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REPORT ON CITIZENSHIP LAW: ESWATINI

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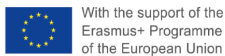
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Report on Citizenship Law

Eswatini

*Sabelo Gumedze**

1. Introduction

The Kingdom of Eswatini is a relatively small country, with a geographical area of 17, 200 km² and a population of 1, 165, 828.¹ Eswatini is completely landlocked, surrounded on the north, west and south by the Republic of South Africa and bordered by Mozambique to the east. In 2018, the name the Kingdom of Swaziland was changed to Kingdom of Eswatini.² According to section 2 of the Declaration of Change of Swaziland Name (Legal Notice No 80 of 2018), reference in any written law or international agreement or legal document to Swaziland shall be read and construed as reference to Eswatini. For purposes of this report, the words Eswatini and Swaziland will be used interchangeably.

The Kingdom of Eswatini's system of government is a 'democratic, participatory, *tinkhundla*-based system which emphasises devolution of state power from central government to *tinkhundla* areas and individual merit as a basis for election or appointment to public office.'³ The *tinkhundla* system of government emphasises the devolution of state power from central government to *tinkhundla* (administrative subdivisions), while only individual merit is a basis for election and appointment into public office with no participation of political parties. Eswatini has been a monarchy ever since the *Nguni* people, who migrated from central Africa many centuries ago, settled in Eswatini (formerly Swaziland). King Mswati III is the present monarch, having ascended to the throne on 25 April 1986, succeeding his father, the late King Sobhuza II. In 2015, a new constitution was enacted by the King and Parliament of Swaziland.

The Kingdom of Eswatini citizenship law is a blended mix resulting from the western law and the Eswatini traditional law and custom. This blend has been reduced into written law which determines the conditions under which the kingdom will recognise persons as its citizens and the conditions under which that status is withdrawn. Citizenship in Eswatini is a status primarily regulated by the constitution. The framework for citizenship is comprehensively provided for in the Constitution of the Kingdom of Swaziland (Swaziland Constitution or Constitution)⁴ and is in the main, descent-based. The Constitution is complemented by the

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¹Based on projections of the latest United Nations data. See <https://worldpopulationreview.com/countries/swaziland-population> (accessed 24 December 2020).

² Section 2 of the Legal Notice No 80 of 2018. The change of name was a unilateral action by King Mswati III.

³ Section 79 of the Constitution of the Kingdom of Swaziland Act, No. 001 of 2005.

⁴ The Constitution of the Kingdom of Swaziland Act, No. 001 of 2005. The Kingdom of Eswatini currently faces several challenges, including the lowest life expectancy of 60 years. See Eswatini Life Expectancy 1950-

Swaziland Citizenship Act, 1992 (Swaziland Citizenship Act). Some aspects of the Swaziland Citizenship Act do not conform to the Swaziland Constitution. The Ministry of Home Affairs is supposedly the custodian, protector and verifier of the identity and status of citizens and other persons resident in the country.⁵ The current Minister of Home Affairs is Her Royal Highness, Princess Lindiwe.⁶

Whilst embracing a gender equality in transmission of citizenship to children born before its promulgation, the Swaziland Constitution provides that only the father can transmit citizenship to children born after its promulgation. This in effect buttresses the patriarchal nature of the country's tradition and custom, which go against the very grain of the principle of equality, which the Constitution protects. The Constitution devotes an entire article to the principle of the of equality, providing that '[a]ll persons are equal before the and under the law in all spheres of political, economic, social and cultural life and in every other respect and shall enjoy equal protection of the law.'⁷

The discriminatory nature of the Eswatini's citizenship regime has not been spared international criticism. In 2006, the United Nations Committee on the Rights of the Child expressed concern that according to the law, the nationality of a child follows that of the father and birth certificates contain a description of the parents' nationality. The justification of this discrimination is the 'assumption that the child of a Swazi mother and foreign father, though resident, would automatically be entitled to the citizenship of his [or her] father's country.'⁸ This will be discussed in more detail later in this report.

This report will firstly present a historical backdrop on citizenship law post-independence. This is largely provided for in the Swaziland Independence Constitution. This history also includes the blatant violation of citizenship law by the government of Swaziland during the tumultuous years where there was a constitutional crisis in the Kingdom. Secondly, the report will present the current citizenship regime, which is largely provided by the Swaziland Constitution as complemented by the Citizenship Act. Thirdly, the report will discuss current and future debates of citizenship law. Lastly, a conclusion will be drawn.

2. Historical Backdrop

The formation of the Kingdom of Eswatini may be dated back to the 19th century and resulted from the violent *Mfecane* era which saw a number of wars and upheavals involving peoples in Southern Africa. The *Mfecane* era was characterised by widespread chaos and warfare among

2020, World Population Prospects available at <https://www.macrotrends.net/countries/SWZ/eswatini/life-expectancy> (accessed 24 December 2020).

⁵ For more information on the Ministry of Home Affairs, see <http://www.gov.sz/index.php/ministries-departments/ministry-of-home-affairs> (accessed 24 December 2020).

⁶ The Former Minister of Home Affairs was the late His Royal Highness Prince Sobandla.

⁷ Section 20(1) of the Constitution.

⁸ Para 86 Committee on the Rights of the Child Consideration of Reports Submitted by state Parties Under Article 44 of the Convention. Initial Report of States Parties due in 1997: Swaziland. 16 February 2006.

CRC/C/SWZ/1. Available at

http://docstore.ohchr.org/SelfServices/FilesHandler.ashx?enc=6QkG1d%2fPPRiCAqhKb7yhsttIGRuuQ17T5Us_c0B0NqgWLi4EiYBiBujoeBqx6shGc7WoU25syWooeXu%2flHua0p5yTVQjWfU5y8Hhrbh3JXc9XIKZPJcXMRwRzqGSGrWN6 (accessed 26 December 2020).

the indigenous ethnic communities in Southern Africa caused by King Shaka of the Zulu Kingdom during the period between 1815 and about 1840. The territory of Swaziland initially came under British control from 1877, following the British annexation of the South African Republic (Transvaal). The Kingdom of Eswatini remained a British ‘protectorate’ throughout the following decades, until 1967, when it was redesignated as a ‘protected state’.⁹ As a protected state, Swaziland, as it was called by the British, had its own Constitution and nationality between 1967 and 1968, before gaining full political independence on 6 September 1968 and becoming a sovereign state. The Swazi nation is predominantly composed of one ethnic group, the Swazi, or *emaswati*,¹⁰ and the official languages are *siSwati*¹¹ and English.

