

Absolute conjugal rights blurring the concept of violence within wedlock: A comparative study of South Africa and Swaziland

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Conjugal Rights and How they are Perceived

Senator Jeremiah Denton, a Republican from the United States once said, “Damn it, when you get married, you kind of expect you’re going to get a little sex.” The statement sheds light on the fact that most people these days presume that within wedlock, any sort of sexual relations are permitted; and are deemed to be a natural obligation arising out of cohabitation. This causal connection could be attributed to the fact that, there has been a strong correlation between the idea of sacrament² (associated to customs) and the wedlock marriages are treated to be binding, and holy institutions. Within this legally recognised and sacred union, the natural obligation is to procreate which is socially and morally acceptable. This highlights the element of sex as something justified. This justification leads to major complications as, when people are seemingly trapped in such institutions; they often are subject to offences that are debilitating to their mental and physical well-being all within the legal sanction of “the right which the husband and wife have to each other’s society.”

South Africa and Swaziland are two countries that are in the continent of Africa. South Africa ranks 119 in the Human Development Report by the UN; while the latter has a ranking of 148 out of 187 countries³. This apart, South Africa has a Gender Inequality Index of 0.394, while Swaziland’s is 0.566, clearly a distinguished figure. The study measures the overall disadvantaged disposition of women in society and Swaziland is certainly in a much lower position as compared to South Africa. The study is also reflective of the overall stances taken by countries, keeping in mind the psycho-social well being of women at large. Thus is also reflective of the legal systems in place.

Nature of marriage in Swaziland and South Africa

The ‘family’ is the most fundamental unit in any society. The way it is interpreted, and its structure is something that changes across the nature of the society it belongs to. South Africa

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²*Religion and Sexual Ethics*, ACME.COM, (April 10, 2018), https://acme.com/jef/religion_sex/.

³*Human Development Reports*, HUMAN DEVELOPMENT DATA (April 10, 2018)<http://hdr.undp.org/en/data>.

is a Constitutional Democracy⁴ that places importance on fundamental freedoms, free speech and individual choice. It is a middle-developing country and is a potential super power that can change the polarity of the world-systems. On the contrary, Swaziland is Africa's last monarchy and the governance is based on the Tinkhundla system a Monarchical Democracy.⁵ Only in 2005 did Swaziland enact its Constitution; despite which there are numerous impediments to fundamental freedoms. The King in Swaziland is the one with all the vested powers, legal and cultural. Thus he has the sole power to decide the nature of the society.

In Swaziland, the High Court usually applies the principles of CEDAW with regard to issues dealing with violence against women. There is no satisfactory codification or legislation that seeks to reform marital power. Case laws offer no breakthrough, as the case of *Sihlongonyane v. Sihlongonyane*⁶ allows women to sue and be sued; and *Aphane v. Registrar of Deeds*⁷ allows joint property ownership. Yet, there are existing legislations that "perpetuate inequality" one of the main ones being the Marriage Act 1964.

The Swaziland Marriage Act is essentially a mix of customary laws and the common law it seeks to harmonise the two, but the two do not have much of a common ground. Professor RS Bhalla says: "the integration (of) the Act has created confusion and complexities in the institution of marriage, rather than improvements."⁸ Aside from the fact that customs allow polygamy, while the act claims to advocate monogamy; there are blurry boundaries between the matrimonial reliefs. For instance, cases of judicial separation apply only to the Act, not to customary law. Even if a wife obtains a decree of separation, her husband "can still go and pester [her] since his customary marriage is not affected by the decree."⁹ There is thus a complete lack of respect to the desires of the parties.

While in South Africa, there has been a shift to promoting gender equality. In the case of *Cary v. Cary*,¹⁰ the Court held that the husband would be liable to pay for court proceedings, as the pertinent issue was to ensure that the wife could present her case to the court, and

⁴*Structure and functions of the South African Government*, STRUCTURE AND FUNCTIONS OF THE SOUTH AFRICAN GOVERNMENT (APRIL 10, 2018), <https://www.gov.za/node/537988>.

