

W A G E



LEGAL AID NEEDS IN ESWATINI 2022

About WAGE

Women and Girls Empowered (WAGE) is a global consortium to advance the status of women and girls, led by the American Bar Association Rule of Law Initiative (ABA ROLI) in close partnership with the Center for International Private Enterprise (CIPE), Grameen Foundation, and Search for Common Ground (Search). WAGE works to strengthen the capacity of civil society organizations and private sector organizations in target countries to improve the prevention of and response to gender-based violence; advance the women, peace, and security agenda; and support women's economic empowerment. In this context, WAGE provides direct assistance to women and girls, including information, resources, and services they need to succeed as active and equal participants in the global economy and public life. WAGE also engages in collaborative research and learning to build a body of evidence of relevant promising practices in these thematic areas. To account for the deeply interconnected nature of women's and girls' experiences, WAGE's initiatives employ approaches that are highly collaborative, integrated, and inclusive. WAGE is funded by the U.S. Department of State Secretary's Office of Global Women's Issues (S/GWI).

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About the ABA Rule of Law Initiative

The mission of the American Bar Association's Rule of Law Initiative (ABA ROLI) is to promote justice, economic opportunity and human dignity through the rule of law. For more than 25 years, through our work in more than 100 countries, ABA ROLI and our partners have sought to strengthen legal institutions, to support legal professionals, to foster respect for human rights, and to advance public understanding of the law and of citizen rights.

In collaboration with in-country partners—including government ministries, judges, lawyers, bar associations, law schools, court administrators, legislatures, and civil society organizations—ABA ROLI designs programs that are responsive to local needs and that prioritize sustainable solutions to pressing rule of law challenges.



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Acronyms

ABA	American Bar Association
ABA ROLI	American Bar Association's Rule of Law Initiative
CSOs	Civil Society Organisations
GBV	Gender-Based Violence
KII	Key Informant Interview
LPA	Legal Practitioners Act
MEL	Monitoring, Evaluation, and Learning
NGO	Non-Governmental Organisation
QA	Qualitative Assessment Strategic Information
SODV Act	Sexual Offences and Domestic Violence Act (2018)
SWAGAA	Swaziland Action Group Against Abuse
UNDP	United Nations Development Programme
UNESWA	University of Eswatini
WAGE	Women and Girls Empowered

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We trust that this report will add value to the work of the Ministry of Justice and Constitutional Affairs, legislators, as well as other relevant decision and justice stakeholders in fulfilling Eswatini’s commitment to access to justice for all *emaSwati*.

Preface

This report presents the findings of a nationally representative assessment on the need for legal aid in Eswatini, conducted between March and May 2022. The survey was commissioned by the American Bar Association Rule of Law Initiative (ABA ROLI), working in partnership with the Ministry of Justice and Constitutional Affairs as part of ABA ROLI’s Women and Girls Empowered (WAGE) program in the country.

The WAGE “*Integrating the Response to GBV, HIV and Economic Marginalization of Swati Women*” program focuses on addressing gender-based violence (GBV) where it intersects with women’s economic empowerment and economic strengthening initiatives. The program comprises three components: access to justice, prevention, and protection, with a focus on holistic service provision and referrals.

The legal needs assessment was undertaken in pursuit of the first component—access to justice—whose activities have included working with the Ministry and other stakeholders towards better laws to address gender-based discrimination and violence. Following wide consultation with a cross-section of justice and GBV stakeholders, ABA ROLI and partners have been advocating for legislation enabling the provision of legal aid, in particular the amendment of the Legal Practitioners Act of 1964 to enable admitted

attorneys working outside of private law firms to represent clients who would otherwise fail to defend their legal rights. In addition to enhancing the ability of *emaSwati* to protect and defend their rights by increasing access to legal representation, legal aid is especially critical for GBV survivors, as many find recourse through the justice delivery system inaccessible, due to the cost of representation by private legal practitioners.

The assessment’s findings capture the perceptions of these women and men who remain outside current justice service provision in Eswatini. This assessment—the first of its kind in the country—ascertains the awareness and attitudes of ordinary *emaSwati* about the law and their ability to access legal support. The data—scientifically collected and analysed—presents an illuminating snapshot of perceptions toward access to justice, legal problems experienced by *emaSwati*, the range of dispute resolution mechanisms *emaSwati* use, as well as the demand for legal aid.

The findings also confirm anecdotal evidence from various government and non-governmental agencies on the overwhelming need for legal aid. As such, it will inform policy, legislative and sectoral programming by a variety of justice stakeholders that will benefit ordinary *emaSwati*. It will be necessary, however, to regularly repeat the assessment in the years to come in order to track shifts in perceptions and experience of access to

justice over the course of the evolution of the legal aid environment in Eswatini. This will contribute to ensuring that the reach and effectiveness of the justice system is improved on a continuous basis.

In presenting the 2022 Budget Speech, the Minister of Finance stated, “The Government is in the process of establishing a Legal Aid System which will ensure equal access to justice for all, especially the poor and the vulnerable groups consisting of children, women and people living with disabilities. Legal aid allows free legal representation for vulnerable persons in the country. The Government will soon be finalising the amendment of the Legal Practitioners Act and the Legal Aid Bill and will solicit assistance from the country’s development partners to help develop this system. Parliament is requested to facilitate the passing of these bills once they are tabled.” Government’s public commitment is encouraging, but it must now be followed up with urgent action to establish the relevant legal and institutional framework. There is not a moment to waste in making legal aid a reality—it is long overdue, and the longer it is delayed, the more *emaSwati* are denied justice.



Susan Marx
Project Director, ABA ROLI Eswatini

Executive summary

Eswatini lacks nearly all standard mechanisms for legal aid. The government does not fund legal aid, and attorneys on staff at NGOs are not permitted to appear in court (only private, for-profit practitioners may do so). Restrictions on advertising prevent attorneys from reaching out to underserved populations about legal assistance and restrictions on touting forbid attorneys from alerting possible litigants to the merit of potential claims. A pro bono culture has not developed among Eswatini's private bar and Eswatini does not have a pro bono requirement. Market-based interventions, such as contingency fees, are also considered forbidden.

The demand among *emaSwati* assessed for legal aid, however, is high. Fifty-eight percent of *emaSwati* surveyed stated that in the last two years they would have benefitted from some form of legal assistance (about half of those specifically singled out *legal representation* as the type of assistance they would have benefitted from). The need for legal aid cuts across all demographics: gender, age, region, the urban-rural divide, education level, employment status, household income, and housing situation.

Yet legal assistance remains out of reach for most. Sixty-nine percent of *emaSwati* “agreed” or “strongly agreed” that the legal system is too expensive to access. Eighty-nine percent of *emaSwati* stated that if legal

representation were free, they would use the legal system to resolve disputes. Implementing legal aid is overwhelmingly popular. Ninety-four percent of *emaSwati* stated that it was either “very important” (84%) or “important” (10%) to do so. Even though the formal justice system is one of the least utilized dispute resolution mechanisms in Eswatini, it is where *emaSwati* want to go. And the reasons are clear: *emaSwati* want legal aid to ensure equal treatment and fairness.

The solutions are not only achievable, but clear. Amend the Legal Practitioners Act (LPA) to permit admitted attorneys who work for NGOs to appear in court. Allow all legal practitioners—including legal aid providers—to reach prospective clients by advertising. And codify that attorneys are not limited to hourly fee agreements, but may use market-based approaches to increase access to justice (e.g., flat fees, contingency fees, or no fee at all).

The Government of Eswatini can also make a commitment to finalize the Legal Aid Bill—originally drafted and consulted on in 2013. The Bill would allow for a government-funded legal aid scheme to complement the donor-funded and market-based approaches above.

The Government of Eswatini and the Law Society could consider additional changes to legal practice, as well, such as expanding opportunities for serving articles of clerkship; creating limited rights of practice for final-year law students in the University's law clinic;

implementing a *pro bono* hours requirement; and, ending the limitation that only lawyers in private practice may lead the Law Society.

A few small amendments to the LPA—already drafted, consulted on, and approved by the major stakeholders in Eswatini’s justice sector—can unlock legal aid. The Legal Aid Bill can add an additional, government-funded mechanism to increase the availability of legal aid services. There is an overwhelming need for legal aid, and incredible support for building a justice sector that serves all *emaSwati*.





“The assurance that the case will get to court and justice be served affords one the confidence to speak up and seek help.”

- Focus group discussion participant, Shiselweni.

Introduction and

background: Eswatini's legal aid landscape

1

Eswatini is one of the only countries in the world without legal aid. Although Eswatini maintains a dual legal system comprised of common law courts (Industrial, Magistrate, High, and Supreme) and courts of limited jurisdiction that apply customary law (the Eswatini National Courts), this assessment and report focuses on legal representation in the common law courts, where lawyers may appear,¹ and legal aid is almost non-existent.

The Government of Eswatini has indicated its support for increasing access-to-justice, setting a deadline of 2023 for the Ministry of Justice and Constitutional Affairs to ensure the availability of legal assistance for the indigent.² Eswatini's Constitution, enacted in 2005, contains a robust chapter on the *Protection and Promotion of Fundamental Rights and Freedoms*³ that includes strong statements about the rule of law and the right to a fair trial. Eswatini has also achieved

several recent legislative accomplishments on issues of socioeconomic, cultural, and rights-based concern, most notably the *Children's Protection and Welfare Act* (2012) and the *Sexual Offences and Domestic Violence Act* (2018). Absent legal aid providers to defend, assert, enforce, and litigate, however, these laws have failed to reach their full potential.

At present, Eswatini lacks a government-funded legal aid scheme. Although criminal defendants have a Constitutionally guaranteed right to a legal representative of their choosing,⁴ the government will pay for an attorney only in those extremely rare instances where a defendant faces life imprisonment or death.⁵ In civil cases, the right to choose and pay for one's legal representative is widely regarded as secure and this report's authors are unaware of an instance in which a civil litigant in Eswatini's common law courts has been denied the right to do so.

In 2013, the United Nations Development

Eswatini National Courts apply unwritten Swazi Law and Custom and are presided over by Court Presidents, who are non-lawyers. Lawyers are not permitted to represent litigants in Eswatini National Courts (*see* Const. of the Kingdom of Eswatini at §21(13(b))). Nevertheless, the Constitution makes clear that Eswatini National Courts may “not apply . . . any custom . . . inconsistent with a provision of this Constitution or a statute, or repugnant to natural justice or morality or general principles of humanity.” (Const. of Kingdom of Eswatini at §252(3)). Absent participants trained in the law, however, it is unclear how this check on the legality of Eswatini customary law is accomplished.

² See Priority 5, Eswatini's Action Plan Roadmap, 2019-2023.

³ Const. of the Kingdom of Eswatini, Ch. 3, §§14-39.

⁴ *Id* at §21(2)(e).

⁵ *Id* at §21(2)(c).

Programme (UNDP) partnered with Eswatini's judiciary to draft a Legal Aid Bill and Policy. The Bill, and its accompanying Legal Aid Policy, were validated by stakeholders in the first half of 2013, but, as of June 2022, neither has reached Parliament. The Legal Aid Policy was updated in June 2021 to allow for the incorporation of legislative and other changes since the Policy was first consulted. The Legal Aid Bill has also recently been reviewed and is undergoing preparations for further consultations with stakeholders.

The absence of a government-funded legal aid scheme is only part of the challenge, however. Eswatini lacks a *pro bono* requirement for attorneys, and, at present, there is not a significant legal culture of *pro bono* service. Rather, many legal practitioners view charging less, or nothing at all, as undercutting one's fellow practitioners.

The Legal Practitioners Act (1964) (LPA), which governs Eswatini's legal profession, is silent on legal aid. Instead, the LPA speaks almost exclusively to attorneys in private practice. The LPA has long been interpreted to restrict the right to appear in court to lawyers in private practice—solo practitioners or partners in law firms. Admitted attorneys in good standing who work for government, serve as in-house

counsel for private companies, or who are on staff at an NGO, forfeit their right to full-fledged practice by virtue of their employment (there is an exception for prosecutors and the Attorney General's office⁶).

Several NGOs, as well as Eswatini's Council of Churches, have admitted attorneys on staff. The University of Eswatini (UNESWA) also maintains a legal aid clinic, offering assistance to the needy alongside experiential learning opportunities for law students. But the admitted attorneys working for these entities are unable to represent their clients in court. If these attorneys return to private practice, they may return to court. Although the LPA does not state such a clear, unambiguous rule⁷—and Eswatini's Constitution guarantees that “a person shall not be discriminated against on the grounds of . . . economic standing”⁸—it remains generally accepted that private, for-profit attorneys are the *only* legal professionals who may represent clients in court.⁹

In step, Eswatini's Law Society limits fidelity fund certificates—documentation that a legal practitioner has made an annual payment into a general fund to compensate victims of attorney dishonesty, and which is a prerequisite to practice¹⁰—to attorneys in private practice. Further, only attorneys in

6 The Law Officers Act (1966) at § 3.

7 The LPA often refers to legal practitioners as those practicing on their “own account” or as a “partner” or in “partnership.”