Upon gaining independence, Eswatini adopted a Westminster-type constitution, known as the Constitution of the Kingdom of Swaziland, 1968 (Independence Constitution).¹² The Independence Constitution was short-lived, as it was repealed in 1973 by King Sobhuza II on the grounds that it was ‘unworkable’ and had imported elements which ran counter to Swazi culture and way of life.¹³ Other reasons which were advanced were that the Independence Constitution had failed to ‘provide the machinery for good governance and for the maintenance of peace and order; and it was the cause of growing unrest, insecurity, dissatisfaction with the state of affairs in Swaziland, and had become an impediment to free and progressive development in all spheres of life’.¹⁴ It was at this very point that King declared that ‘I have assumed supreme power in the Kingdom of Swaziland and that all legislative, executive and judicial powers is vested in myself.’¹⁵ Through the King’s Proclamation to the Nation, all political parties were banned. To date, even after the promulgation of the new Swaziland Constitution, political parties are not accommodated in the *tinkhundla* system of government.¹⁶

The King’s Proclamation to the Nation¹⁷ was to become the supreme law of the Kingdom until the promulgation of the new Swaziland Constitution in 2005. In 1978, there was a return to a parliamentary system through the promulgation of the Establishment of the Parliament of Swaziland Order 23 of 1978, with the King still retaining all judicial, executive and legislative powers. This position was further affirmed by King Sobhuza II through Decree No 1 of 1981, a few months before he died.¹⁸ Whist the King’s Proclamation was a brainchild of King Sobhuza II, the current monarch, King Mswati III, affirmed this position of having all judicial, executive and judicial powers, through Decree No 1 of 1987 issued immediately after he took over the throne.

⁹ L Fransman, A Berry, A Harvey, *Fransman's British Nationality Law*, Bloomsbury Professional 3rd ed, 2011, catalogue entry on Swaziland.

¹⁰ Literally meaning “People of Mswati”. Mswati was one of the Kings of Swaziland.

¹¹ *SiSwati* is also one of the official languages spoken in the neighbouring South Africa.

¹² Act No. 50 of 1968.

¹³ See the King’s Proclamation to the Nation of 12 April 1973.

¹⁴ King’s Proclamation (n 13 above).

¹⁵ King’s Proclamation (n 13 above).

¹⁶ See Section 79 of the Constitution which provides that ‘[t]he system of government for Swaziland is a democratic, participatory, *tinkhundla*- based system which emphasises devolution of state power from central government to *tinkhundla* areas and individual merit as a basis for election or appointment to public office.’

¹⁷ If any other law was inconsistent with the Proclamation, that other law was, to the extent of the inconsistency, be null and void.

¹⁸ King Sobhuza II died on 21 August 1982.

In terms of the current Swaziland Constitution, the monarch has executive,¹⁹ legislative²⁰ and arguably judicial²¹ powers. The Constitution provided that the King and *Ingwenyama*²² has such rights, prerogatives and obligations as are conferred on him by this Constitution or any other law, including Swazi law and custom, and shall exercise those rights, prerogatives and obligations in terms of this Constitution.²³ The Kingdom of Eswatini's legal system operates on a dual basis, comprising the application of both customary law (Swazi law and custom) and general law, influenced by Roman-Dutch common law. Whilst the general law has jurisdiction over all persons within the Kingdom of Eswatini, the customary law is only applicable to the indigenous Swazi people. The customary law of the kingdom has been and continues to be unwritten and comprises of traditions and customs of the Swazi people as practiced and passed down over generations. The Swaziland Constitution recognised the operation of Swazi customary law, providing that, '[s]ubject to the provisions of this Constitution, the principles of Swazi customary law (Swazi law and custom) are hereby recognised and adopted and shall be applied and enforced as part of the law of Swaziland.'²⁴

The Eswatini citizen law must be viewed in light of the constitutional approach to the system of governance. The Constitution states that its crafting arose from a need 'to blend the good institutions of traditional law and custom with those of an open and democratic society so as to promote transparency and the social and cultural development of our Nation.'²⁵ As shall become more clear, the acquisition of citizenship also encapsulates a traditional and customary process, which is unique to the Kingdom of Eswatini.

The history on citizenship law in the Kingdom of Eswatini cannot be completed without a discussion of how it was violated during the country's darkest hour, which culminated in the abrogation of the Independence Constitution. The emergence of an opposition party, the Ngwane National Liberation Congress (NNLC) in parliament after the 1972 general elections, for which Mr Bhekindlela Thomas Ngwenya a part, was the main reason for the abrogation of the Swaziland Independent Constitution.²⁶ According to Eswatini's political history, before Ngwenya who, now an opposition parliamentary candidate,²⁷ was sworn in as an elected member of parliament, it was alleged that he did not have Eswatini citizenship. The then Deputy Prime Minister, as a Minister in charge of immigration, issued a declaration which effectively declared Ngwenya a prohibited immigrant of Eswatini.²⁸

Upon challenging the declaration, seeking an order declaring him to be 'a citizen of Swaziland', the court was not convinced that the government of Swaziland had proved that

¹⁹ Section 64(1) of the Constitution provides that 'the executive authority of Swaziland vests in the King as Head of State and shall be exercised in accordance with the provisions of this Constitution'.

²⁰ Section 106(a) of the Constitution states that, subject to the provisions of the Constitution, 'the supreme legislative authority of Swaziland vests in the King-in-Parliament'. Here again the King features in so far as the legislative power is concerned.

²¹ Section 140(1) of the Constitution states that 'the judicial power of Swaziland vests in the Judiciary' and 'an organ or agency of the Crown shall not have or be conferred with final judicial power'.

²² The King and *Ingwenyama* (literally meaning the Lion) is in terms of section 4(2) of the Constitution, 'a symbol of unity and the eternity of the Swazi nation.'

²³ Section 4(4) of the Constitution.

²⁴ Section 252(2) of the Constitution.

²⁵ Para 5 of the Preamble to the Constitution.

²⁶ See JSM Matsebula *A history of Swaziland* (1988) at 257, See also Thulani Maseko, 'The drafting of the Constitution of Swaziland, 2005' (2008) 2 *AHRLJ* 319.

²⁷ The ruling party, which was a royal political party, was called *Imbokodvo* National Movement (INM).

²⁸ The Deputy Prime Minister issued the declaration in terms of section 9(1)(g) of the Immigration Act 32 of 1964.

Ngwenya was not a citizen of Swaziland and consequently set aside the deportation order.²⁹ Subsequent to this judgement, the government appealed the decision. While the appeal was pending, the government rushed through and tabled in parliament an amendment to the Immigration Act³⁰, which was hastily passed into law. Essentially, the Amendment Act established a tribunal that was mandated to decide on cases dealing with disputed nationality. Any appeal against ruling of the tribunal could only be made to the Prime Minister, whose decision was to be final, thus excluding the jurisdiction of the Swazi courts. The Prime Minister's decision could not be challenged in any court of law.³¹ Most unfortunately, the application of the Amendment Act was retrospective.