⁵Joint Civil Society Report, *Swaziland*, 120TH SESSION OF THE HUMAN RIGHTS COMMITTEE (2017) (APRIL 10, 2018), [http://tbinternet.ohchr.org/Treaties/CCPR/Shared Documents/SWZ/INT_CCPR_CSS_SWZ_27649_E.pdf](http://tbinternet.ohchr.org/Treaties/CCPR/Shared/Documents/SWZ/INT_CCPR_CSS_SWZ_27649_E.pdf).

⁶SZHC 144 (2013).

⁷SZSC 32 (2010).

⁸R. S. Bhalla, *Some Reflections on the Swaziland Marriage Act 1964*, 111 S. African L.J. 542, 551 (1994).

⁹*Ibid.*

¹⁰1999 (3) SA 615 (C).

further receive judicial protection. There is also no distinction between civil and customary marriages.

Overall, the nature of marital ties seems grimmer in Swaziland vis-a-vis, South Africa. Women are practically treated as chattel in the former; and their rights are largely curtailed. This is largely because of the prevailing land and property laws. These women depend on men for ownership of land; and they also are in a destitute state, where they are degraded to the state of belonging to men. As a result, sexual favours are demanded from them, and they are at a higher risk of contracting sexually transmitted diseases. In fact, Swaziland has one of the largest HIV infected population in the world and women are inflicted at a higher percentage than men. This owes to the fact that the women are compelled to sleep with men who usually have already contracted these diseases if they deny, they are usually subject to even more violence, which makes it a vicious cycle.

South Africa has more forward legislations, and is one of the few countries in the world that recognised irretrievable breakdown of marriage as a ground for obtaining a divorce. They also allow for several grounds under their ‘no-fault divorce’ provisions these “eliminate the potentially embarrassing and unrealistic requirement of guilt”¹¹ especially pertaining to when the marriage is not viable to one of the parties. This is directly in contrast to Swaziland, where King Mswati III has altogether banned divorces under customary. He relied heavily on customs where one could not ‘turn back’ after marriage. This is indicative of the status of society and the lack of importance given to individual choices. Individual choice is something that is supposed to be one of the key highlights in the 21st century, as it is marked by liberty and individual freedoms. This makes it incomprehensible to think of a country where not only seriously places shackles on these notions, but also has a system in place that is outrightly oppressive to their existence. Forcing someone to live with another, solely on the grounds that it historically took place, is an argument that does not carry a lot of weight. It is problematic, as custom is made rigid and unrelenting in light of codification which possibly creates consequences that were not always accounted for.

Absolute Conjugal Rights and Gendered Violence

South Africa has completely prohibited orders for Restitution of Conjugal Rights. According to the South African Divorce Act, Sections 14 and 15 no court is allowed to pass an order for Restitution of Conjugal Rights. The rationale behind is that the country sought to avoid

¹¹Tamar Ezer et al., *Divorce Reform: Rights Protection in the New Swaziland*, 8 GEORGETOWN JOURNAL OF GENDER AND THE LAW 883, 883 (2007).

instances where the woman's physical integrity would be at stake.¹² It took into account the fact that compelling a woman to be a part of a relationship would be a threat to her life; and also would vitiate the idea of consent. Thus the prohibition in South Africa is unambiguous and absolute. Even with respect to divorce decrees, the benefit of the wife is always given primacy. In the case of *MMM v. JCM*,¹³ the Namibia High Court quashed the petition for Restitution of Conjugal Rights, in light to adultery performed by the same even though he said that he did it after he was deserted. The judgement was in favour of his wife and she was under no obligation to cohabit with him, and was granted a divorce.