8 Const. of the Kingdom of Eswatini at §20(2).

9 The Industrial Court, which handles labour and employment matters at the trial level, permits non-attorneys to represent litigants. See Industrial Relations Act (2000) at § 10.

10 The Legal Practitioner's Act at §43(10)(a) (emphasis added) (“A legal practitioner shall not practise or act as a legal practitioner *on his own account or in partnership* unless he is in possession of a Fidelity Fund certificate.”).

private practice may train candidate attorneys during the mandatory clerkship period:

“No attorney shall have or retain any clerk under articles unless the attorney is actually practicing the profession of attorney either *on his own account or as a partner in a firm of attorneys.*”¹¹

The Law Society's Bye-Laws (1992)

(Byelaws) extend this viewpoint, speaking to “firms” of attorneys, defined as “two or more attorney members practicing in partnership or a member practicing for his own account.”¹²

The Byelaws make clear that the Law Society is concerned with private practitioners, and restricts its leadership positions to such:

“No person shall be eligible for election as a member of the [Law Society's Executive] Council unless such person is a member who is practicing as an attorney or advocate in Swaziland *in private practice.*”¹³

Private attorneys dominate Eswatini's legal landscape—they are the only ones issued fidelity fund certificates to practice, permitted to represent clients in court, allowed to train future attorneys, and allowed to lead the Law Society itself (the entity charged with promoting and regulating the legal profession).¹⁴ This dominance has a

downstream effect, filling Eswatini's dockets with *private* matters, limiting the breadth of legal issues that judges are asked to decide and develop and become expert in.

Other barriers to legal aid exist, as well. The Law Society's Byelaws list as dishonorable misconduct “directly or indirectly inviting or advertising or touting for instructions for professional business or doing or permitting in the carrying on of his practice anything which may reasonably be regarded as likely to attract business unfairly.”¹⁵ The ban on advertising hinders all practitioners, but specifically impacts access-to-justice by preventing lawyers from disseminating information on the availability of legal assistance. The Byelaws' ban on touting prevents attorneys from contacting prospective clients who may have legitimate cases but are unaware of their rights in law. These provisions are out of step with modern practice, and it remains unanswered whether the ban on advertising and touting would survive a legal challenge premised on Eswatini's constitutional guarantee of free speech.¹⁶

Eswatini's justice sector also discourages market-based interventions to increase the availability of legal assistance. Although the

11 The Legal Practitioners Act at §16(1) (emphasis added); *see also Id.* at Schedule, Section 7 (identifying the length of service for articles of clerkship as either one, two, three, or four years).

12 The Law Society of Swaziland Bye-Laws (1992) at §2.

13 *Id.* at §7(2) (emphasis added).

14 The Legal Practitioners Act (1964) at § 36.

15 *Id.* at §15(2)(f).

16 *See* Constitution of the Kingdom of Eswatini at §24(2)(b) and (c).

Law Society’s Byelaws “allow all such fees . . . reasonable for the performance of the work concerned,”¹⁷ in July 2006, a five-member committee of the Law Society “met twice and came up with four categories [of fees] . . . according to the number of years in practice.”¹⁸ The four categories prescribe maximum hourly rates, although “attorneys in each of the above categories may apply to the [Law Society’s Executive] Council for leave to be elevated to the next category. . . depending on such factors as industry and ability.”¹⁹

It is unclear precisely what authority this 2006 report on fees holds. The Byelaws permit *any reasonable fee* for the work concerned, but the 2006 report speaks only of hourly rates, and ties maximum fees to years of practice, not the work involved. As with previous studies,²⁰ the Law Society produced this report in response to a request for guidance on attorneys’ fees. This report’s authors agree with the assessment reached by other justice-sector evaluators that “[i]n [Eswatini], lawyers are not allowed to enter into contingency arrangements and charge contingency fees, as such fees are regarded as unethical.”²¹ The authors are unaware of the Law Society’s committee report on fees being tested in court against either the Byelaws’ *any reasonable fee* standard or against the Constitution’s guarantee of equal protection in all spheres of economic life.²²

Viewed together, Eswatini has fashioned a justice sector devoid of legal aid, although in the first quarter of 2022, Eswatini made a legislative commitment to the creation of a “legal aid unit.”²³ Nevertheless, private attorneys are not required to provide *pro bono* services, and a culture of *pro bono* service has not meaningfully developed. Legal practitioners

Table 1: The Law Society’s committee report on fees (2006)

Title	Years of practice	Maximum hourly rate
Junior Junior Attorney	0-3 years	E400
Junior Attorney	3-6 years	E800
Junior Senior Attorney	6-10 years	E1,200
Senior Attorney	10+ years	E2,000

17 Law Society Bye-Laws at §16(3); *see also Id.* at §15(2)(m) (“reasonable fee”).

18 *Report by the committee established to create a demarcation between junior and senior attorneys and how each category is to charge a fee* (12 July 2006) (made available by the Law Society of Eswatini).

19 *Id.*

20 *See* Maxine Langwenya, *Justice Sector and the Rule of Law* (March 2013) at 108.

21 Maxine Langwenya, *Justice Sector and the Rule of Law* (March 2013) at 148.

22 Constitution of the Kingdom of Eswatini at §20(1).

23 Hon. Neal Rijkenberg, Minister of Finance, 2022/2023 Budget Speech to Parliament (18 February 2022).



...Eswatini has fashioned a justice sector devoid of legal aid

hoping to provide legal aid face an untenable choice: work for an NGO and lose the right to appear in court, or provide legal aid from a for-profit, private law practice, disqualifying oneself from nearly all donor funds.

The restrictions on who can appear in court hinders the training of future lawyers, as well. There are no provisions for the right of limited, supervised appearances for law students, and the admitted attorneys on faculty at UNESWA's law clinic are unable to take the clinic's cases to court without a private practitioner in tow. Recent graduates serving articles may only satisfy the LPA's clerkship requirements if their year(s) of service are completed under the supervision of a private, for-profit practitioner.

Restrictions on advertising hinder the dissemination of information about the few legal aid services that exist in Eswatini, and the prohibition on touting forbids attorneys from alerting potential litigants of meritorious claims. Moreover, generally accepted restrictions on contingency-fee agreements prevent attorneys from using a common marketplace intervention to stake one's legal services on poor clients with good cases. In sum, Eswatini has kept in the cupboard nearly *all* of the most commonplace tools for increasing access-to-justice.

The question, then, is whether there is a demand for change.



“Promote peaceful and inclusive societies for sustainable development, provide access to justice for all and build effective, accountable and inclusive institutions at all levels.”

- United Nations Sustainable Development Goal 16

Methodology²⁴

2

No survey on justice needs or legal aid has been conducted in Eswatini.²⁵ This is the first nationally representative assessment—providing empirical, baseline evidence—of *emaSwati*'s interest in, and need for, legal aid. Qualitative Assessment Strategic Information (QA), an independent research firm based in Eswatini, conducted both the quantitative and qualitative assessments. The quantitative survey is the primary focus of this project, while the qualitative interviews add depth and understanding.

The quantitative survey was designed as a cross-sectional, analytical, household-population survey. Because GBV prevention and response is a cross-cutting thematic area for WAGE, the assessment aligned respondent demographics with available data on instances of GBV in Eswatini. A random, stratified probability sample was used to draw the survey sample—first, by proportion of population in Eswatini's four administrative regions (Hhohho, Manzini, Shiselweni, and Lubombo). Second, by urban and rural

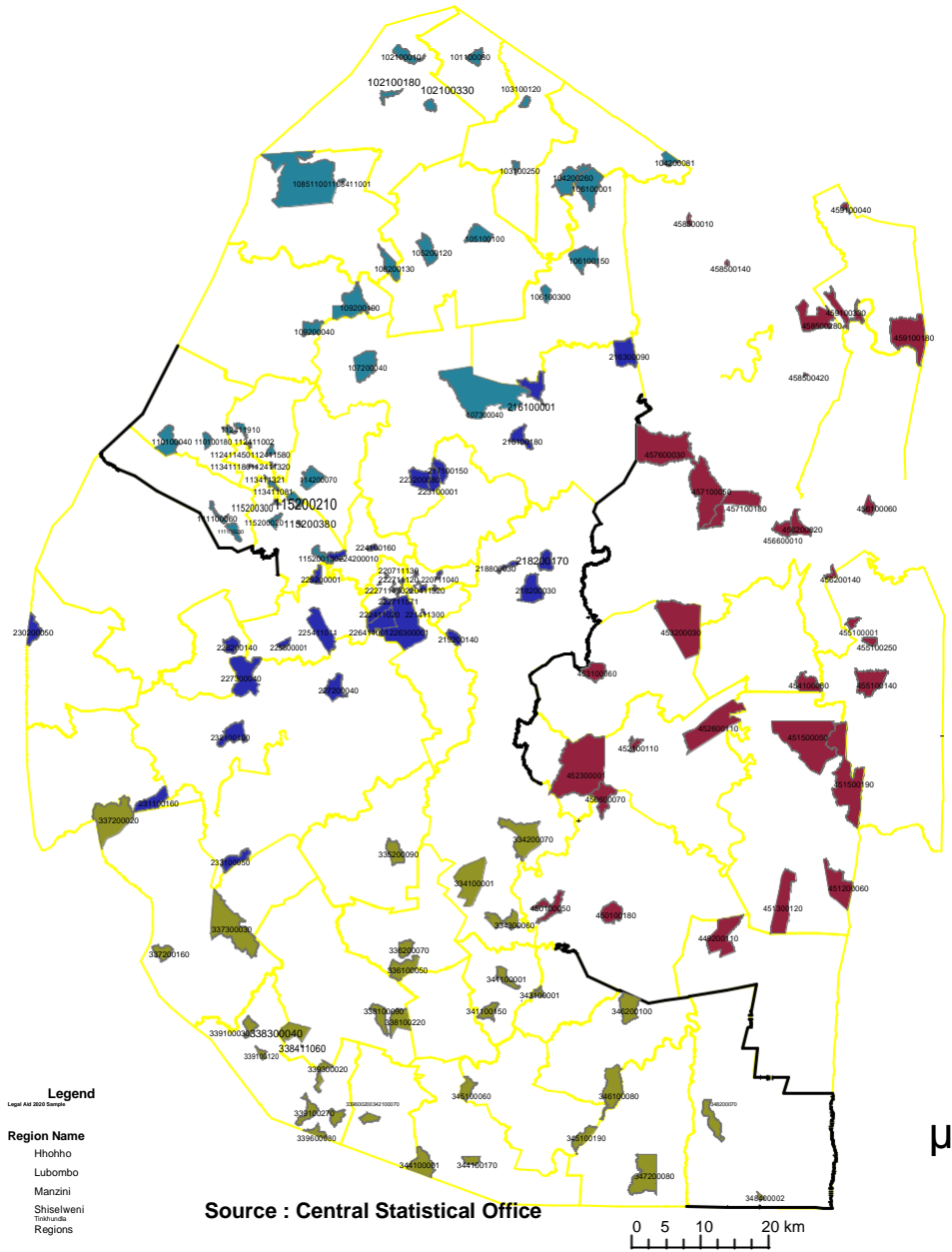
residences, with a 20:80 ratio of urban to rural, aligning with proportionate reporting of gender-based violence in Swaziland Action Group Against Abuse's (SWAGAA) 2021 program data on reported cases of GBV in Eswatini. And lastly, by gender, with a 75:25 ratio of women to men, again aligning with proportionate experiences of gender-based violence in SWAGAA's 2021 program data on reported cases of GBV in Eswatini.

The Central Statistical Office in Eswatini's Ministry of Economic Planning and Development approved a sample framework of 1,200 respondents as providing a nationally representative sample. QA ultimately surveyed 1,231 respondents, all of whom completed a structured questionnaire of 23 primary questions (several questions had subparts). This final sample size yielded results with a margin of error of +/- 5 percentage points at a 95% confidence level.

²⁴ The survey tool, data, and this report may be accessed at: <https://rise.articulate.com/share/fICy30B8FmC4gS13HZqxJ0b-GhzLY5sUm>

²⁵ See Anil Naidoo, *Development of a Legal Aid System in Swaziland* (2012) at 5 ("It is, however, rather unfortunate that no legal aid baseline and user perception studies have been undertaken."); Maxine Langwenya, *Justice Sector and the Rule of Law* (March 2013) at 149 ("This observation [that awareness and knowledge of rights are minimal amongst most Swazis] is not, however, validated by any systematic surveys or studies to measure levels of awareness or even identify areas where the problems are more acute, as no such study has ever been conducted in Swaziland.").