At this point, Ngwenya was invited by the Tribunal to appear before it for purposes of determining his citizenship status.³² The Tribunal found that Ngwenya was not a Swazi citizen in that he was born in South Africa, and that although he may have come to live in Swaziland, he did not follow the prescribed way of attaining Swazi citizenship.³³ Reacting to this decision, Ngwenya challenged the constitutionality of the Immigration Amendment Act, and subsequently the decision of the tribunal, in a court of law. Whilst the High Court of Swaziland rejected the challenge,³⁴ the Court of Appeal decided in favour of Ngwenya and held that the Immigration Act was unconstitutional in that the constitution required a joint sitting of parliament if the amendment could effectively curtail the jurisdiction of the court.³⁵ It was this decision of the Court of Appeal that became 'the last straw that caused the repeal of the Independent Constitution and its electoral process.'³⁶

3. Evolution of Citizenship Law

3.1 Citizenship under the 1967 Constitution

During the protected state era, wherein Swaziland had a greater degree of internal self-government than its former status as a protectorate, its 1967 Constitution provided for a "*ius soli* right to citizenship for anyone born in the territory before and after its adoption."³⁷ This basically meant that anyone who was born in the territory, despite them being born of non-Swazi citizens, had the "right of soil" to the citizenship of Swaziland. In other words, they had the birthright citizenship of Swaziland. This prevented statelessness, in cases where citizenship

²⁹ Bhekindlela Thomas Ngwenya v The Deputy Prime Minister and the Chief Immigration Officer 1970-76 SLR (HC) 119.

³⁰ Immigration (Amendment) Act 22 of 1972.

³¹ Richard S Mthembu 'Human rights and parliamentary elections in Swaziland' in C Okapaluba *et al* (eds) *Human rights in Swaziland: The legal response* (1997) 130.

³² Mthembu (n 31 above) 130.

³³ Mthembu (n 31 above) 130.

³⁴ Bhekindlela Thomas Ngwenya v The Deputy Prime Minister and the Chief Immigration Officer 1970-76 SLR (HC) 119.

³⁵ Bhekindlela Thomas Ngwenya v The Deputy Prime Minister and the Chief Immigration Officer (C.A) 1970-76 SLR (HC) 123.

³⁶ Mthembu (n 31 above) 131.

³⁷ B Manby, *Citizenship in Africa: The Law of Belonging*, Hart Publishing (2018) 78.

could not be acquired by persons born in the territory of Swaziland. It is important to note that in the case of Swaziland, the *ius soli* was not restricted.

3.2 Citizenship under the 1968 Independence Constitution

The Independence Constitution was the first instrument to comprehensively provide for citizenship after Swaziland gained independence.

3.2.1 Persons who become citizens on 6th September 1968

The first group of persons which the Independence Constitution had to address were those who were to become citizens of Swaziland on 6th September 1968. Section 20 of the Independence Constitution provides that '[e]very person who, on 5th September 1968, is a citizen of the former protected state of Swaziland by virtue of any of the provisions of Chapter XI of the former Constitution shall, on 6th September 1968, be a citizen of Swaziland.' It is important to note that in 1968, there was formal continuity of citizenship from an existing citizenship regime (under the 1967 constitution). It was not merely a creation of a wholly new citizenship.

3.2.2 Persons born in Swaziland after 5th September 1968

The second group of persons which the Independence Constitution addressed were persons born in Swaziland after 5 September 1968. To this end, section 21 of the Independence Constitution provided that '[e]very person born in Swaziland on or after 6th September 1968 shall, if his [or her] father is a citizen of Swaziland, become a citizen of Swaziland at the time of his [or her] birth.' In common with other former British territories (and the previous constitution), Swaziland thus adopted a pure *ius soli* rule attributing citizenship based only on birth in the territory.

3.2.3 Persons born outside Swaziland after 5th September 1968

The third group of persons addressed in the Independence Constitution are those who are born outside Swaziland on or after 6th September 1968. Accordingly, section 22 provided that these shall, 'if his [or her] father is a citizen of Swaziland and is domiciled in Swaziland, become a citizen of Swaziland at the time of his [or her] birth.' For those born outside the territory, the Independence Constitution provided for citizenship to be acquired only through the father, and only if the father was domiciled in Swaziland (that is, not living permanently elsewhere).

3.2.4 Persons entitled to be registered as citizens

The Independence Constitution also provided citizenship by registration, by which citizenship could be acquired based on simple application, if the conditions were fulfilled. Section 23 provided that certain persons were entitled to be registered as citizens of Swaziland:

one, any woman who is married to a person who is a citizen of Swaziland;³⁸ two, any woman whose marriage has been terminated by death or dissolution if the person to whom she was married was a citizen of the former protected state of Swaziland or a citizen of Swaziland or would but for his death have been a citizen of the former protected state of Swaziland;³⁹ three, any person one of whose parents is a citizen of Swaziland or was, at the date of the death of such parent, a citizen of Swaziland or a citizen of the former protected state of Swaziland;⁴⁰ four, any person who is certified, by writing under the hand of the *Ngwenyama* or the Secretary to the Swazi National Council, to have '*khonta*'d',⁴¹ that is to say, to have been accepted as a Swazi in accordance with Swazi law and custom;⁴² and five, any person born in Swaziland on or after 6th September 1968 who was stateless at the time of his birth and is stateless at the time of the application and who is not entitled to acquire as of right the citizenship of his or her father or his or her mother.⁴³

The '*khonta*' system is unique to Swaziland and is fully enshrined in Swazi law and custom, which has been practised for many centuries. Though this '*khonta*' system, a non-citizen male (with a wife) is given a piece of land (to build and till) and accepted as a member of a community (within a chiefdom) by the Chief. Once given the land, a certificate of *khonta* was granted under the direction of the King. It is also possible for an unmarried woman to '*khonta*', but only through her male child.

The Independence Constitution prohibited persons who had not attained the age of twenty-one years from making an application for citizenship. Such an application could only be made by their parent or guardian on their behalf.⁴⁴ By law, any person so registered as a citizen of Swaziland in terms of the Independence Constitution, was deemed to be a citizen from the date upon which he or she was so registered.⁴⁵

3.2.5 *Citizenship by Naturalisation*

The Independent Constitution empowered the Minister responsible for citizenship to grant a certificate of naturalisation to a person who had attained the age of twenty-one years, upon that person making an application.⁴⁶ The following requirements were to be met by such an applicant:

one, that he or she had been ordinarily and lawfully resident in Swaziland; two, that throughout the period of twelve months immediately preceding the date of application; three, that during the seven years immediately preceding the said period of twelve months, for periods amounting in the aggregate to less than four years or, in the case of a Commonwealth citizen, for periods amounting in the aggregate to not less than three

³⁸ Section 23(1)(a) of the Independent Constitution.

³⁹ By virtue of section 127(a) or (b) of the former Constitution. Section 23(1)(b) of the Independent Constitution.