On the contrary, Swaziland is one such country where divorce itself is prohibited by King Mswati III's decree. So the system essentially keeps a woman bound to a relationship that is fundamentally a threat to her being. In order to obtain a divorce, a woman must first get an order for Restitution of Conjugal Rights after which her husband may decide to change his mind, and forcefully cohabit with the woman. In 2006, Cyril Magongo from Swaziland gave a vivid account of how his father would abuse his step mother; and how she had no choice and could not leave the wedlock as she would be pursued every time.

"My father punched my stepmother in the face three times. She fell into a wall and cut her face He kicked her in the head after she fell I took her to the hospital. She now has a metal plate in her head She was in the hospital for 3 months She is still married to him."¹⁴

In the same study, a research was conducted that interviewed people in Swaziland as to why they would want a divorce. The most prevalent answer was due to the fact that they were victims of abuse or violence. So, by delegitimizing divorce, and compelling parties to return and share a household only furthers this threat. This is also in direct contract to the newly enacted constitution in Swaziland itself where under Article 38; there would be no derogation of the freedom of parties that would compel them to undergo "torture, cruel, inhuman or degrading treatment or punishment." The fact that forcefully ensuring that parties cohabit is a breach of the same.

Still, there are numerous countries that practice Restitution of Conjugal Rights it is a way to ensure that the sacred nature of marriage is retained. It thus permits the State to govern marital relationships and impose restrictions that certainly are not reasonable. Especially in light of violence leading to fractured relationships. Undoubtedly, one might argue that it is a

¹²*Ibid.*

¹³(I 2808/2011) [2013] NALCMD 275.

¹⁴*Ibid.*

Western and Imperial stand-point to impose ideals of ‘liberty, equality and natural justice’ in settings that rely so heavily on customary laws. However, if a country is clearly disadvantaging a certain section of society to the point where they are victimised, and are abused largely, there ought to be regulating norms that draw a line.

Even before Restitution of Conjugal Rights was abolished by the Divorce Act in South Africa; in 1957, they had the ‘Sexual Offences Act’ in place. This Act sought to keep women who were in a vulnerable position, protected. It mainly targeted the issues of brothels and rape. Thus brought in the protection associated to official law in regions of unofficial or undesired behaviour.¹⁵ It was a protectionist stance, but with time, the act has only been amended and expanded. It now is one of the few developing countries in the world to even recognise Marital Rape. Section 56 of the ‘Criminal Law (Sexual Offences and Related Matters) Amendment Act’ explicitly states that a subsisting marital tie is not a valid defence for committing rape.

On the contrary, Swaziland is one such country that has no formal codification (apart from the CEDAW regulations applied in cases of violence against women) that deals with protecting victims of gender-based violence. They do have the ‘Sexual Offences and Domestic Violence Bill of 2015’ but it is yet to be enacted. Marital rape is not even addressed, as the law presumes that consent by a woman is natural consequence after a marriage takes place.

One study looked at forced sex victimisation in Southern Africa. The findings showed that Swaziland was one country that showed a high rate of sexual violence, even in wedlocks¹⁶. The study proposed that there needs to be a radical change in the legal system, so as to end gender discrimination in the legal codes itself. It would be important to note that there do exist a correlation between the systematic discrimination propagated by the legal codes, or the lack thereof, and the element of violence in the social (primarily marital) sphere.

The case of *Zama v. Zama*¹⁷ in the High Court of Swaziland illustrates how the principles regarding marital rights and divorce proceedings continue to be archaic, and pave way for violence. In the case, Judge Rooney observed how, to obtain a divorce, it is necessary for the petitioner to first file for Restitution of Conjugal Rights only after can the aggrieved party files for divorce if the same fails. The law does not just coerce individuals to live together; it

¹⁵*Ibid*, 19.

¹⁶Alexander C. Tsai et al., *Prevalence and Correlates of Forced Sex Perpetration and Victimization in Botswana and Swaziland*, 101 AMERICAN JOURNAL OF PUBLIC HEALTH 1068, 1068–1074 (2011).