Enumeration area map



The survey relies on Eswatini’s updated 2017 census figures and was conducted in 150 randomly sampled enumeration areas, which were provided by the Central Statistical Office. Enumerators conducted eight interviews per enumeration area and restricted interviews to one person per household. Enumerators were trained for two full days before engaging in field

piloting where the survey was administered, but results were not recorded. Under the leadership of a field manager and six supervisors, quantitative data was collected by a team of 32 enumerators from 28 April to 04 May 2022. Every interview was conducted in-person, one-on-one, using Computer-Assisted Personal Interviewing.

Table 2: Quantitative survey sample by gender and region

Region	Men (urban)	Women (urban)	Men (rural)	Women (rural)	TOTAL
Hhohho	30	82	58	171	341
Lubombo	12	28	51	155	246
Manzini	25	63	73	228	389
Shiselweni	4	18	57	176	255
Total	71	191	239	730	1231

To obtain the qualitative data, focus group discussions (FGDs) and key informant interviews (KIIs) were conducted from 12 April to 04 May 2022. Interviews were conducted by two facilitators, assisted by two notetakers, using an FDG guide and an in-depth KII guide. QA then applied emergent themes analysis to the qualitative data. For the focus groups, adult participants 18 years and older were randomly selected in each administrative region. For the KIIs, interviewees were purposefully selected to ensure key stakeholder organizations and relevant individuals were engaged. Please refer to Table 3 for more information on the KII sample.

Descriptive statistical analysis was performed on the quantitative survey data. Demographic attributes were presented to create a respondent profile of each category of respondent. QA performed descriptive statistical analysis on the quantitative survey data. In addition, QA presented demographic attributes to create a profile of each category of respondent.

Table 3: Qualitative KII and FGD sample

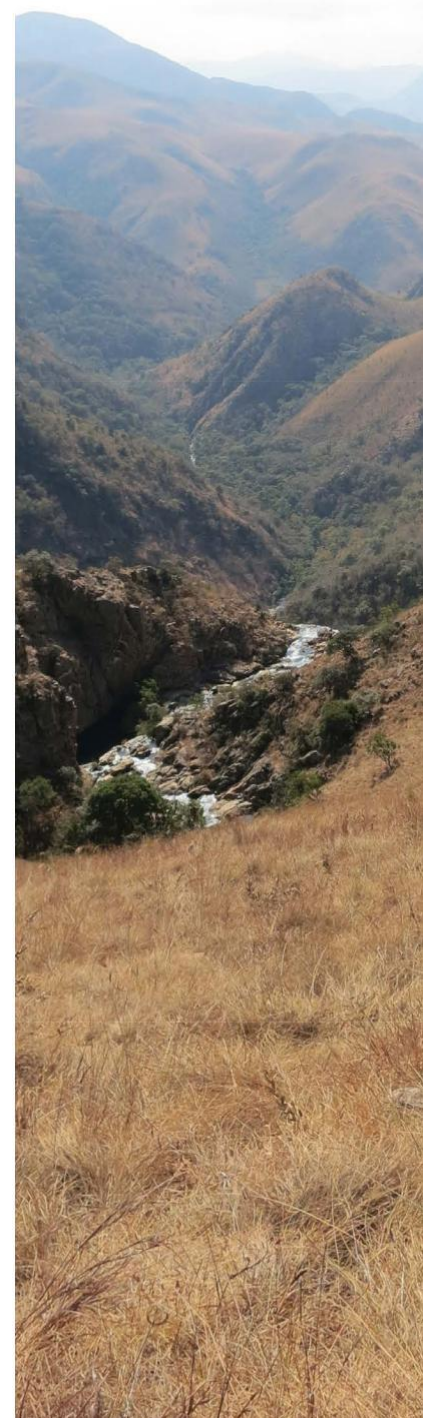
Approach	Respondent	Interviews
Key informant Interviews	Government agencies	2
	Private legal practitioners	2
	Non-governmental legal service providers	4
Focus group discussions	Adult women	4
	Adult men	4
	Total	16

Table 4: Respondent demographics

Gender	Number of respondents	%
Men	310	25%
Women	921	75%
Residence		
Urban	262	21%
Rural	969	79%
Region		
Hhohho	336	29%
Lubombo	248	21%
Manzini	360	30%
Shiselweni	256	21%
Age		
18-20	51	4%
20-24	157	13%
25-29	198	16%
30-34	185	15%
35-39	155	13%
40-44	115	9%
45-49	86	7%
50-54	67	5%
55-59	65	5%
60+	152	12%
Education		
Never attended school	71	6%
Primary	192	16%
Secondary	294	24%
High school	434	35%
Vocational	42	3%
Diploma	109	9%



Relationship Status	Number of Respondents	%
Single/Never married and not living in with a partner as if married	587	48%
Single/Never married but living in with a partner as if married (cohabiting)	82	7%
Married (one partner)	408	33%
Married (polygamous)	37	3%
Widowed/Divorced/Separated but living with a partner as if married (cohabiting)	42	3%
Widowed/Divorced/Separated and not living with partner as if married	75	6%
Housing		
Unhoused - live at home (reside at home with my family)	474	39%
Owner (own a Swazi Nation Land home)	45	30%
Renter SNL (rent a property on Swazi nation land)	157	13%
Renter private. (rent a private deed property)	160	13%
Unhoused - live with a friend/relative (reside in a home owned or rented by someone else)	368	4%
Owner (own private deed home)	27	2%
Employment Status		
Employed full-time	241	20%
Employed part-time/seasonal	111	9%
Self-employed	225	18%
Not employed	510	41%
Student	97	8%
Retired	47	4%
Monthly Income		
None	353	29%
Less than E1k	340	28%
E1k-E5k	421	34%
E6k-E9k	58	5%
E10k-E19k	46	4%
E20k-E119k	13	1%





**“The competition
should be no longer of
finances but that of the
rule of law.”**

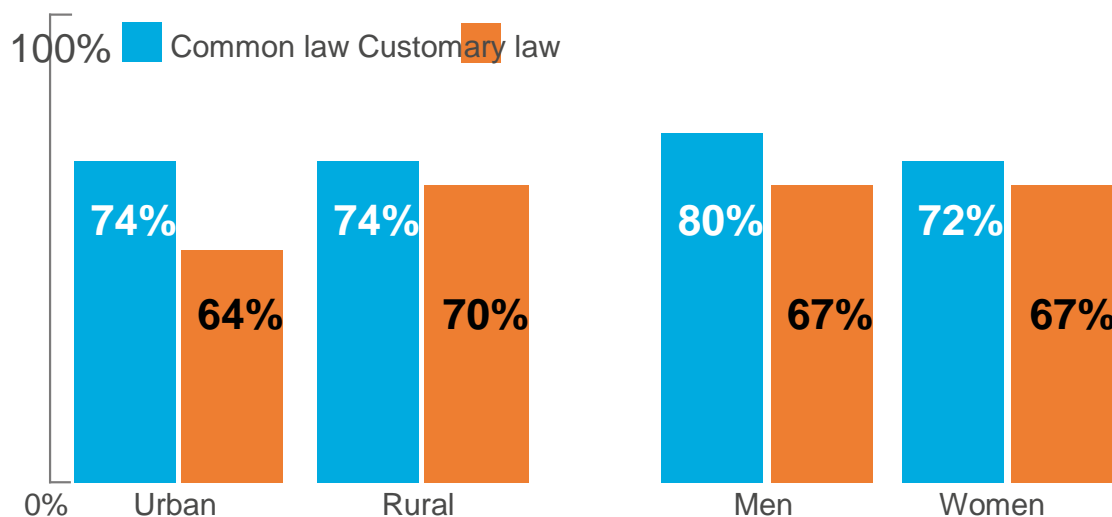
*- Sibusiso Nhlabatsi, UNESWA
Law Clinic*

Key findings

emaSwati use a range of dispute resolution mechanisms

Approximately half of all survey respondents stated that they were aware of both the common law and customary law in Eswatini, while 10% indicated that they were unaware of either.

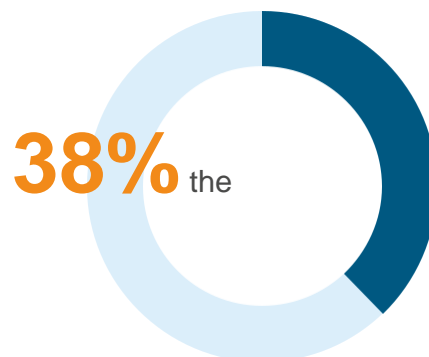
● Awareness of legal systems that operate in Eswatini by urban/rural and by gender



Respondents were asked: What legal systems are you aware of that operate in Eswatini? (men: n=310; women: n=921); (urban: n= 262, rural: n=969)

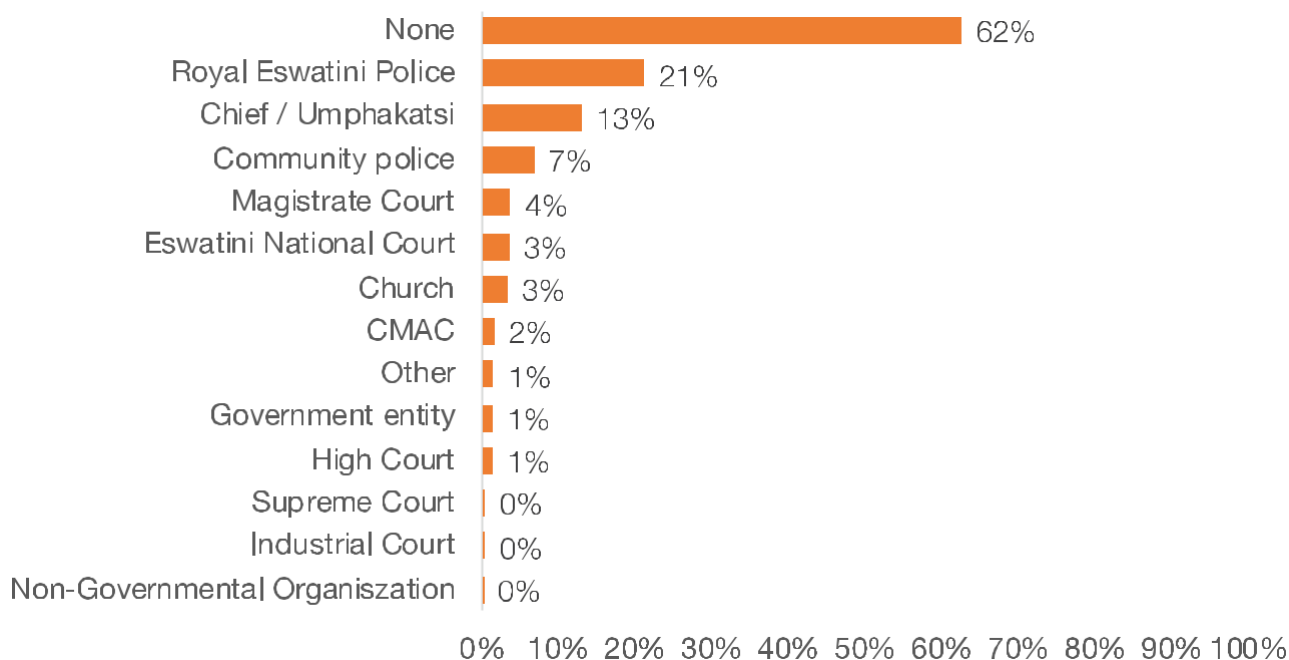
In the last two years, 38% of respondents stated that they had engaged some sort of dispute resolution mechanism. The most common mechanism engaged was the Royal Eswatini

Police (21%), followed by a chief/umphakatsi (13%), and then community police (7%). Very few respondents engaged a common law court structure—the highest was the Magistrate court (4%), roughly similar to the rate of engagement for Eswatini’s National Courts (3%).



of respondents stated that they had engaged some sort of dispute resolution mechanism

