has been widely criticised since its enactment because of its vague definitions and broad designation of ministerial power as well as its inconsistencies with Swaziland's own constitution and Swaziland's obligations under international and regional human rights law. This includes condemnation by the International Bar Association and Amnesty International.¹² The STA is regularly used by the police to legitimise interference with trade union activities. For instance during the 2014 May Day celebrations organised by the Trade Union Congress of Swaziland (TUCOSWA), Mario Masuko, President of PUDEMO, and Maxwell Dlamini, Secretary General of the Swaziland Youth Congress, were arrested and charged under the STA after delivering speeches in which they questioned the socio-economic governance of the country. The charges brought against them meant that if they were found guilty, they would have faced a sentence of up to 15 years of hard labour. Over a year passed with both men in detention and with no verdict having been passed. Finally, on 14 July 2015, the two men were released on bail, with conditions forbidding them from addressing public rallies. Whilst no longer incarcerated, the charges against both men have not been dropped.

Additionally, on 17 and 18 March 2014, charges of criminal contempt were brought against human rights lawyer Thulani Maseko and editor in chief of the *The Nation*, Bheki Makhubu. Both men were charged following publication of articles in *The Nation* that questioned the reasoning behind and circumstances of a case before the High Court of Swaziland. The state action taken against them was subject to condemnation by UN experts¹³ in June 2014. The Office of the High Commissioner for Human Rights (OHCHR) reported¹⁴ concerns that the detention of both men was related to the legitimate exercise of their right to freedom of expression as recognised in the Constitution of the Kingdom of Swaziland. The OHCHR stated that it was of the view that the detention and trial of Maseko and Makhubu for the exercise of their right to express an opinion on the court case was counter to Swaziland's international human rights obligations. The two men were subsequently sentenced to 2 years in prison without benefit or bail where the usual sentence is 30 days. Following much international condemnation and the dismissal of the judge who had imprisoned them, Bheki Makhubu was finally released on 30 June 2015 having spent 447 days in prison, the prosecution having decided not to oppose his appeal against conviction. The prosecution adopted a similar approach in the case of Thulani Maseko who was also released in July of this year.

The use of oppressive laws to limit freedom of speech is not limited simply to the use of existing legislation; there are also instances of unhelpful commentary by government officials that is indicative of the repressive nature of the Swazi State. For example, in August 2014, Sibusiso Barnabas Dlamini, the Swazi prime minister, made a speech in Parliament in which he publically threatened Sipho Gumedze from Lawyers for Human Rights and Vincent Ncongwane, the General Secretary of TUCOSWA, by suggesting that members of their constituency "must strangle them."¹⁵ These comments were made following their attendance at the US-Africa Leaders' Summit in Washington DC.

These actions are in contrast to the Charter that commits the Commonwealth to 'peaceful open dialogue and the free flow of information ... through a free and responsible media... to enhance democratic traditions and strengthening the democratic processes'.¹⁶ The Commonwealth Observer mission¹⁷ in 2013 heard testimony that a number of journalists critical of the government had lost their jobs, faced legal action or jail, with the consequence that the practice of self-censorship had grown amongst reporters. The media in Swaziland is overwhelmingly controlled by the state, and thus, ultimately, by the king. The repeated arrests of the editor of one of the very few independent publications that has been critical of the state and its institutions is clearly intended to intimidate those who would seek to challenge the current regime. The recommendation made by the Commonwealth Observer mission urging the Government of Swaziland to encourage and facilitate private media has apparently failed to inspire action. Instead, efforts to intimidate and restrict the media in fulfilling its legitimate role are ongoing. Beyond this, the much-criticised STA is being used to suppress political dialogue and thus scupper democratic processes. We believe that CMAG must not be a bystander whilst there are ongoing, serious and persistent violations of fundamental Commonwealth values.

2.2 Freedoms of Association and Assembly

The new Swazi constitution, which came into effect in February 2006, introduced a Bill of Rights, which includes freedom of association, but does not allow parliamentary candidates to stand for election as members of political parties, only as individuals. As

noted above, the constitution also maintains the executive role of the monarch. Consequently, parallel to the limitations placed on the freedom of expression in Swaziland, there are also barriers facing those who would seek to exercise two other closely related human rights – the freedoms of association and assembly. The STA has also been widely criticised for its use in the suppression of free political activity in Swaziland and as a tool to target and harass legitimate political opponents.