⁴⁰ Section 23(1)(c) of the Independent Constitution.

⁴¹ To '*khonta*' is to be accepted as a Swazi in accordance with customary law and in respect of whom certificate of *khonta* is granted by, or by direction of, the King, is in force. See section 5(1) of the Swaziland Citizenship Act, 1992.

⁴² Section 23(1)(d) of the Independent Constitution.

⁴³ Section 23(1)(e) of the Independent Constitution.

⁴⁴ Section 23(2) of the Independent Constitution.

⁴⁵ Section 23(3) of the Independent Constitution.

⁴⁶ Section 24(1) of the Independent Constitution.

years; four, that he or she is of good character; five, that he or she had adequate knowledge of either English or siSwati; and six, that he or she intended to continue to reside in Swaziland once the certificate was granted.⁴⁷

3.3 Citizenship under the Citizenships Order 1974

After the repeal of the Independence Constitution, the Citizenships Order 1974 (King's Order in Council No 22 of 1974) was promulgated. Section 3 of the Citizenship order 1974 provides that a person who on 12 April 1973 was a citizen of Swaziland by birth under the Independence Constitution would continue to be such a citizen only if at the time of birth his father had Swazi citizenship. It is noteworthy that this Order had a retrospective application, and its effect was that a number of persons who on 6 September 1968 were citizens of Swaziland by birth or descent, ceased to possess that citizenship on 12 April 1973.⁴⁸

3.4 Citizenship under the Citizenship Act of 1992

The Citizenship Act of 1992 expanded the acquisition of citizenship through '*kuKhonta*' custom, providing that a person who had khonta'd became a citizen automatically, without the requirement for an application to register as a citizen.⁴⁹ The Citizenship Act also conferred a right to acquire Swazi nationality on persons whose mother but not father was a Swazi. In this case, there was a requirement for such persons to seek a certificate of naturalisation from the Minister of Home Affairs.⁵⁰

4. The Current Citizenship Regime

The legal regime for acquisition and loss of citizenship in Swaziland is comprehensively addressed in the 2005 Constitution. The Constitution came into effect after there was already in existence an existing law on citizenship, the Swaziland Citizenship Act of 1992.⁵¹ It could be argued that the Swaziland Citizenship Act technically operationalises the provisions of the Constitution (to the extent that it is not contrary to it). The Swazi government has asserted, in its state report to the United Nations Committee on the Elimination of Discrimination Against Women (CEDAW), that these pieces of legislation are 'essentially consistent with one another in all material aspects, including their approach to women's rights to enjoy and exercise their citizenship rights'.⁵² The government also noted that, 'in their articulation of issues of

⁴⁷ Section 24(1) of the Independent Constitution.

⁴⁸ Fransman et al (n 9) 1287.

⁴⁹ Swaziland Citizenship Act No.14 of 1992, section 5.

⁵⁰ Manby (n 37 above) 101.

⁵¹ This Act repeals Act No 36 of 1976 and Order No. 22 of 1974.

⁵² Committee on the Elimination of Discrimination against Women, Consideration of Reports submitted by States parties under article 18 of the Convention on the Elimination of All Forms of discrimination against Women. Combined initial and second periodic reports of states parties: Swaziland, 29 January 2013, CEDAW/C/SWZ/1-2 at p 49. Available at <http://daccess-ods.un.org/access.nsf/Get?Open&DS=CEDAW/C/SWZ/1-2&Lang=E> (accessed 26 December 2020).

citizenship, and women's rights therein, these laws are also consistent with principles of Swazi Law and Custom'.⁵³

However, the Swaziland Citizenship Act does not entirely conform to constitutional provisions, thus presenting confusion on the applicable rules. After all, it was already in existence prior to the Constitution. Nevertheless, the Constitution supersedes the Swaziland Citizenship Act. Section 268 of the Constitution provides that '[t]he existing law, after the commencement of this Constitution, shall as far as possible be construed with such modifications, adaptations, qualifications and exceptions as may be necessary to bring it in conformity with this Constitution.'⁵⁴

In the main, the Swaziland Constitution provides for the acquisition and loss of citizenship. As shall become clearer, under the legislation applicable in Eswatini, mothers cannot transmit their citizenship to children under the same conditions as fathers.

4.1 Classes of Citizenship

Generally, acquisition of citizenship refers to the mechanism by which (or manner in which) persons acquire citizenship. In the case of Swaziland, there are various mechanisms which exist depending on the class of people, the person acquiring citizenship belongs. These various classes of people are addressed in the Constitution.

The first class of people which are addressed in the Swaziland Constitution 2005 are the citizens of Swaziland at the time of its promulgation. According to section 40 of the Swaziland Constitution, 'a person who, on the commencement of this Constitution, is a citizen of Swaziland shall continue to be such citizen.'

The second class of people addressed in the Swaziland Constitution are those who acquire citizenship by descent. These are the so-called 'natural-born citizens.'⁵⁵ Section 41 of the Swaziland Constitution provides that 'a person born, whether before or after the commencement of the Constitution and whether in or outside of Swaziland, is a citizen by descent if that person is a descendant.'

The third class of people addressed in the Swaziland Constitution are people who acquire citizenship by operation of the law. The phrase 'citizenship by operation of law' refers to a person 'who was born before the existence of the status of a citizen of Swaziland and was a member of a class of persons, firstly, generally regarded as Swazi by descent, and secondly, subsequently declared by law to be citizens of Swaziland'.⁵⁶ Accordingly, a person born in or outside Swaziland before the commencement of the Constitution shall be a citizen of Swaziland by operation of the law provided at birth, one of his or her parents was a citizen of Swaziland.⁵⁷

⁵³ CEDAW (n 52 above)

⁵⁴ Section 268(2) of the Constitution defines "existing law" to mean 'the written and unwritten law including customary law of Swaziland as existing immediately before the commencement of this Constitution, including any Act of Parliament or subordinate legislation enacted or made before that date which is to come into force on or after that date.'

⁵⁵ See also section 4(1) of the Swaziland Citizenship Act, 1992.

⁵⁶ S 42 (2) of the Constitution.

⁵⁷ S 42(1) of the Constitution.

4.2 Acquisition of Citizenship

4.2.1 *Citizenship at Birth*

In addressing the acquisition of citizenship by birth, section 43 of the Swaziland Constitution presents four scenarios.

First, section 43(1) of the Constitution provides that a person born in Swaziland after the commencement of the Constitution is a citizen of Swaziland ‘by birth’, provided at the time of birth, the father of that person was a citizen of Swaziland in terms of the Constitution.⁵⁸ In essence this provision discriminates in that a mother cannot transmit citizenship in terms of the Constitution.