Mechanisms engaged for dispute resolution in past two years

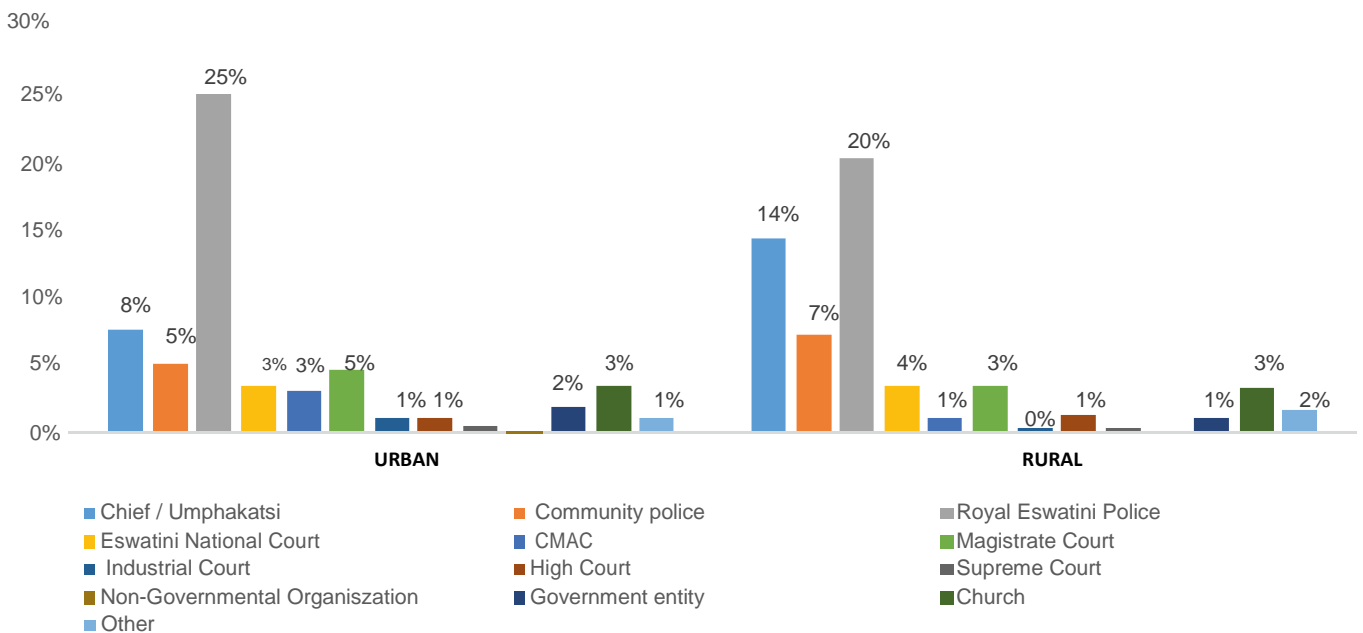


Respondents were asked: In the past two years, which of the following have you engaged to resolve a dispute? (n=1231)

Rural populations engaged chiefs and the Eswatini National Courts at higher rates than their urban counterparts, while urban populations engaged the Magistrates’ courts more frequently than those who reside in rural areas.

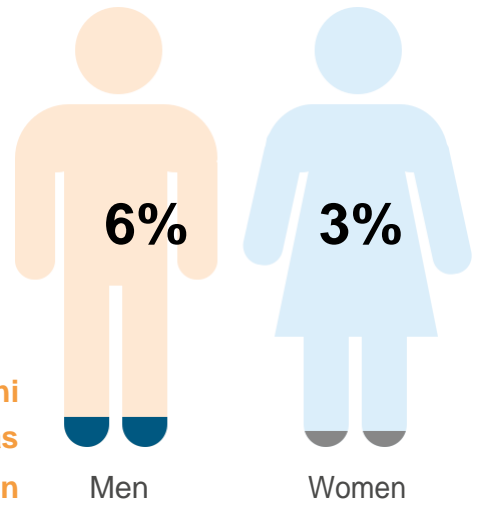


Mechanisms engaged to resolve disputes by urban/rural residence



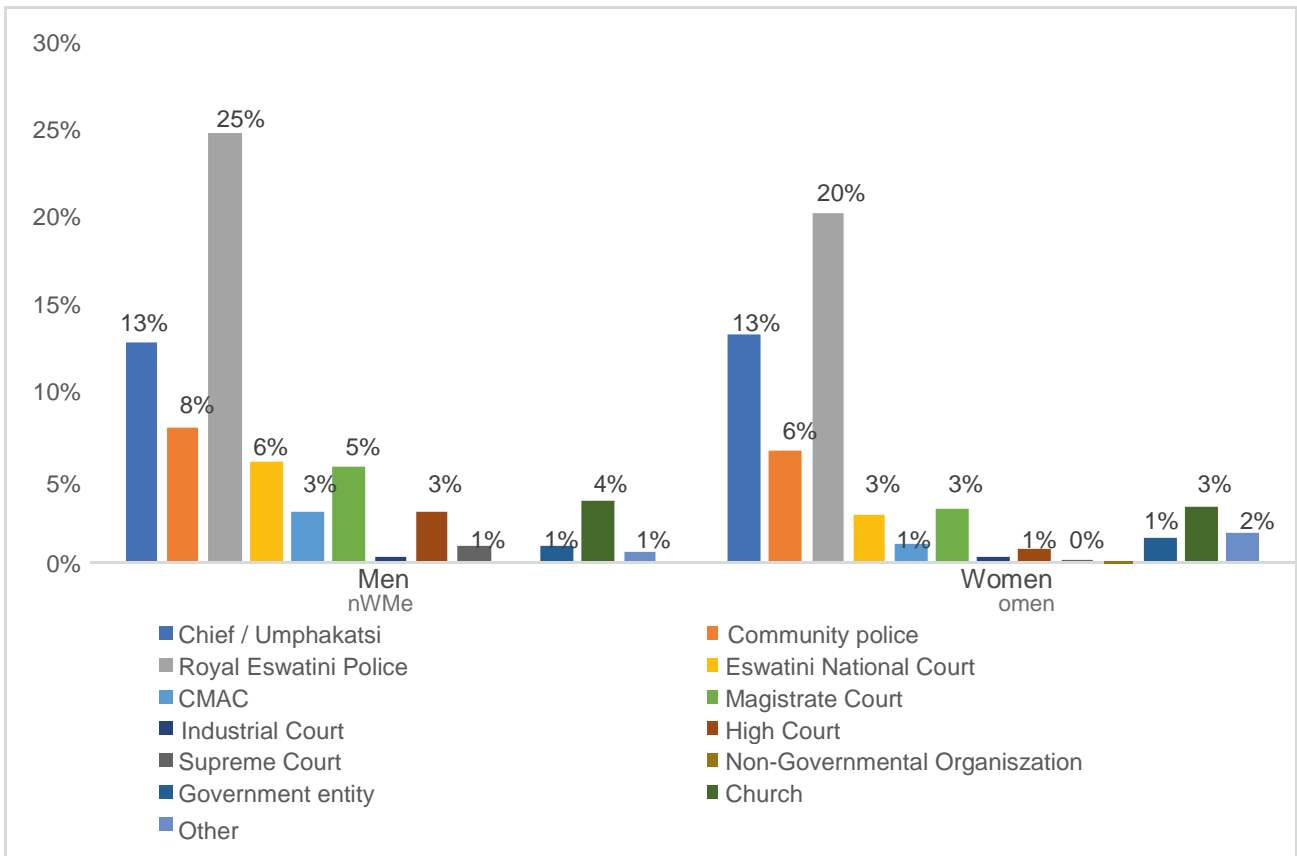
Respondents were asked: In the past two years, which of the following have you engaged to resolve a dispute? (urban: n= 262, rural: n=969)

Looking at the data by gender, the use of the Eswatini National Court is twice as high among men (6%) than women (3%) and the Magistrates' courts showed a gap nearly as large (5% for men; 3% for women).



The use of the Eswatini National Court is twice as high among men

Mechanisms engaged to resolve disputes by gender

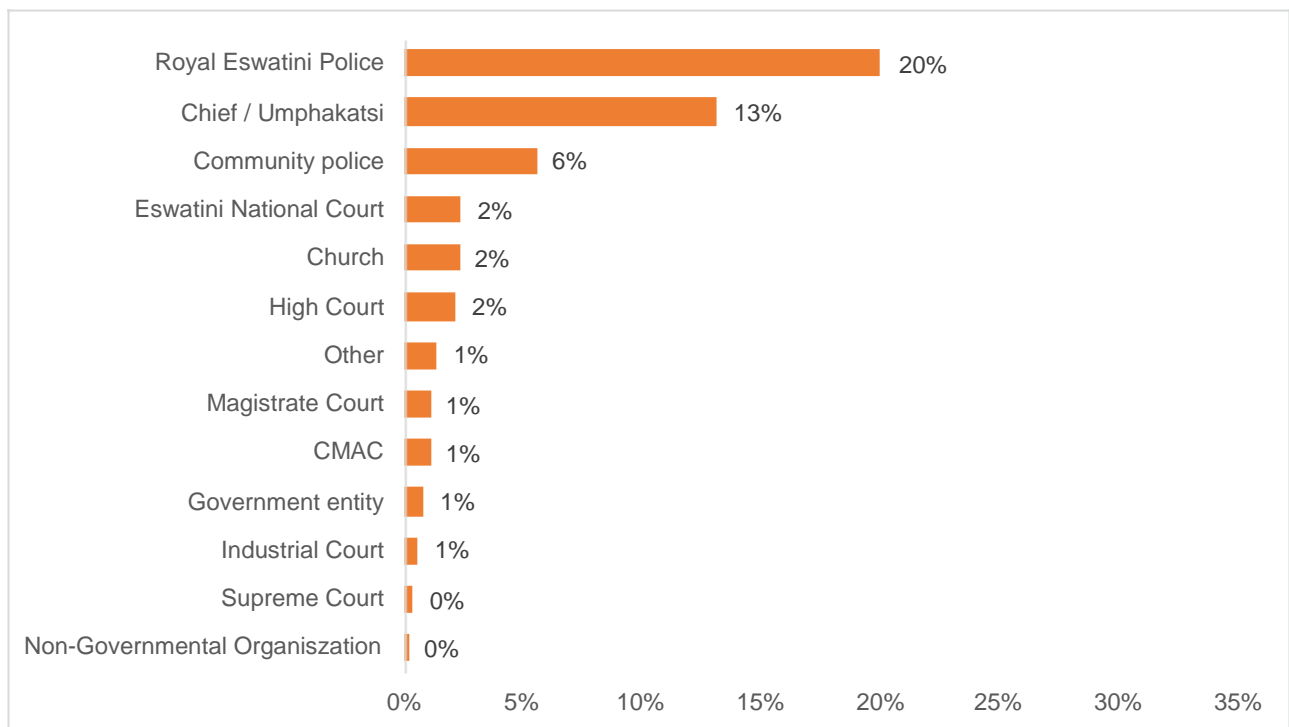


Respondents were asked: In the past two years, which of the following have you engaged to resolve a dispute? (men: n=310; women: n=921)

when respondents were asked what mechanisms a close friend, colleague, or family member engaged in the last two years to resolve a dispute, the responses were similar.



Mechanisms friends and family engaged in the past two years to resolve disputes



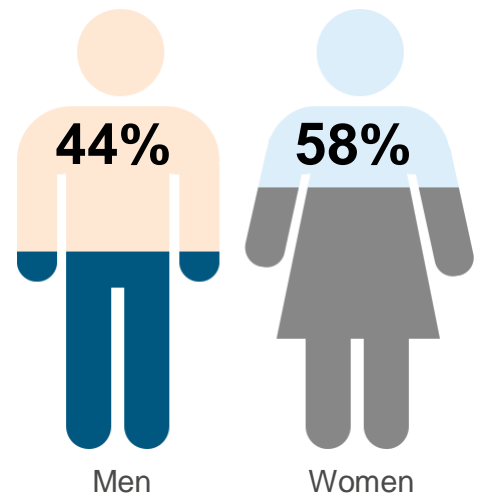
Respondents were asked: In the past two years, which of the following has a close friend, colleague, or family member engaged to resolve a dispute? (n=1231)

3 Key findings

As to efficacy, about half of respondents reported that the mechanism they engaged worked “very well” or “fairly well”. Similarly, about half of respondents stated that they felt “very satisfied” or “fairly satisfied” with the outcome.