By way of practical example, PUDEMO was formed as an opposition party in 1983 with the goal of achieving multi-party democracy in the Kingdom. As political parties are banned, PUDEMO has been operating illegally since its foundation and its leadership and members have been subject to repeated arrests and police violence. PUDEMO's youth league, the Swazi Youth Congress (SWAYOCO) is in a similar situation.¹⁸ Both organisations are prescribed entities under the STA. PUDEMO and SWAYOCO seek to be a uniting force at the centre of a broad range of organisations, for example working with the Swazi United Democratic Front and the Swaziland Democracy Campaign, but the use of this legislation severely restricts their activities

Furthermore, in 2009, the Swazi government proposed further restrictive legislation in the form of the Public Services Bill that sought to prevent public workers from being active in trade unions and organisations that the government considered to be political. It proposed to make it an offence for a public servant to be 'visibly associated' with a political formation or association. The Bill received international condemnation for violating several international conventions (to which Swaziland is a party), including its role in suppressing trade union movements and their efforts to represent the interests of their members. Despite this criticism, the Swaziland Parliament proceeded to pass the Bill in September of this year.¹⁹

Similarly, on 17 October 2014, Winnie Magagula, the Swazi Minister of Labour and Social Security, announced a Cabinet resolution that halted the operations of all federations pending legal reforms. This brought about an effective ban on all trade union and employer federations in Swaziland. This is contrary to the recommendations made by the a high level International Labour Organization (ILO)²⁰ fact finding mission in January 2014 and in violation of Swaziland's ratification of the ILO convention guaranteeing freedom of association for employers and workers. This also falls within the CMAG guidelines and demonstrates significant restrictions on trade unions that prevent them from playing their legitimate role in Swazi society.

The practical application of such legislation and this ministerial approach is demonstrated in the following examples. On 24 November 2014, the STA was used to sanction the case of police activity in which the police armed with guns, tear gas, shields and headgear surrounded 250 striking mining workers at the Maloma mine.²¹ The strikers were refused access to medical facilities, water or toilets. Despite complying with all legal requirements and the strike being peaceful, the strikers faced intimidation and the threat of violence from the state security forces. This state sponsored action by the police is indicative of the Swaziland government's growing intolerance of trade unions and a contravention of the right to freedom of association and assembly as recognised in the Commonwealth Charter.

More recently, on 27 February 2015, a mass meeting of organisations affiliated to TUCOSWA was due to take place with an agenda that included discussion of the deregistration of the union, an update on its pending application for re-registration and a discussion on multi-party democracy in Swaziland. However, the meeting was unable to proceed as armed police officers attended and told the TUCOSWA

leadership that the meeting had to be stopped because deliberating on political parties had negative implications for the country. Members were asked to leave and armed police manned the gates to ensure no one entered.

On 14 March 2015, a National Executive Committee meeting of TUCOSWA was due to take place, but an hour before the commencement of the meeting plain clothes police entered the building and told those present to leave as the meeting would not be allowed to proceed. The police then proceeded to take over the venue and the gates to prevent anyone from entering. There was said to be a scuffle between the police and the committee members as Muzi Mhlanaga, the Secretary General of the Swaziland National Association of Teachers, attempted to photograph what was happening during this incident. The committee members were manhandled and police demanded their mobile phones to stop the leadership from photographing events. Following these events a letter was sent by TUCOSWA to the Minister of Labour and Social Security, Winnie Magagula, seeking redress for the treatment of its members and alerting the minister to the continuing harassment of TUCOSWA by the police. TUCOSWA argued that if the police action had been justifiable then they would have been charged and not manhandled. Following international pressure, in particular through the ILO, TUCOSWA was effectively unbanned on 12 May 2015 by the Swaziland Ministry of Labour & Social Security.