Section 48(1) of the Constitution provides that a person born aboard a ship or aircraft registered in Swaziland wherever it may be shall be deemed to be born in Swaziland.⁵⁹ In the event that the ship or aircraft of the Government of the Kingdom of Eswatini is unregistered, a person born aboard shall be deemed to be born in Swaziland in terms of section 48(2) of the Constitution. Section 46 of the Constitution provides that a child born after the death of the father shall be deemed to be a citizen on the same conditions as if the father were alive when that child was born.⁶⁰

Second, section 43(2) of the Constitution provides for a person born outside Swaziland after the commencement of the Constitution is a citizen of Swaziland provided at the time of birth, the father of that person was a citizen of Swaziland in terms of the Constitution.⁶¹ Again, if the father pre-deceased the birth of the child there is no impact on the child’s rights. However, section 43(3) of the Constitution provides that a person born outside Swaziland who becomes a citizen by virtue of section 43(2) shall cease to be a citizen if the father of that person was also born outside Swaziland unless, ‘within one year after attaining the age of majority (or within such extended time as the Board may allow) that person notifies the Board in writing of the desire to retain the citizenship of Swaziland.’ This limitation on transmission of citizenship outside the country is originally derived from the rule in British law.

These provisions establish a blatant discrimination, giving different treatment to fathers and mothers, which is attributable to their respective description by gender. They are in conflict with Section 20(2) of the Constitution, which provides that that ‘[f]or avoidance of any doubt, a person shall not be discriminated against on the grounds of gender, race, colour, ethnic origin, tribe, birth, creed or religion, or social or economic standing, political opinion, age or disability.’ The Constitution goes further by stating that the word “discriminate” means ‘to give different treatment to different persons attributable only to their respective descriptions by gender, race, colour, ethnic origin, tribe, birth, creed or religion, or social or economic standing, political opinion, age or disability.’ In fact, the promise made in the preambular provision of the Constitution that ‘it is necessary to protect and promote the fundamental rights and freedoms of ALL in the Kingdom of in terms of a constitution...’ is a contradiction in terms. Swaziland remains one of the six countries in Africa which do not provide mothers with equal rights as fathers to confer their nationality on their children, leading to a risk of statelessness for such children.

⁵⁸ This section is essentially the same as section 7(1) of the Citizenship Act.

⁵⁹ See also section 18 of the Swaziland Citizenship Act.

⁶⁰ Section 16 of the Swaziland Citizenship Act provides for a similar provision.

⁶¹ This section is essentially the same as section 7(2) of the Citizenship Act.

Third, section 43(4) of the Constitution provides that ‘where a child born outside of marriage is not adopted by its father or claimed by that father in accordance with Swazi law and custom and the mother of the child is a citizen of Swaziland, the child shall be a citizen of Swaziland by birth’.⁶² The Swaziland state report to CEDAW noted that, while this provision provides a limited form of protection against statelessness caused by the gender discrimination in the law, a child in this circumstance may still face the risk of statelessness where he or she is denied or not claimed by his or her father and cannot be registered as a citizen of Swaziland unless and until evidence is obtained that his or her father has not claimed him or her in accordance with Swazi law and custom.⁶³ Section 43(4) of the Constitution has the following practical implication - the child’s mother must appear before the Citizenship Board to formally apply for Swaziland citizenship in respect of her child covered under this provision. This is viewed as degrading as the mother ‘will have to declare details of the circumstances surrounding the pregnancy and the subsequent denial of paternity or non-claiming of the child in accordance with Swazi law and custom by the father’.⁶⁴

The Swaziland State Report to CEDAW also noted that, ‘[w]hile the negative impact may directly be to the child, this disadvantage arises because of the mother’s incomplete citizenship rights on an equal basis with her Swazi male counterpart whose children are automatically Swazi citizens regardless of the nationality of their mother and who has no exceptional circumstances to prove or impediments to overcome regarding this right.’⁶⁵ In its concluding observations, the CEDAW Committee recommended that ‘Swaziland repeals the discriminatory provisions in the Constitution and the Citizenship Act to ensure that Swazi women married to foreign men can transfer their nationality to their husbands and children on the same basis as Swazi men married to foreign women, in line with article 9 of the Convention’.⁶⁶ A further recommendation has been made to establish a programme that would guarantee that children born to a union between Swazi women and foreigners are granted equal access to healthcare, education and basic services, and not rendered stateless.

Fourth, section 43(5) of the Constitution provides that a child adopted⁶⁷ under the legislation relating to the adoption of children or under customary law, shall, if not already citizens, be deemed to be citizens of Swaziland by birth if, at the time of the adoption, the adoptive parent was a citizen of Swaziland or would have been a citizen if the Swaziland Constitution were in force.

The discriminatory aspects of section 43 of the Swaziland Constitution were also considered in the state report of Eswatini to the UN Committee on the Rights of the Child submitted in 2017. The report noted that Eswatini had not made any changes to the law, as required in terms of the Committee’s concluding observations from 2006 (numbers 32 and 33)

⁶² It is important to note that section 42(4) the Constitution addresses the question of children born outside the institution of marriage while section 43(1) and (1) seems to override the existence of ‘child born outside marriage’, by automatically making a child a citizen through his or her father being a citizen. The protection is not afforded in case the father is *not* a citizen.

⁶³ Committee on the Elimination of Discrimination against Women (n 51 above).

⁶⁴ Committee on the Elimination of Discrimination against Women (n 51 above).

⁶⁵ Committee on the Elimination of Discrimination against Women (n 51 above).

⁶⁶ Committee on the Rights of the Child 43rd session Consideration of Reports Submitted by States Parties under Article 44 of the Convention. Concluding Observations: Swaziland. CRC/C/SWZ/CO/1. 16 October 2006. Available at

<https://docstore.ohchr.org/SelfServices/FilesHandler.ashx?enc=6QkG1d%2fPPRiCAqhKb7yhskcAJS%2fU4wb%2bdIVicvG05RyN0cT7NHfD048ind4G97YU5bjsWYp6txpgbAMjOtInvNd3MBGC5H%2b4uWghXk42s3Hu t8qWOX%2b9WeosSSjUviY%2f3GV1qq6XVATKblk6bhjnPg%3d%3d> accessed 10 February 2021.

⁶⁷ Whether before or after the commencement of the Constitution.

‘to ensure that children can derive their nationality, not only from their father, but also their mothers unless the child is born outside of marriage and is not adopted or claimed by the father’.

⁶⁸ It was mentioned that the Government of Eswatini made an undertaking to review this issue during the drafting of the subsequent bill on citizenship.

4.2.2 *Foundlings*

Section 47 of the Constitution, a deserted child of not more than seven years⁶⁹ found in Swaziland shall, unless the contrary is proved, be deemed to have been born in Swaziland and shall, for purposes of the Chapter (dealing with citizenship), be treated as a citizen by birth.