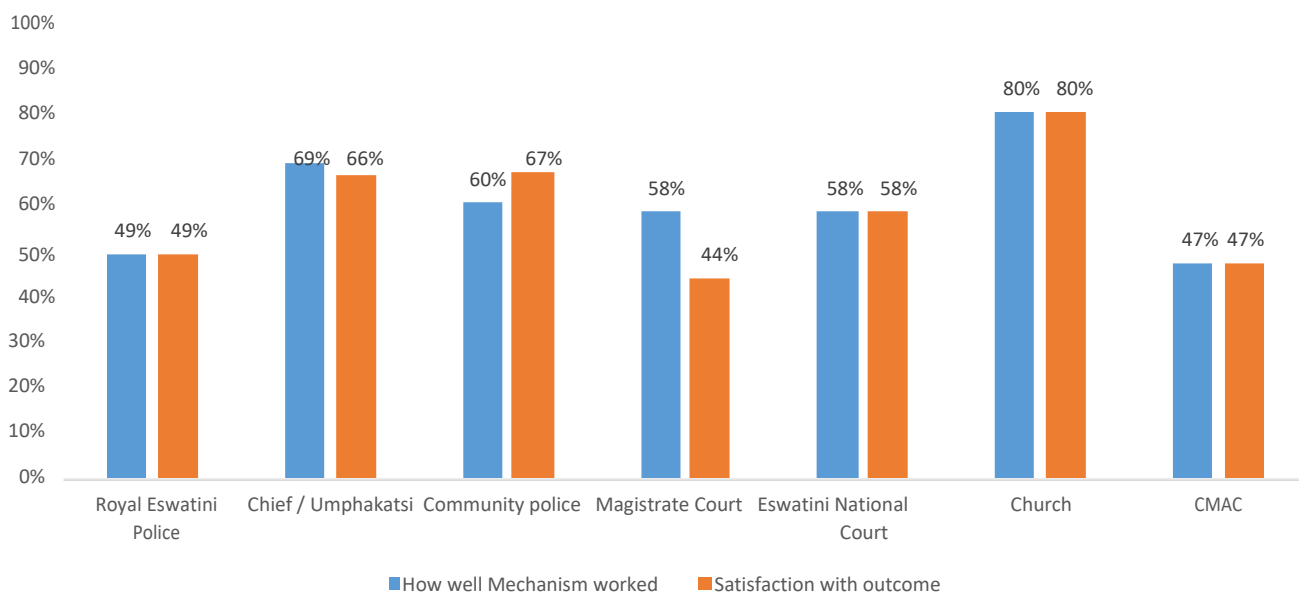


The mechanism with the largest different between satisfaction (44%) and respondents' assessment of how well the process worked (58%), was the Magistrates' court, with a 14% difference. This dissociation suggests that the Magistrates' court process may be the most well liked in terms of resolving disputes. The Magistrates' court is the only mechanism in which the process was so well liked even when the outcome was not satisfactory. Applying this same analysis, the community police fared the worst. Despite respondents being satisfied with the outcome (67%), a significantly lower number (60%) felt that the mechanism worked well.



Women are more satisfied with the Magistrates' court

● Efficacy and satisfaction with mechanisms to resolve disputes (% who said very/fairly well & very/somewhat satisfied)



Respondents were asked: Thinking about the approach/es you used to resolve a dispute and the process used to resolve the dispute, how well/badly would you say the approach worked to resolve the dispute regardless of the outcome? (% who said very/fairly well)

Respondents were asked: Thinking about the approach/es you used to resolve a dispute and the outcome of the dispute resolution process, how satisfied would you say you were with the outcome the approach? (% who said very/somewhat satisfied)

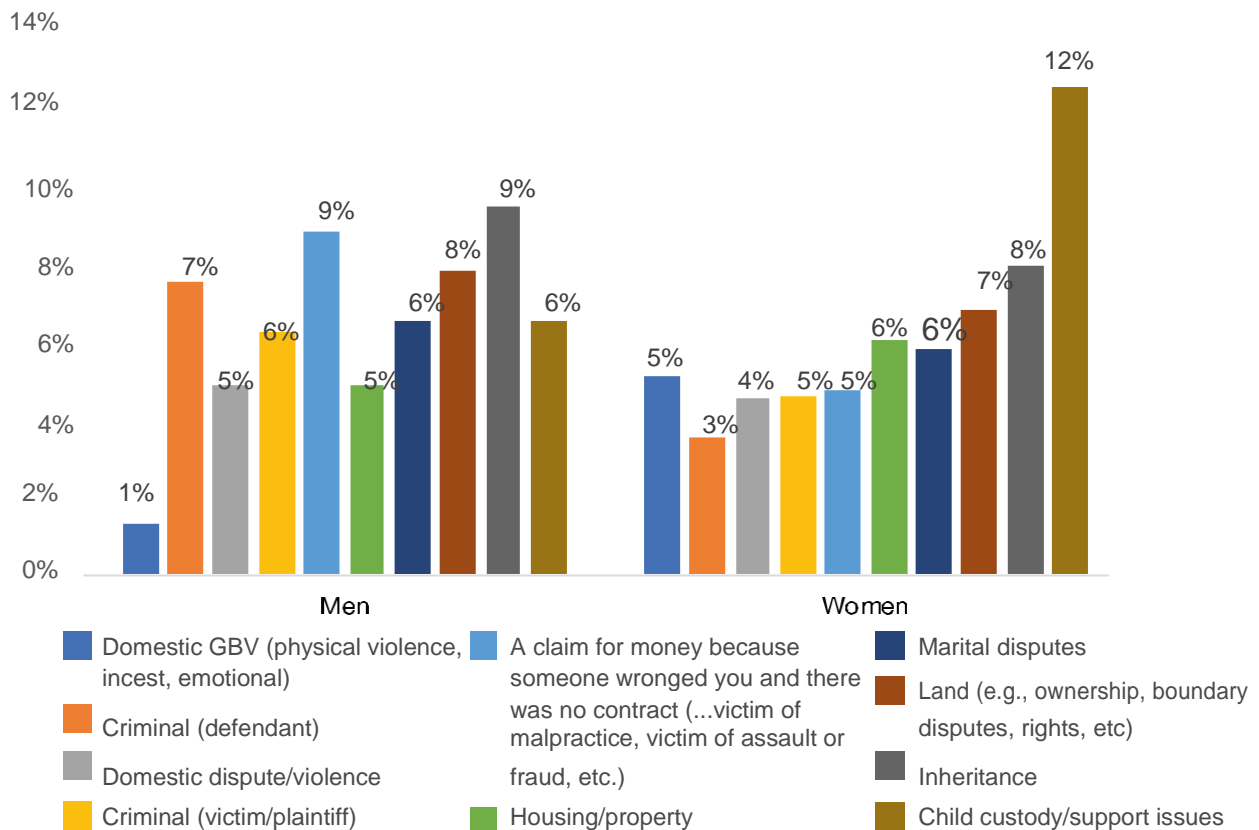
Eswatini's most prevalent legal issues concern family 38% and land

Respondents cited a host of legal issues, but the most prevalent concerned family and land. Child custody and support issues (12%) were the most prevalent legal issue that women faced in the last two years. For men, 9% of respondents cited either land disputes or non-contractual civil wrongs (torts/delict).

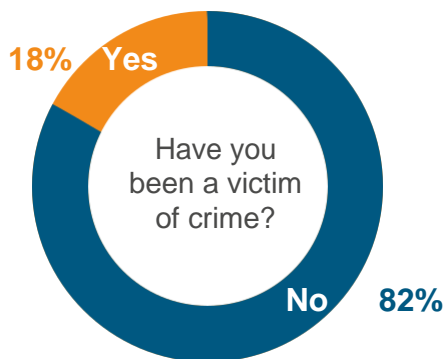


of respondents stated that they had engaged some sort of dispute resolution mechanism

Legal issues experienced by respondents by gender

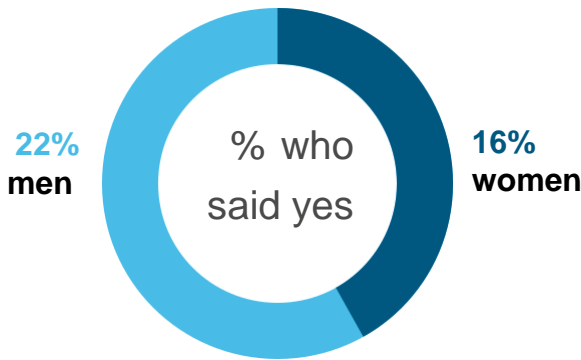


Respondents were asked: In the past two years, which of the following legal issues have you faced? (men: n=310; women: n=921)

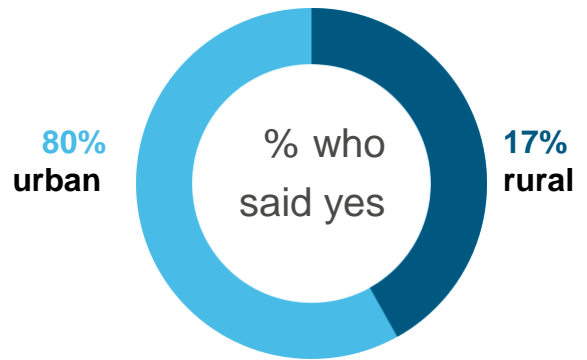


Respondents were asked: In the past two years, have you been the victim of a crime? (n= 1231)

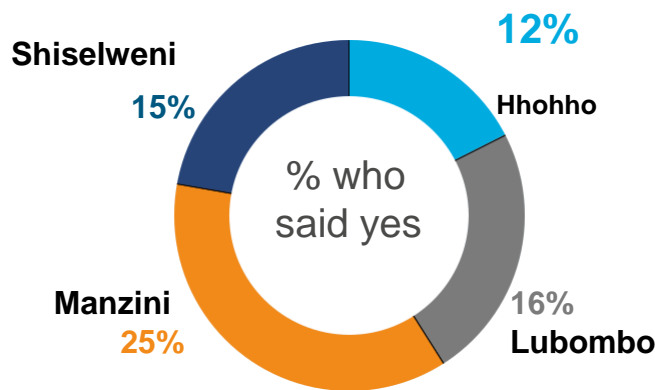
● **Been a victim of a crime by demographics (% who said “yes”)**



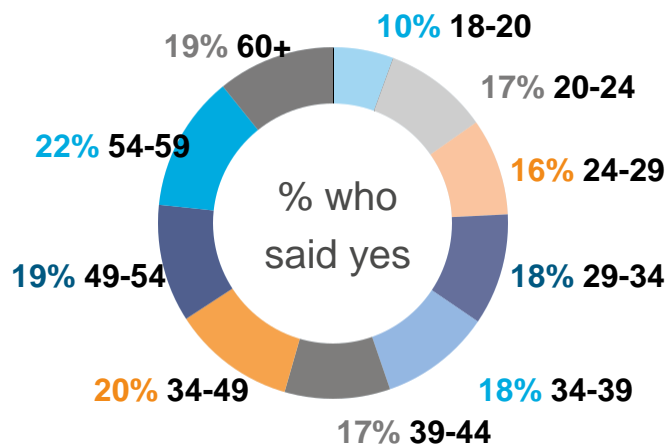
Victims of crime (gender)



Victims of crime (urban or rural)



Victims of crime (region)

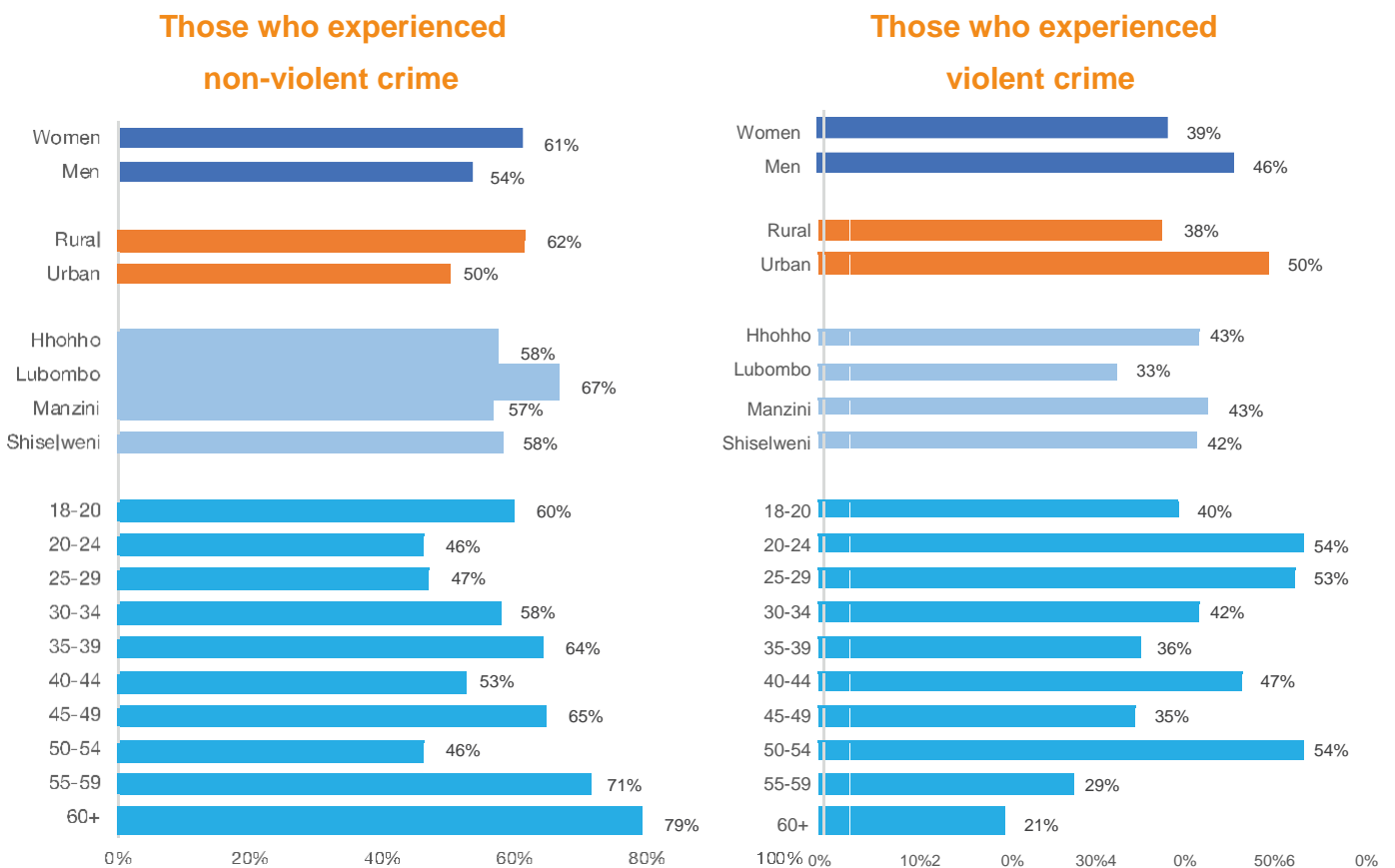


Victims of crime (age)

Although 18% of respondents reported that they were the victim of a crime in the last two years—and 2/3 of that 18% indicated that they reported the crime (i.e., 12% of all respondents)—only half that number (6%) informed surveyors that in the last two years they had been *charged* with committing a crime. This self-reporting discrepancy may be the result of a disclosure hesitancy among respondents. Nevertheless, criminal cases also comprise a significant portion of legal issues and needs in Eswatini.