Furthermore, the approach of the Swazi authorities has had a detrimental effect on the country's economic situation. In June 2014, the United States suspended Swaziland from the benefits of the African Growth and Opportunity Act citing 'Swaziland's use of security forces and arbitrary arrests to stifle peaceful demonstrations, and the lack of legal recognition for labor and employer federations',²² and insufficient progress towards certain democratic standards, including the Swazi government's systematic violations of workers' rights and restrictions on the freedom of assembly. Consequently garment workers (90% of whom are women), have been hardest hit with the layoff of up to 3,000 garment workers' jobs so far.²³ These cases are symptomatic of the targeted approach of the Government of Swaziland to curtail the rights of Swazi workers and restrict the avenues by which the Swazi people are able to associate and mobilise in response to growing discontent with the state.

These instances demonstrate serious and persistent violations of the Commonwealth's shared principles and ought to be countered for the benefit of the Swazi people.

2.3 Women's Rights and Gender Equality

The Commonwealth Charter recognises that 'gender equality and women's empowerment are essential components of human development and basic human rights'.²⁴ The Constitution of Swaziland contains clauses recognising both equality and the rights and freedoms of women. Further, in 2008, Swaziland signed the SADC Gender and Development Protocol, and then achieved ratification in 2012. The Protocol sets targets for gender quality in a number of areas to be achieved by 2015. In Swaziland little progress has been made to achieve these. Further, Swaziland is also a party to the UN Convention on the Elimination of All forms of Discrimination against Women (CEDAW). In July 2014, the Committee on the Elimination of Discrimination against Women set out concluding observations and recommendations for Swaziland²⁵ following receipt of periodic reports from Swaziland. The Committee raised a number of concerns in regard to the position of women in Swaziland, including: the under-representation of women in Parliament; deficiencies in the constitutional

definition of discrimination and the legislative framework; the failure to enact the bill on sexual offences and domestic violence; and the high prevalence of HIV amongst women.

The impact of the deficiencies in protection of women's rights in Swaziland can be illustrated by considering the issue of violence against women. Levels of gender-based violence (GBV) remain shockingly high. In 2013, there were around 2904 cases of GBV reported to the police, with females representing 77% of all victims.²⁶ In Swaziland, marital rape is not considered a crime under common law or statute. In its 2010 report *Too late, too little*,²⁷ Amnesty International highlighted the absence of laws to protect women from rape and violence in the home and evidence of how violence against women is seen as the norm quoting statistics from 2006/7 that found 4 out of 10 men and women believed that a husband was justified in beating his wife in some circumstances. Furthermore, the Sexual Offences and Domestic Violence Bill has been under discussion and before Parliament since 2006 and is yet to be implemented.

With regard to the constitutional promises made to women, these principles are not developed into enabling legislation. This has resulted in widespread discrimination against Swazi women, denying them their rightful position in state institutions, as well as their rights to citizenship, to land and to protection from violence. For example, while the Swazi constitution states that at least 30% of parliamentarians should be women,²⁸ women hold only 6% of the seats in the Swazi parliament at the present time.²⁹

We believe that women are considered subordinate in Swazi society. Whilst constitutionally women are permitted to open bank accounts, take a job and obtain a passport without the permission of a male relative, these constitutional rights are in direct conflict with customary law that classifies women as minors. The constitution provides for equal access to land but customary law forbids women from registering property in their own name. It was not until June 2012 that the Deeds Registry Act 1968 was amended to allow women to register and administer property in their own name. Nevertheless, in July 2014 the Committee on the Elimination of Discrimination against Women stated that this change in the law has not been widely disseminated amongst women and is being poorly implemented.³⁰ In practice this means (especially in rural areas) that women cannot inherit land and thus in 2006/7 half of the widows aged 15-49 were dispossessed of their property.³¹

Swaziland ratified CEDAW without entering any reservations and thus voluntarily committed itself to take steps to protect, respect and realise the equal rights of women. The Commonwealth Charter equally recognises that gender equality and women's empowerment are essential to human rights. Yet, as the above examples illustrate, Swaziland continues to seriously and persistently violate principles relating to the equal rights of women.