4.2.3 *Citizenship by Marriage*⁷⁰

The Constitution provides under section 44(1) that ‘a woman who is not a citizen of Swaziland at the date of her marriage to a person who is a citizen (otherwise than by registration) shall become a citizen by lodging a declaration in the prescribed manner with the Minister responsible for citizenship or with any Diplomatic Mission or Consular Office of Swaziland or at any other prescribed office, either before or at any time during the marriage, accepting Swaziland citizenship’.⁷¹ The Constitution further provides that ‘a woman who lodges a declaration in terms of section 44(1) shall be a citizen from the date of her marriage, where the declaration is lodged before marriage, or where the declaration is lodged after marriage, from date of lodgement’.⁷²

Neither the Constitution or the Citizenship Act cater for the situation where the non-Swazi husband of a Swazi wife wishes to acquire Swazi citizenship by virtue of the marriage. The assumption, which is ill-conceived, is that the ‘man who is not a citizen of Swaziland’ is not interested in being (or cannot be) a Swazi citizen by virtue of the marriage. This is a result of the Swazi patriarchal system, which assumes that the woman leaves her home to become a member of her husband’s family and not the other way round. A former chairperson of the Citizenship Board, Mr Zonke Khumalo (now deceased), was reported as having stated in no uncertain terms that ‘foreigners who marry Swazis and expect to gain citizenship will be told to go back to wherever they came from.’⁷³ A possible avenue for acquiring citizenship for a non-Swazi husband is through registration, which in and of itself has additional and different requirements which are more onerous. This will be discussed in the following part.

The practical implications of the gender discrimination in sections 43 and 44 of the Swaziland Constitution are adverse. First, it becomes difficult if not impossible to ‘obtain travel documents in respect of children born of non-Swazi men (husbands), as this is a right attached

⁶⁸ Committee of the Rights of the Child, Combined second to fourth periodic reports submitted by Eswatini under article 44 of the Convention, due in 2011, 8 July 2019. CRC/C/SWZ/2-4, Para 58. Available at <http://docstore.ohchr.org/SelfServices/FilesHandler.ashx?enc=6QkG1d%2fPPRiCAqhKb7yhsttlGRuuQ17T5UsC0B0NqgUVMwiv6zApKKDV5x10Cy3TWzrxZxEMu7SVHoT68Oh3AQgZGnUc1iJShOnYm14LDLWlufYUXRx5y9W48cjQNDJ3> (accessed 26 December 2020.)

⁶⁹ Section 17 of the Swaziland Citizenship Act refers to a ‘deserted infant’.

⁷⁰ The section on marriage applies to marriage whether before or after the commencement of the Constitution.

⁷¹ Section 44(2) of the Constitution.

⁷² Section 44(2) of the Constitution.

⁷³ Buhle Dube & Alfred Magagula, *The Law and Legal Research in Swaziland*, September/October 2007. Available at https://www.nyulawglobal.org/globalex/Swaziland.html#_Chapter_IV-Citizenship (accessed 27 December 2020).

to citizenship. When one registers a travel document in respect of a child, there is a requirement that one produces the child's birth certificate'.⁷⁴ Second, the travel document cannot be issued unless the child bears a Swazi surname.⁷⁵ It will be worse if the father is also not a Swazi citizen or his application for Swazi citizen (through registration) is still pending. Three, the non-Swazi husband will find it difficult to access civic assistance/service and worse securing employment and being able to conclude financial or business transactions, owing to his status. Four, the Swazi legislative framework prevents children of Swazi women and foreign men *from accessing some basic citizen rights and resources, which proves to be a frustrating experience.*⁷⁶ *On the other hand, the woman who is not a Swaziland citizen will have a 'smooth sailing' immediately after her marriage to a male Swazi citizen. In the case of death of the spouse, nationality of the surviving spouse, that of the child or another dependant will not be affected.*⁷⁷

4.2.4 Citizenship by Registration⁷⁸

In Swaziland, in common with several other former British territories, the name for the discretionary procedure for acquisition of citizenship based on long residence (most commonly known as naturalisation) is registration. According to section 45(1) of the Constitution, a person may acquire citizenship by registration where that person satisfies the Citizenship Board on the following conditions:

one, that they have been ordinarily and lawfully resident in Swaziland, for a continuous period of at least twelve months immediately preceding the date of application for registration and for periods amounting in the aggregate to not less than five years during the seven years preceding the date of application for registration;⁷⁹ two, that they are of good character;⁸⁰ three, that they have an adequate knowledge of siSwati or English;⁸¹ four, that they intend, in the event of citizenship being granted, to reside in Swaziland;⁸² five, that they have adequate means for support whilst in Swaziland;⁸³ and six, that they have contributed and shall contribute to the development of the country.⁸⁴

The Constitution provides under section 45(3) that 'a person who is ordinarily resident in Swaziland and has been so resident for a period of at least ten years and whose application is supported by a Chief after consultation with *bandlanthane*'⁸⁵ or supported by three reputable citizens, may be registered as a citizen. It is a requirement that citizenship by registration can only be granted to any person provided they take 'the oath or affirmation of allegiance in the

⁷⁴ In order to obtain a birth certificate, the child's father must be present to supply his own details.

⁷⁵ Swaziland is a very small country and it is easy to identify a non-Swazi surname.

⁷⁶ See also Dube & Magagula (n 71 above). These include but are not limited to accessing passports, scholarships for higher education and representing the country abroad.

⁷⁷ Section 52(1) of the Constitution.

⁷⁸ According to section 49(6) of the Constitution, "registration" includes naturalisation or registration (otherwise than as of right) under any law that existed before the commencement of this Constitution.

⁷⁹ Section 45(2)(a)(i)-(ii) of the Constitution.

⁸⁰ Section 45(2)(b) of the Constitution.

⁸¹ Section 45(2)(c) of the Constitution.

⁸² Section 45(2)(d) of the Constitution.

⁸³ Section 45(2)(e) of the Constitution.

⁸⁴ Section 45(2)(f) of the Constitution.

⁸⁵ In terms of section 45(6) of the Constitution, *bandlanthane* means a Chief's council established in accordance with Swazi law and custom.

Second Schedule or such other oath or affirmation as may be prescribed'.⁸⁶ The person to whom citizenship by registration is granted shall be a citizen from the date of the issuance of the certificate of registration under section 45(6) of the Constitution. The Citizenship Board is responsible for issuing to a citizen of Swaziland the certificate of citizenship.⁸⁷ It also has the competence to revoke a certificate of citizenship, in cases provided for by law.⁸⁸

4.3 Loss of Citizenship

As the Constitution provides for the acquisition of citizenship, it also provides for its loss. The Constitution provides for three ways for the loss of citizenship, that is, through deprivation, renunciation, and death.