Type of crime experienced by demographics (% who said “yes”)

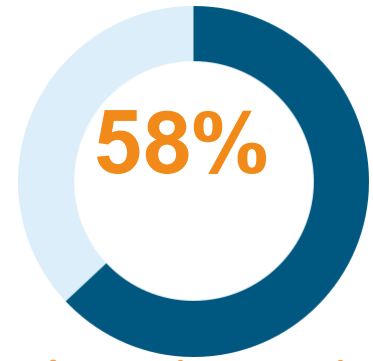


Respondents were asked: *What type of crime were you a victim of? (% who said yes)*
 (non-violent: n=127; violent: n=89)

Eswatini’s need for legal aid is urgent

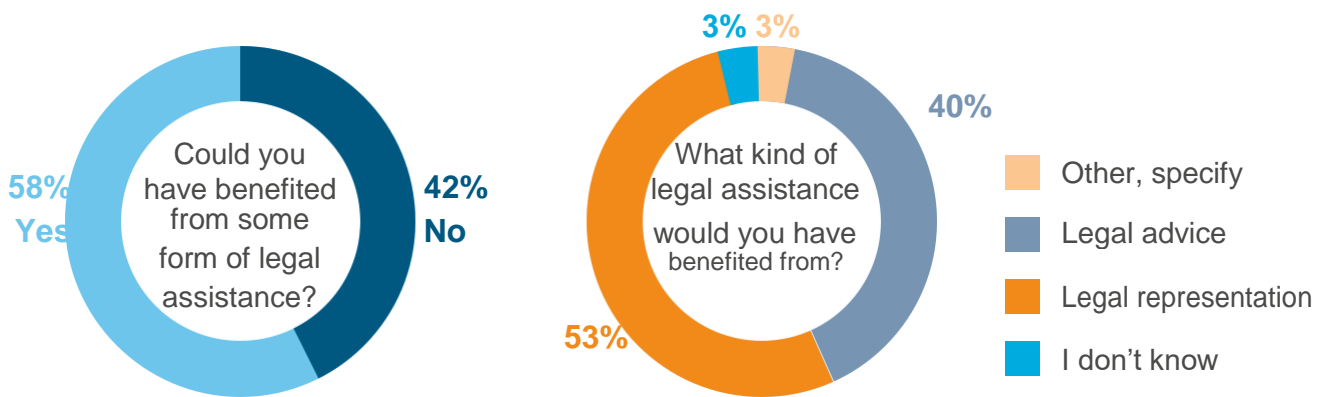
Fifty-eight percent of respondents stated that in the last two years they could have benefited from some form of legal assistance. A little more than half of those who could have benefitted from legal assistance specifically identified legal *representation* as the type of assistance they could have benefitted from.

The need for legal assistance cut across gender, urbanization, region, age, education level, income, and employment status. There is almost no major demographic group in which less than half did not report needing some form of legal assistance in the last two years. Additionally, each of these major demographic groups expressed a specific need for legal representation.



of respondents stated that in the last two years they could have benefited from some form of legal assistance

Need for legal aid and type of legal assistance needed



Respondents were asked: In the past two years, could you have benefited from some form of legal assistance? (n=1231)

Respondents were asked: What kind of legal assistance would you have benefited from? (n=709)

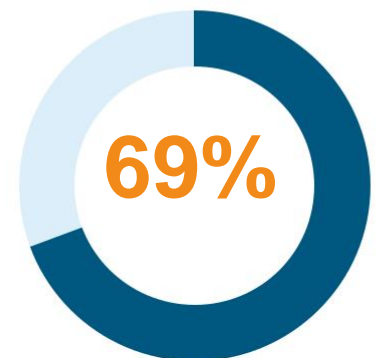
Of those who stated that they would not have benefited from legal aid in the last two years, 44% stated that they did not have a legal issue or that the issue was handled within the family structure. Additional reasons given were that the respondent knew how to navigate the court system (25%), the respondent could afford representation (16%), and the respondent felt knowledgeable enough about the law not to need assistance (15%).

Cost is the most pressing barrier to accessing the courts

When looking at the perceptions respondents have on the accessibility of the common law system in Eswatini, the survey found that the majority of respondents (69%) believe the common law system is too expensive to access despite 60% of respondents feeling that the common law system was open to all.

Other barriers exist, too. When it comes to respondents' perceptions of the fairness and efficiency of the common law system, the majority of respondents felt that the common law system was not fair and efficient, as only 46% of respondents felt it was fair while only 43% felt that it was efficient.

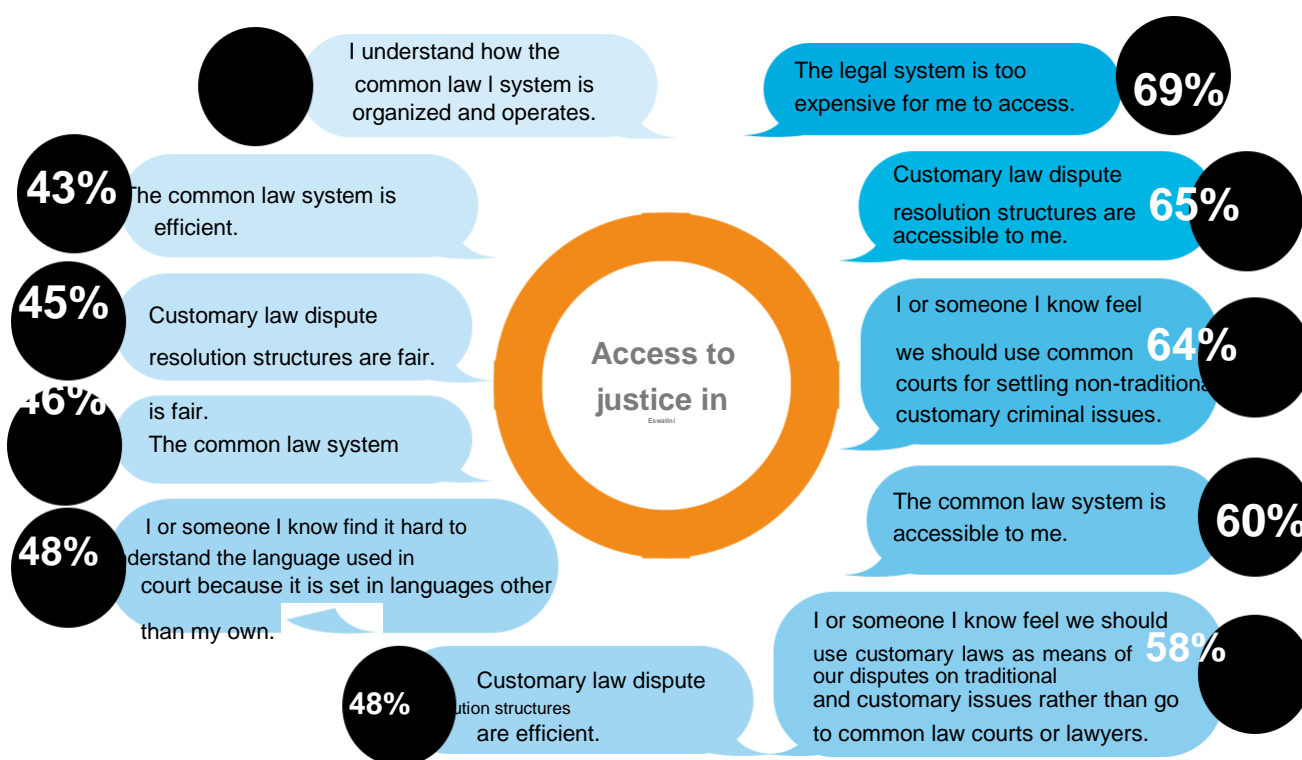
About 1 in 2 respondents (48%) found it hard to understand the language used in court because it is set in languages other than their own while even fewer indicated that they understood how the common law system was organized and operated. The majority of respondents (64%) felt that the common law courts should be used for settling non-traditional or non-customary criminal issues.



of respondents believe the common law system is too expensive

Looking at the perceptions respondents have on customary law dispute resolution structures, 65% of respondents felt that customary law structures were open and accessible for all, but most respondents felt that these structures were not fair and efficient (only 45% of respondents felt it was fair and 48% felt that it was efficient). Despite these perceptions, about 6 out of 10 respondents (58%) felt that customary laws should be used as a means of settling disputes on traditional and customary issues rather than going to common law courts or lawyers.

● Perceptions on access to justice (% who strongly agree/agree)



Respondents were asked: The following are statements people have said about access to justice in Eswatini. Please tell me whether you agree or disagree or neither agree or disagree with the statements below. (% who agree/strongly agree)

Public support for legal aid is near universal

Eighty-nine percent of respondents agreed that “[i]f a government or NGO lawyer was free, I would use the legal system to resolve disputes.” Similarly, 89% also agreed that “[i]f legal assistance were free, I would use the legal system to resolve disputes.” These numbers held steady across nearly all demographic points.



● Perceptions on access to legal assistance (% who strongly agree/agree)

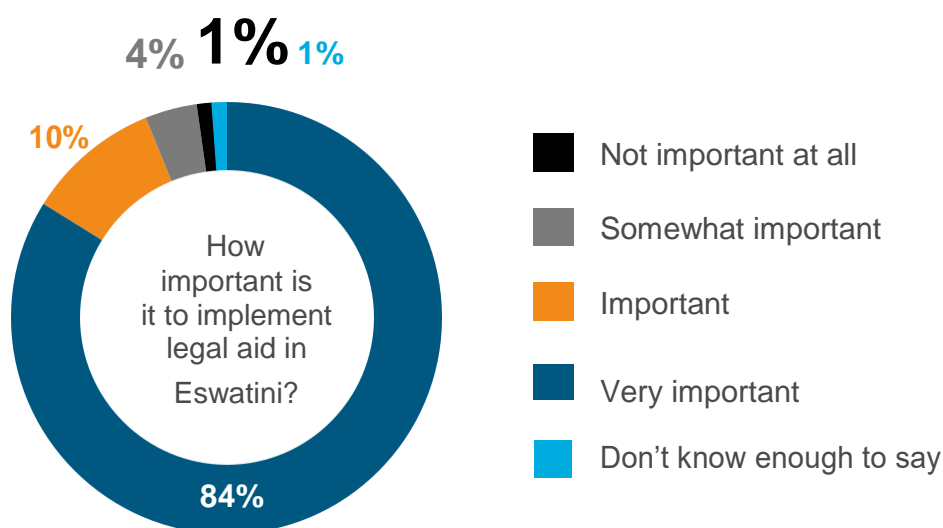


Respondents were asked: The following are statements people have said about access to legal assistance in Eswatini. Please tell me whether you agree or disagree or neither agree or disagree with the statements below. (% who agree/strongly agree)



Ninety-four percent of respondents stated that implementing legal aid in Eswatini was very important (84%) or important (10%). Only 1% stated that doing so was not important at all, the same percentage who felt they did not know enough to say.