¹⁷[1989] SZHC 49.

does not allow them to separate their lives. The defendant in the case (the husband), was in jail for harming his wife with a screwdriver. Yet, the plaintiff had to “first seek his return before she [could] be rid of him.”¹⁸ A precedent of this nature inextricably links the life and existence of the woman to her husband; she is not given an individual status. Her voice is subsumed in the public sphere because of the oppressive patriarchal social structures, and the same legal codes penetrate into her private sphere, fettering her.

It may be argued that sometimes the Restitution of Conjugal Rights are a necessity especially in light of economic disadvantages a woman may face in case she is deserted by her husband. She may need financial support, if not emotional, from her spouse; and if he neglects or abandons her, she would be in a peril. But, it comes to the point where it needs to be decided how far the State is going to intervene in the private sphere. The cons certainly outweigh the benefits, and it is potentially life-threatening for a woman to be coerced to submit to domestic violence as one restores conjugal relations. Considering Restitution of Conjugal Rights stems from Ecclesiastic laws, it comes across as archaic and intrusive in the 21st Century that mandates individualism.

Ensuring Gender Parity through Reforming Official Laws

Living in an era that is more patriarchal than egalitarian, it is important to look at the extent to which any regime penetrates into an individual’s life. As aforementioned, the idea of Restitution of Conjugal Rights does come with its benefits and perhaps, at one point, sought to provide a sense of security to those in marital relationships. But, in the current context, it fails to look at the flaws of human nature which itself corrupts the essence of the act. The once protectionist law, is now the reason as to why numerous cases of marital rape, domestic abuse, and assault takes place behind closed doors where a party may not wish to reside.

If the laws of the land are themselves problematic, there can be no scope for improvement in society unless they are changed. Swaziland continues to be a country that has a vast gender disparity where women are blatantly abused and treated as far inferior, compared to men. This stems from the traditional customs and the way they are practiced. Since 2005, there has been a report that indicates that there has been a serious curtailment of rights; and that the State essentially propagates a single religion Christianity.¹⁹ On the contrary, South Africa is one such country that has made a dramatic shift in the turn of the century. It was the fifth country in the world to legalize same-sex marriage, and was considered to be a pioneer

¹⁸*Ibid*, 27.

¹⁹*Ibid*, 7.

among the newly developing nations. This is indicative of the liberal and progressive standpoint taken up by the country.

Not only are Swaziland and South Africa starkly different because of the explicit repeal of Restitution of Conjugal Rights by the latter; but the overall importance given to equality, health, and integrity of persons living in the country (South Africa). There are several other codifications that serve this purpose, and that help achieve a level playing field. South Africa does not have police-State, where parties are forced to cohabit. Rather, it looks into retaining a woman's physical integrity by addressing the unofficial zones that emerge as a result of official actions like explicitly discriminatory codes that serve to the patriarchal advantage.

So in a time period, where on one end of the globe, there are different waves of feminism; and on the other end, there are women who are denied basic human rights that are supposed to be common to all the sexes. Many feminist authors often write about how a city/state is reflective of unequal gendered ties. This can be interpreted with rising patriarchy and how gendered separation is becoming more apparent in urban areas too. Thus Swaziland, being under an absolute Monarchy, is only relatively worse off in comparison to South Africa. Undoubtedly, steps are being taken to prevent such the large gap of inequality among the sexes; but it is utopian to assume that this 'gap' doesn't exist at all.

If society is structured in such a way that is manifestly to the disadvantage of a woman, it leaves a large scope for there to be a positive correlation of violence, and atrocities committed against her. Restitution of Conjugal Rights as a mandatory process in the legal sphere is an exhibition of the excessive control a State may take up in regulating personal relations. Though the spirit may be to ensure that a spouse is not left deserted, if one is made to forcefully cohabit it makes the matrimonial home just another organ synchronized by the paternal state. Where, it may even go to the extent of putting one's life in danger, and harming them in cases where it is forced.