4.3.1 *Deprivation of Citizenship*

Section 49(1) of the Swaziland Constitution grants the Citizenship Board⁸⁹ the powers to issue an order for deprivation of citizenship in the following cases:

- i the issue of the relevant certificate has been declared by a court to have been procured by fraud, misrepresentation or concealment of material facts;
- ii the person has shown himself by any overt act other than marriage to have acquired another citizenship;
- iii the person has by any voluntary act other than marriage acquired another citizenship;
- iv the person has, on being so required by the Citizenship Board, failed to renounce the citizenship of any other country;
- v the person has been resident outside Swaziland⁹⁰ for a continuous period of seven years and during that period has failed without reasonable excuse to register with the Board at such times and in such a manner as may be prescribed a declaration of intention to retain citizenship of Swaziland.⁹¹

The Board must be satisfied that on any of the grounds mentioned above, it is not conducive to the public good that the person should continue to be a citizen of Swaziland.

The issue of fraudulent marriages for citizenship is also addressed in the Constitution. Section 49(2) provides that a 'woman who acquired citizenship as a consequence of her marriage to a citizen of Swaziland, may be deprived of that citizenship where the marriage was entered into merely for the purpose of acquiring citizenship'.

It is a requirement that prior to making a revocation order, the Citizenship Board shall give notice to the person concerned of the fact that the revocation of the citizenship of that 'person is being considered, stating the grounds for revocation and the right of that person to apply to the Board within the period stipulated in the notice challenging the revocation order

⁸⁶ Section 45(4) of the Constitution.

⁸⁷ Section 53(1) of the Constitution. The certificate of citizenship remains the property of the Government of Swaziland and shall be delivered upon demand by or on behalf of the Board. See Section 54(2) of the Constitution.

⁸⁸ Section 54(3) of the Constitution.

⁸⁹ Established in terms section 53 of the Constitution.

⁹⁰ Otherwise than in the public service.

⁹¹ Section 49(1) of the Constitution.

and giving reasons in support of the challenge'.⁹² The Board does not issue a revocation order blindly. Section 49(4) of the Constitution provides that the Board 'shall investigate the case and where reasonably practicable hear the person or the legal representative of that person. In so depriving a person of Swaziland citizenship, the Board shall endeavour not to render the person stateless'.⁹³ Moreover, the loss of Swazi citizenship is not transferrable to the spouse or child.⁹⁴

According to section 10 of the Swaziland Citizenship Act, a person who is a citizen of Swaziland by registration or, in the case of a married woman, by declaration⁹⁵ may be deprived of his or her citizenship by order of the Minister if the Minister is satisfied of the following:- one, that that person has shown himself or herself by any overt act other than marriage to have acquired another citizenship;⁹⁶ or two, that that person has by any voluntary act other than marriage acquired another citizenship;⁹⁷ three, that that person has, on being so required by the Minister, failed to renounce his or her citizenship of any other country;⁹⁸ or four, that that person has been resident outside Swaziland⁹⁹ for a continuous period of seven years and during that period has failed without reasonable excuse to register with the Minister at such times and in such a manner as may be prescribed a declaration of his or her intention to retain citizenship of Swaziland.¹⁰⁰

4.3.2 Renunciation of Citizenship

Section 50 of the Constitution allows individuals who seek citizenship of another country to renounce their citizenship of Swaziland.¹⁰¹ The constitutional provision extends to citizens of Swaziland who have reached adulthood, or women who are married or planning marriage. The plea is made by virtue of submitting a declaration on the renunciation of citizenship with the Board, if the individual is already a citizen of another country. If the person is not yet a citizen of another country, he or she needs to submit the declaration that - upon becoming citizen of the country concerned – he or she will no longer be a citizen of Swaziland.

According to section 11 of the Swaziland Citizenship Act '[i]f a citizen of Swaziland who has attained the age of majority or, being a woman, is or has been married, is about to become a citizen of another country and for that reason desires to renounce his or her citizenship of Swaziland, he or she may do so by lodging with the Minister a declaration of renunciation of such citizenship, and upon lodgement of the certificate or, if not then a citizen of that other country, upon such, he or she shall cease to be a citizen of Swaziland.'¹⁰²

⁹² Section 49(3) of the Constitution.

⁹³ Section 49(5) of the Constitution.

⁹⁴ Section 52(2) of the Constitution.

⁹⁵ Section 11 of the Swaziland Citizenship Act.

⁹⁶ Section 10(1)(b) of the Swaziland Citizenship Act.

⁹⁷ Section 10(1)(c) of the Swaziland Citizenship Act.

⁹⁸ Section 10(1)(d) of the Swaziland Citizenship Act.

⁹⁹ Otherwise than in the public service.

¹⁰⁰ Section 10(1)(f) of the Swaziland Citizenship Act.

¹⁰¹ Section 50 of the Constitution.

¹⁰² Under section 8 of the Swaziland Citizenship Act.

Even when an individual obtains release from the citizenship of Swaziland, his or her duties, obligations and liability related to Swaziland citizenship before cessation remain in place.¹⁰³

4.4 The Citizenship Board

As already observed above, the Citizenship Board plays a critical role generally in the acquisition and loss of citizenship in the Kingdom of Eswatini. This Board meets regularly and transmits its decisions to the Minister of Home Affairs for implementation. Section 53(1) of the Swaziland Constitution provides that the Board shall have exclusive authority to undertake the following:

1. grant or cancel citizenship by registration;¹⁰⁴
2. investigate and where appropriate revoke the citizenship of any person under section 49 (of the Constitution);¹⁰⁵
3. advise the Minister responsible for citizenship on any other aspects relating to citizenship;¹⁰⁶
4. do such things as are incidental or related to the exercise of its powers.¹⁰⁷

Section 53(2) of the Constitution states that the Board will be composed of a Chairman and at most seven other members. All of the Board's members will be appointed by the King on the advice of the relevant Minister.¹⁰⁸ Of interest is the fact that, in the composition of the Board, at least one of the members will need to have a qualification equivalent to the one required for becoming a Judge of the High Court.¹⁰⁹ The tenure of office for the Board is a period not exceeding five years and both the Chairman and the members are only eligible for a single appointment.¹¹⁰ All matters submitted before the Citizenship Board for consideration must be concluded within six months.¹¹¹

5. Current and possible future debates

The Kingdom of Eswatini is in the process of reviewing its citizenship law.¹¹² The official draft Citizenship Bill is not yet public. Any debate on the contents of Citizenship Bill would be premature at this stage. After all, Swaziland stated that consultation on Citizenship Act were ongoing.¹¹³ Be that as it may, the Kingdom of Eswatini made a number of important pledges

¹⁰³ Section 51 of the Constitution.

¹⁰⁴ Section 53(1)(a) of the Constitution.

¹⁰⁵ Section 53(1)(b) of the Constitution.

¹⁰⁶ Section 53(1)(c) of the Constitution.

¹⁰⁷ Section 53(1)(d) of the Constitution.