● Importance of implementing legal aid in Eswatini

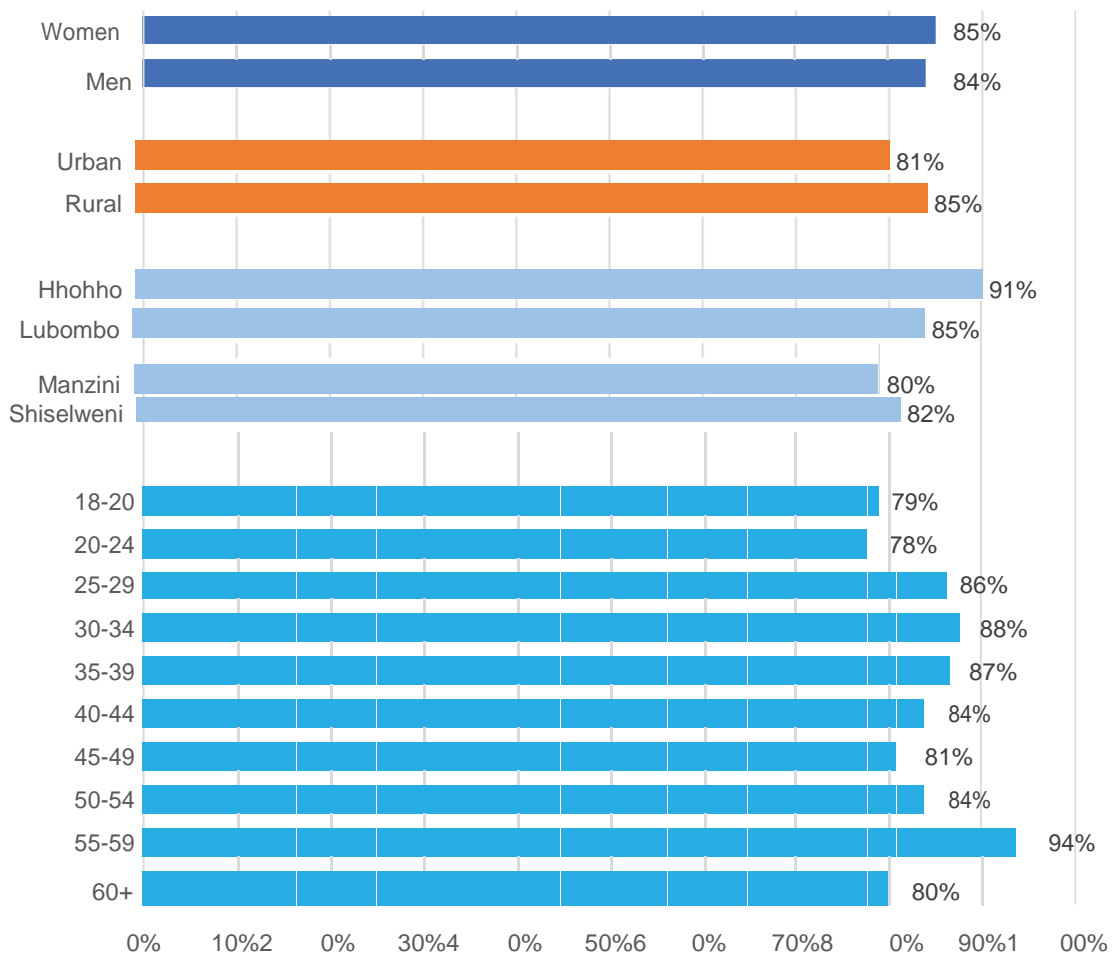


Respondents were asked: In your opinion, how important is it to implement legal aid in Eswatini?
(n=1231)



Importance of implementing legal aid in Eswatini by several demographics (% who said “very important”)

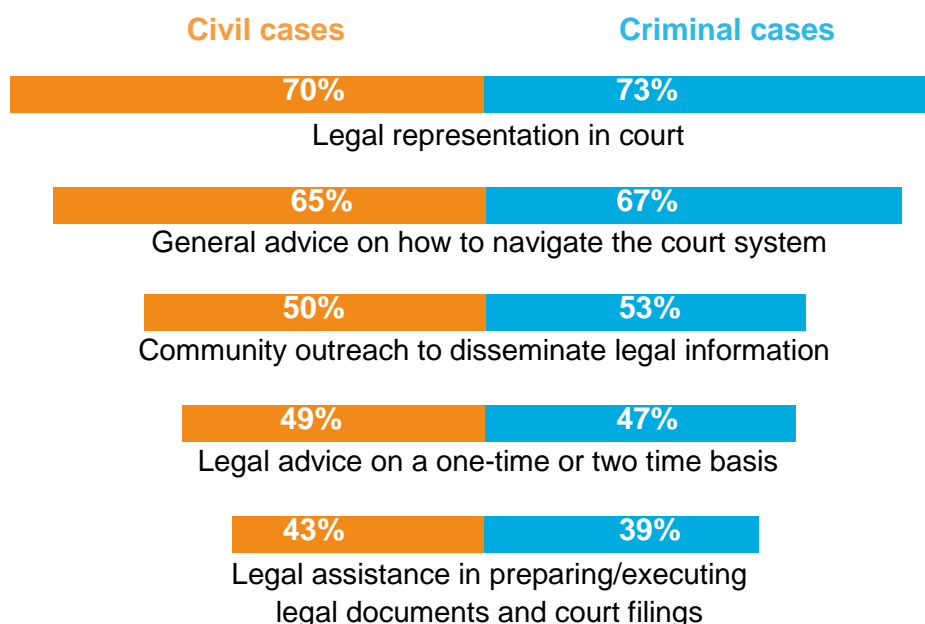
Importance of legal Aid by Demographics (% who said very Important)





Respondents' strongest preference is for legal representation. Although respondents were informed that they could select as many facets of legal aid as they wished, a clear preference still emerged for *representation*.

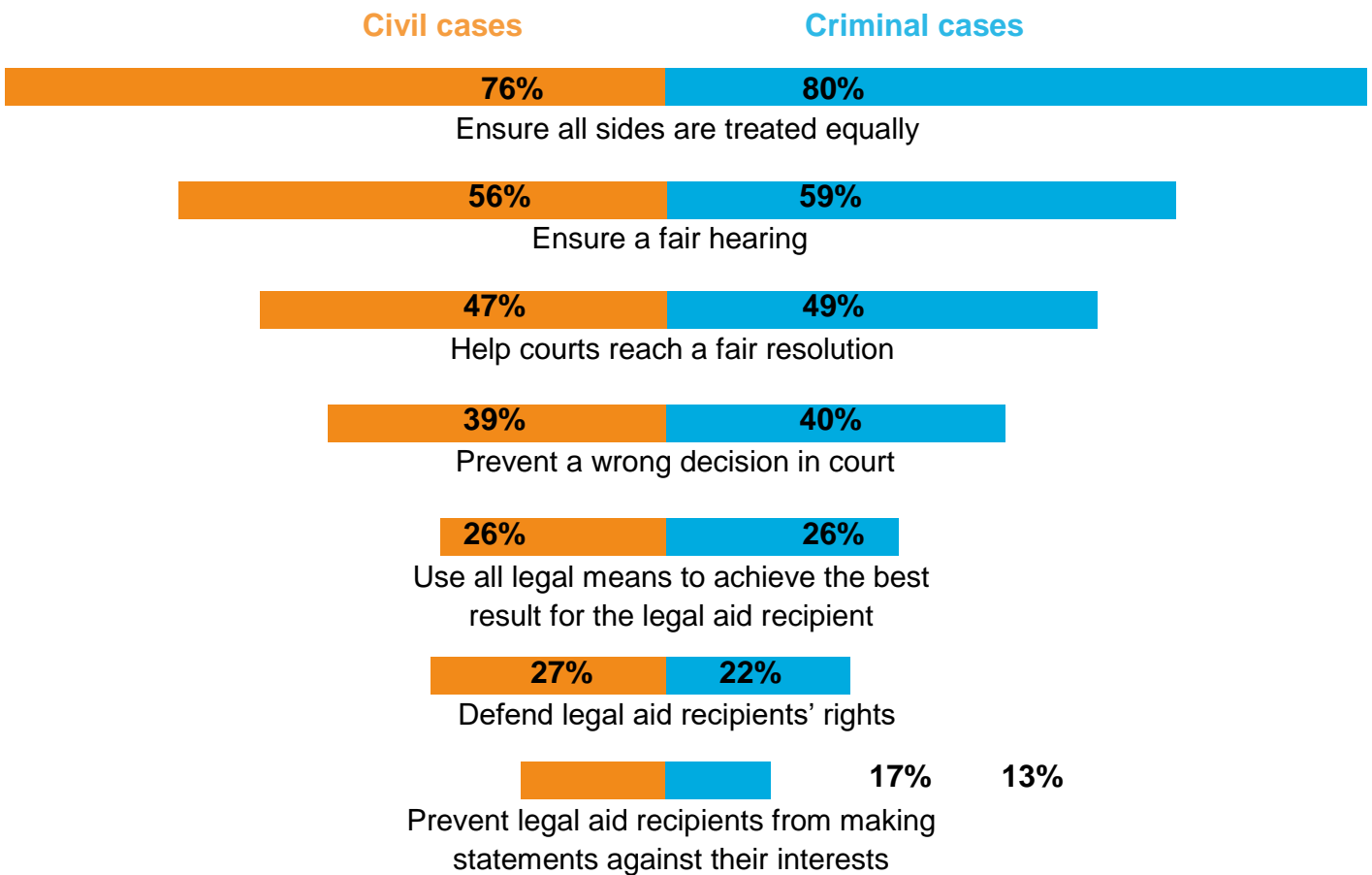
● Services legal aid should provide for criminal & civil cases



Respondents were asked: If legal aid was available in Eswatini, which services do you think should be included as part of “legal aid”? (n=1231)

Respondents also demonstrated a strong preference for equality and fairness. When asked what role legal aid should play in Eswatini, respondents were asked to choose the three most important principles from a list of seven options. Ensuring that all sides are treated equally, ensuring a fair hearing, and helping courts reach a fair resolution were the top three most frequent responses.

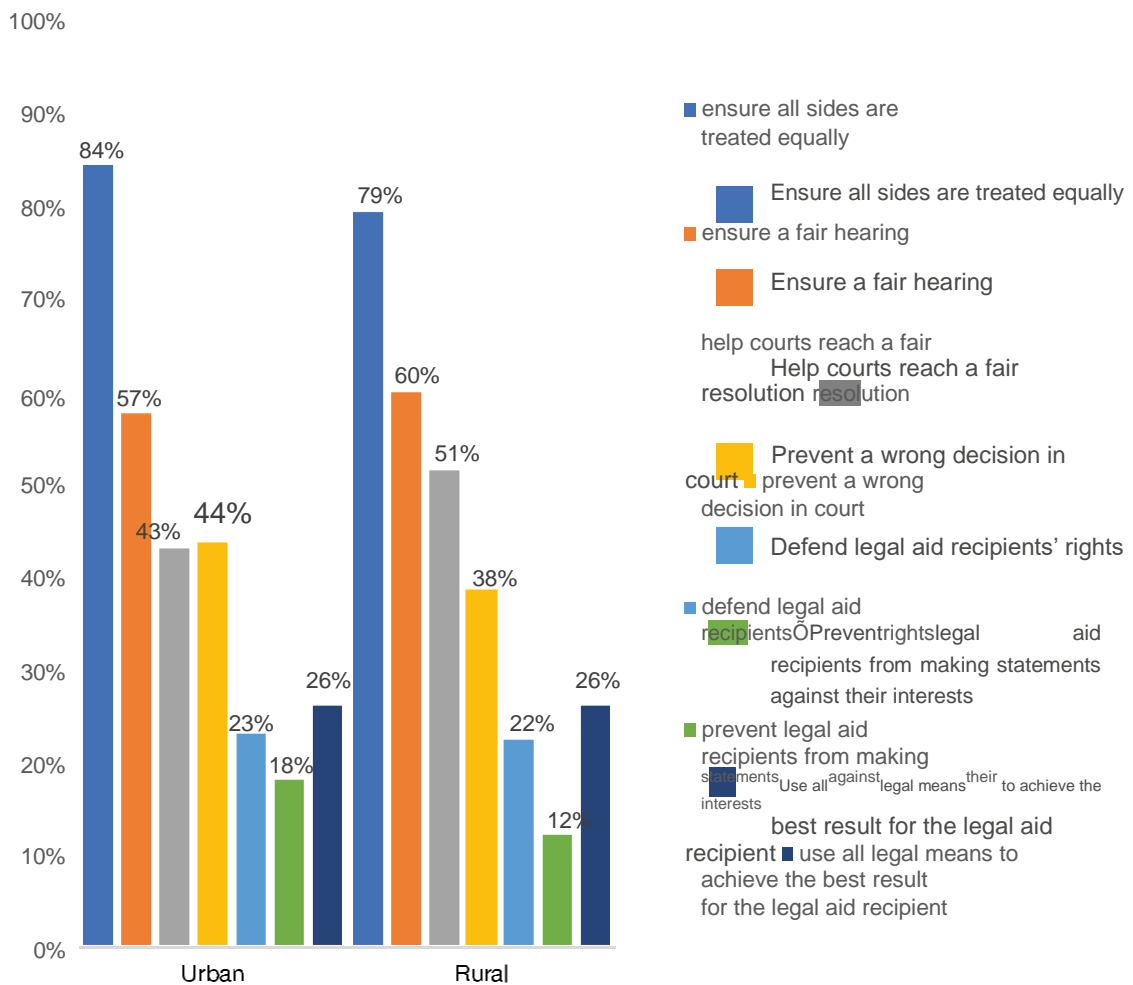
● Role legal aid should play in Eswatini



Respondents were asked: In your opinion, what role should legal aid play in Eswatini? (n=1231)

Disaggregating respondents' opinion of the role legal aid should play for criminal cases by urban-rural residence and gender, a similar pattern of role preference is observed. The figure below shows that the majority of respondents in urban and rural areas, and majority of men and women, are of the opinion that legal aid should ensure all sides are treated equally, receive a fair hearing, and help courts reach a fair resolution.