3. Lack of Respect for the Rule of Law and Separation of Powers

The Commonwealth Charter requires of its members a belief in the rule of law 'as an essential protection for the people of the Commonwealth and as an assurance of limited and accountable government'.³² Regrettably, there is strong evidence to suggest that this belief is lacking in the Kingdom of Swaziland. In 1973, King Sobhuza II (the current king's father) revoked the constitution and imposed a state of emergency under which, the king was exempted from legal accountability and made supreme authority over the executive.

As of today, the issue of the independence of the judiciary remains unresolved. The current judicial structures undermine the independence of the judiciary with the consequent abrogation of the rule of law. The king retains absolute authority over the judiciary having the power to appoint and remove judges. Until 17 June 2015, the position of Chief Justice in Swaziland was held by Judge Michael Ramodibedi, a Lesotho citizen. He held this position unlawfully and in contravention of the Swazi constitution³³ that mandates that a Swazi Chief Justice should have been appointed by 26 July 2012. Ramodibedi was instrumental in undermining the independence of the judiciary both in word and action. On 16 June 2011, Ramodibedi issued an explicit practice directive No.4³⁴ stating that immunity applied to any claims made indirectly against the king, thus reinforcing the Swazi constitutional position that provides immunity to the king from any suit or legal process.³⁵

Shortly after taking office as acting Chief Justice in 2010, it was reported that Ramodibedi assembled all the judges and stated that he was “makhulu baas”³⁶ (“big boss”) and that they had a constitutional duty to obey him. A year later he ordered that judges could not hear cases against the king or royal institutions, and took over the allocation of cases meaning that cases against the government could be allocated to judges most likely to be sympathetic to the state. Finally, following much controversy and the threat of impeachment on charges of impropriety, Ramodibedi resigned his position in April 2014. Following his resignation a warrant was issued for his arrest but the former Chief Justice avoided arrest by locking himself away in his official government mansion. It took over a year after his ‘resignation’ for the judge to be finally removed from his position. It was not until a legal notice signed by the king himself that Ramodibedi’s resignation was finalised and his position in Swaziland was brought an end.

Most recently in 2015, there has been a raft of appointments to the Supreme Court that have raised serious questions of nepotism, and further call into question the independence of the judiciary since many of the new appointees are related to one another. In addition, the appointment of the Attorney General Majahenkhaba Dlamini to the Supreme Court casts doubt on the king’s commitment to the doctrine of the separation of powers as Dlamini is a member of the Swazi government handpicked by the king and now also a judge. The Swazi constitution (s153) stipulates that the appointment of justices of the Supreme Court is by the king on advice from the Judicial Service Commission. In practice, the constitution empowers the king with free rein over the appointment of the most senior members of the judiciary, and the appointment procedure allows little transparency.

These actions are contrary to the efforts made by the Commonwealth Technical Assistance Partnership to assist Swaziland in strengthening the judiciary. In the last Secretary General’s visit to Swaziland, on 4 August 2012, Swaziland was offered assistance through the provision of judges to help with the recognised weaknesses in the Swazi judicial system.

A weakened judiciary with a consequent loss of public confidence in the ability of this institution to protect citizens against state violations is a blow to democracy, since an independent and effective judiciary is fundamental to all Commonwealth members - indeed to all states. Thus, the Commonwealth’s recognition of the importance of member states to maintain the integrity of the roles of the legislature, executive and judiciary are severely compromised with a direct impact on the rule of law and the practice of democratic governance. These actions by those ruling Swaziland

demonstrate persistent and serious breaches of the shared principles of the Commonwealth.

4. Recommendation

ACTSA, having consulted with civil society in Swaziland, calls on the CMAG to consider the Government of Swaziland's persistent and serious violations of the Commonwealth Charter and the shared principles enshrined therein.

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- ⁶ Supra note 1, p23.
- ⁷ *Charter of the Commonwealth* (2013) Paragraph I - Democracy.
- ⁸ *Charter of the Commonwealth* (2013) Paragraph II - Human Rights.
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- ¹⁵ AllAfrica (2014) *Swaziland: PM says 'strangle' workers' leaders*, <http://allafrica.com/stories/201408100038.html>.
- ¹⁶ *Charter of the Commonwealth* (2013) Paragraph V - Freedom of Expression.
- ¹⁷ Supra note 1, pp9-10.
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