¹⁰⁸ Five of these members shall constitute a quorum and the Chief Immigration officer shall be *ex officio* member.

¹⁰⁹ Section 53(3) of the Constitution.

¹¹⁰ Section 53(4) of the Constitution.

¹¹¹ Section 53(7) of the Constitution.

¹¹² Committee on the Elimination of Discrimination against Women, state report of Swaziland (n 51 above) 52.

¹¹³ Committee on the Elimination of Discrimination against Women, List of Issues and Questions in relation to the combined initial and second periodic reports of Swaziland. Addendum: Replies of Swaziland. CEDAW/C/SWZ/Q/1-2/Add.1. 20 May 2014.

which inform reform to its citizenship law.¹¹⁴ First, the country committed to reduce statelessness by means of adding a provision in the national law by 2024 to grant nationality to all children born in Swaziland who would otherwise be stateless, and to children born to parents of unknown origin. Second, a commitment was made to initiate national consultations on gender equality in nationality legislation and start reforms that would ensure citizens' equal ability to transfer nationality to spouses and children by end of 2024. Third, the Kingdom committed to establish by 2022 a procedure, fully aligned with the 1954 Convention, for determining the status of stateless migrants. Lastly, Swaziland committed that by the end of 2021 it will conduct and publish a study that will help to 'better understand the situation of groups and individuals who are stateless or at risk of statelessness in the territory with a view to finding a solution to their situation'.¹¹⁵

5.1 The automatic passing of citizenship to non-Swazi husbands

The automatic passing of citizenship to non-Swazi husbands does not seem to be likely in the near future, yet it is a subject of contemporary debate. Though it was argued that this issue will be addressed in the forthcoming Citizenship Bill (if at all), the pointers indicate that it is in fact a non-starter. According to the state report to CEDAW, from the views expressed by Chiefs who were consulted as part of compiling its report, 'citizenship is an issue of extreme importance to Swazis in terms of defining identity and belonging, the allegiance of all things Swazi and the continuation and eternity of the Swazi nation.'¹¹⁶ It was underscored by the Chiefs that 'Swazis guard citizenship jealously and cannot risk its abuse because this will ultimately weaken the nation therefore as men are charged with continuing lineage and women join marital families – whether Swazis or non-Swazis, it would be inappropriate for women to automatically pass on their citizenship.'¹¹⁷

5.2 Dual citizenship

According to Eswatini law, dual citizenship is not explicitly permitted. In 2009, the former Home Affairs Minister, Chief Mgwagwa Gamedze, announced in parliament that it was illegal for Swazi citizens to hold dual citizenship and declared that anyone who has dual citizenship will be liable for arrest.¹¹⁸ Of interest is the fact that the government of the Kingdom of Eswatini has thus far been unsuccessful in carrying out those arrests. In fact, arresting an individual in this case is not appropriate as it is not stated to be a criminal offence. Instead, the deprivation of citizenship would be most appropriate in the given circumstances. This can only be applicable to persons who are not citizens (of Eswatini) by birth. Explaining the difficulty in

¹¹⁴ Results of the High-Level Segment on Statelessness: Pledges by African States <http://citizenshiprightsafrika.org/wp-content/uploads/2019/12/UNHCR-High-Level-Segment-on-Statelessness-Oct-2019-Pledges-by-African-States-and-organisations.pdf> (accessed 10 February 2021).

¹¹⁵ Results of the High-Level Segment on Statelessness: Pledges by African States <http://citizenshiprightsafrika.org/wp-content/uploads/2019/12/UNHCR-High-Level-Segment-on-Statelessness-Oct-2019-Pledges-by-African-States-and-organisations.pdf> (accessed 10 February 2021).

¹¹⁶ Committee on the Elimination of Discrimination against Women report (n 51) 52.

¹¹⁷ Committee on the Elimination of Discrimination against Women report (n 51) 52.

¹¹⁸ Arthur Mordaunt, 'Swazis with dual citizenship face arrest', Times of Swaziland 7 July 2009. Available at <http://www.times.co.sz/news/7664-swazis-with-dual-citizenship-face-arrest.html> (accessed 26 December 2020).

dealing with the issue of dual citizenship, the Minister stated that those who acquired dual citizenship always relied on a legal technicality whenever the state attempted to bring them to book. These were predominantly South African citizens, whose status allowed them to acquire any other citizenship including being Swazi citizens.¹¹⁹ It was also impossible for the country to engage with the Republic of South Africa on this issue because the country was a sovereign state and Eswatini could not interfere.¹²⁰ To date, the country has not entered into an agreement with any country regarding dual citizenship, including South Africa, with which it has the majority of Swazi citizens possessing dual citizenship.

6. Conclusion

The trajectory of the Kingdom of Eswatini's citizenship law post-independence arguably exemplifies the blending of the institutions of traditional law and custom with those of an open and democratic society. The defining moments of the abrogation of the Independence Constitution in 1973 and the consequent laws that were enacted thereafter illustrated the point that the Kingdom of Eswatini was adamant to approach the citizenship issue in its own terms and in line with its beliefs, which were firmly ensconced in Swazi Law and custom.

The political landscape which was introduced in 1973, through the King's Proclamation to the Nation of 1973 remains and has also been endorsed through Swaziland Constitution of 2005. As already mentioned that the King retains executive, legislative and arguably judicial powers, he continues to also play a pivotal role in citizenship related matters. The fact that the King is responsible for appointing the Citizenship Board (on the advice of the Minister), illustrates the point that he remains in control of what obtains in terms of decisions made by the Board. After all, the Board would only be accountable to the appointing authority. Further, the Minister in charge of the Ministry of Home Affairs, which is responsible for citizenship matters, is also appointed by the King.

Some of the criticisms levelled against the current citizenship law, both within Eswatini and Internationally border on the enjoyment of human rights and fundamental freedoms, which the Constitution seeks to guarantee. The contradiction in terms, which is observed within the Constitution where human rights are guaranteed but also taken away when it comes to the citizenship regime, remains a cause for concern. The right to equality before the law is one such right, which could be tested in court in relation to the notion that only the father can transmit citizenship to children born after the Constitution's promulgation (as opposed to mothers). The other issue is in relation to the absence of automatic passing of citizenship to non-Swazi husbands (my married Swazi wives). The issue of dual citizenship, is another cause for concern, particularly because other countries permit it. The technicality, this cannot be addressed through arresting dual citizenship holders. Afterall, there are persons who can automatically have dual citizenship at birth as a result of the Swazi law and another country's law. As the Swazi law remains silent on same-sex marriages (viewed as a taboo in Eswatini), it will also be interesting to see if this will be another consideration, particularly in acquiring citizenship through marriage. On whether these issues will be considered in the future, it only remains to be seen.

¹¹⁹ Mordaunt (n 118 above)

¹²⁰ Mordaunt (n 118 above)