● Role legal aid should play for criminal cases in Eswatini by urban/rural residence

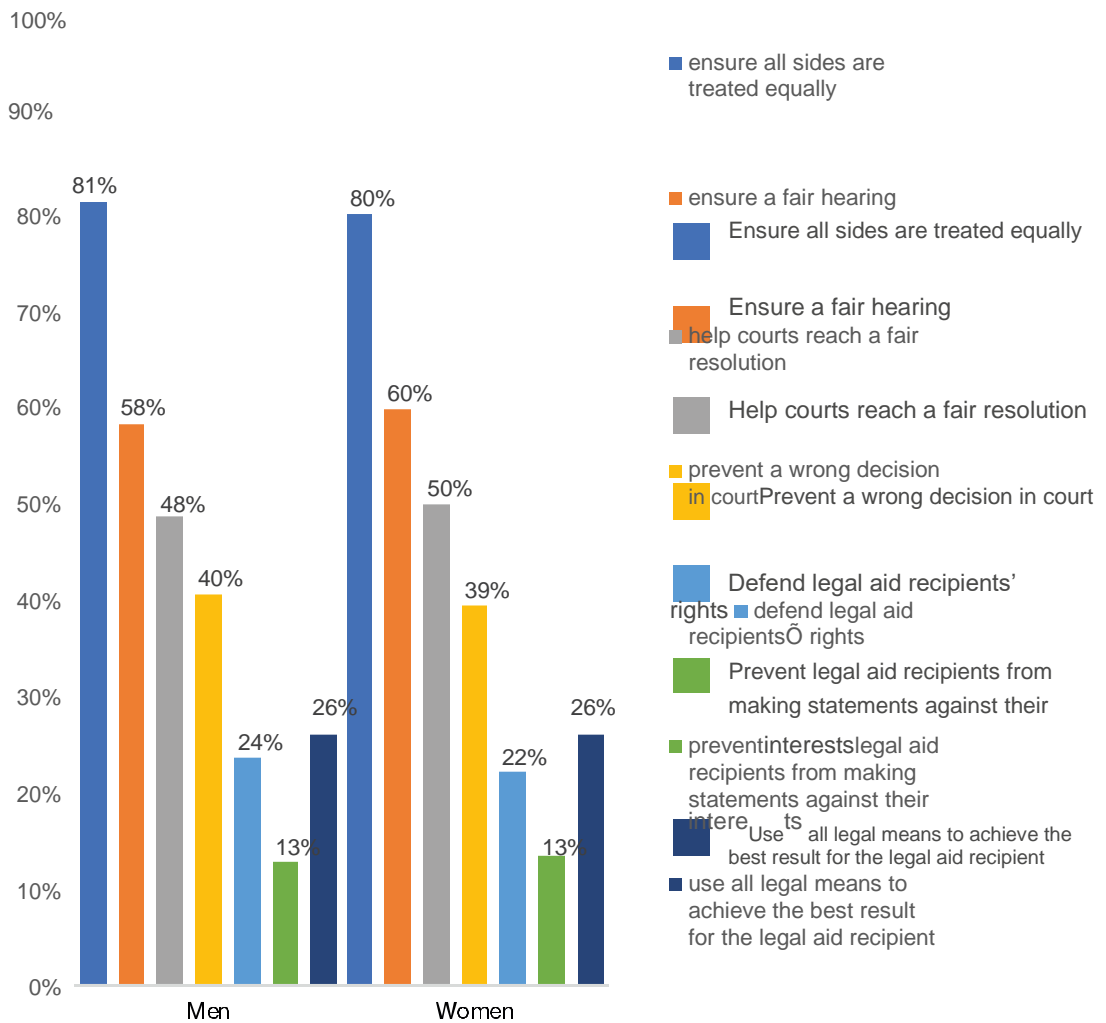


Respondents were asked: In your opinion, what role should legal aid play in Eswatini? (men: n=310; women: n=921); (urban: n= 262, rural: n=969)

Looking at respondents' opinions on the role legal aid should play for civil cases by urban-rural residence and gender, a similar pattern of role preference for legal aid is observed. The majority of respondents in urban and rural areas and majority of men and women are of the opinion that legal aid should ensure all sides are treated equally, ensure a fair hearing and help courts reach a fair resolution.

● Role legal aid should play for criminal cases in Eswatini by urban/rural residence

Role Legal Aid should Play for Criminal cases by Gender



Respondents were asked: In your opinion, what role should legal aid play in Eswatini? (men: n=310; women: n=921); (urban: n= 262, rural: n=969)

3 Key findings

“Promote peaceful and inclusive societies for sustainable development, provide access to justice for all and build effective, accountable and inclusive institutions at all levels.”

- United Nations Sustainable Development Goal 16




Analysis of findings

Eswatini has a widespread, unmet need for legal aid. Fifty-eight percent of *emaSwati* would have benefitted from some form of legal assistance in the last two years. Of that 58%, more than half stated that they would have benefitted from legal representation. In other words, about three-fifths of *emaSwati* had an unmet legal need in the last two years, while about one-third had an unmet need specifically for legal *representation*. The need for legal aid cuts across all demographics: gender, age, region, the urban-rural divide, education level, employment status, household income, and housing situation. No matter how you analyze the data, the result is the same — the justice sector is failing to meet the needs of most *emaSwati*.

The barrier to legal assistance is equally clear: it is too expensive. Sixty-nine percent of *emaSwati* “agreed” or “strongly agreed” that the legal system is too expensive to access, making it the survey’s number one perception on access-to-justice in Eswatini. Further, 89% percent of *emaSwati* stated that if legal representation were free—whether provided by the government or an NGO—they would use the legal system to resolve disputes.

Implementing legal aid is hugely popular, as well. When asked about implementing legal aid, 94% stated that it was either “very important” (84%) or “important” (10%). If legal assistance was available, it would be the first port of call for many people. The formal justice system is utilized the least, but it is where *emaSwati* want to go.

The reasons for wanting access to the courts are not only clear, but laudable. *EmaSwati* showed a strong preference for the principles of equality and fairness, stating that legal aid should ensure these principles are upheld during the dispute resolution process. In contrast, less than half of *emaSwati* felt that the current systems are fair. Respondents indicated a general lack of confidence in the administration of justice that holds true in both customary and common law structures. *EmaSwati* are looking for a mechanism that treats all sides fairly and equally and believe that legal aid will help them overcome the barrier of cost to access the courts and do so.



**“Promote the rule of law
at the national and
international levels and
ensure equal access to
justice for all.”**

-United Nations SDGs, Target 16.3

Recommendations

Eswatini has a host of readily available legislative solutions to drastically improve access-to-justice and better meet the needs of its population.

Implement three amendments to the LPA

First: Amend the LPA to guarantee the right of admitted attorneys working for CSOs to appear in court. To be clear, the term CSO is used here to include NGOs, as well as other legal aid providers in Eswatini such as the Council of Churches and UNESWA.²⁶ Permitting CSO attorneys to appear in court will unlock donor-funded legal aid, freeing CSOs that are intimately familiar with the needs of their communities to offer a fuller complement of support and services. Just as CSOs hire project managers and social workers, accountants and medical doctors, so too should attorneys be able to practice in full while serving their community. Amending the LPA is not only a technically simple task, but costs Eswatini nothing. Securing the right of appearance for legal aid lawyers is a necessary condition to *any* form of legal aid—whether donor- or government-funded—and should be

the first step in Eswatini’s law reform process.

Second: Amend the LPA to permit legal practitioners to advertise while ending the ban on touting. Most lawyers in Eswatini recognize that the ban on advertising and touting is out-of-step with modern practice and hinders their ability to reach clients. Legal aid providers cannot function without disseminating information about their services and conducting direct outreach to clients. Again, this reform is a technically easy amendment to execute that is necessary groundwork for any form of legal aid in Eswatini, whether donor- or government-funded.

Third: Move the Law Society’s Byelaws’ standard of *any reasonable fee* into the LPA, allowing attorneys to modernize their practice, respond to market demands, and better meet the needs of their clients. Attorneys should be free to contract with clients in the manner that best suits the parties, whether structured around hourly fees, flat fees, project-based fees, retainer agreements, or contingency fees. Clients in both the private and legal aid context will benefit by securing the same economic freedom to contract that

²⁶ The authors are not recommending a broader change to the LPA to secure the right of all admitted attorneys to appear in court, recognizing that whether in-house counsel for private companies, or government attorneys outside of the Deputy of Public Prosecutions and Attorney General’s offices should be allowed to do so remains a highly contentious issue among Eswatini’s private bar.

other professionals in Eswatini enjoy. The Law Society would also retain its historical check on practitioners, punishing fees that exceed reasonability for the work involved. An amendment to the LPA regarding fees should also clarify that practitioners are free to charge *less*—including nothing at all—for services. The justice sector would benefit from a clear return to the Byelaws’ flexible standard on fees by cementing the *any reasonable fee* standard into the LPA.

All three amendments to the LPA highlight its outdated nature. The LPA warrants a wholesale review, but the need to revisit the entire legislation should not delay an achievable, laser-focused amendment on the right of appearance, advertising, and fees, that will increase access-to-justice and meet Eswatini’s urgent need for legal aid.

These three amendments have reached final draft form—approved by the Ministry of Justice, the Attorney General’s drafters, key stakeholders, and the Law Society. As this report illustrates, there is no time to waste—the amendments must be tabled in Parliament to complete the enactment process. Legal aid is hugely popular, long overdue, and the need to increase access-to-justice is *urgent*.

All three amendments also touch on constitutional issues such as economic freedom, equal protection, and free speech. If government fails to implement these reforms to the LPA with the urgency they deserve, it risks

litigation by legal-aid minded lawyers to secure these changes via the courts.

Pass the Legal Aid Bill

The Ministry of Justice has signaled an increased willingness to finalize the draft Legal Aid Bill and bring it to Parliament. It is unclear whether the parties that were consulted on the draft Bill in 2013—in particular, the Law Society, which has signaled skepticism about the Legal Aid Bill—will still offer its support, or if major stakeholders need to be consulted anew. If passed, the draft Legal Aid Bill would fundamentally shift the justice sector, creating a government-funded legal aid scheme.

Of concern is whether The Government of Eswatini has the funds, and the political will, to provide longterm support for a government-funded legal aid service. The *Sexual Offences and Domestic Violence Act* (2018) and the *Children’s Protection and Welfare Act* (2012) both contain mandates that have yet to be fully funded. The independence of legal aid is also crucial to its success—as a new endeavor, government must demonstrate that it will permit government-funded legal assistance to be client-focused and to operate independently. Despite these questions, government-funded legal aid would be a monumental step forward for Eswatini’s justice sector that ought to be supported and celebrated by all.

Make other reforms to the legal profession

Several additional reforms could enhance legal aid, as well. The Law Society is charged with regulating the legal profession and could implement a *pro bono* hours requirement, or take steps to encourage *pro bono* service among its members. The LPA could be amended to permit the right of limited, supervised appearance for final-year law students handling cases in UNESWA's legal aid law clinic.

The LPA could also be amended to permit articles of clerkship served under attorneys other than just those in private practice—namely, government attorneys, non-profit attorneys, or via judicial clerkships.

The Law Society could also amend its Byelaws to broaden the class of attorneys permitted to stand for its leadership positions. Opening the Law Society's Executive Council to include the broad range of careers that attorneys pursue would help bring a perspective other than that of private, for-profit attorneys to the membership society that every legal practitioner in Eswatini is required to join.



A close-up photograph of a stone wall. The wall is constructed from large, irregular, grey and blue-grey stones. In the center of the wall, large, dark, three-dimensional metal letters are mounted. The visible letters are 'A', 'B', 'A', 'N', 'E', 'M', 'A', and 'G'. The letters are set against the textured background of the stone. At the top of the wall, there is a concrete ledge with some dark, scrubby vegetation growing from it. The bottom of the wall meets a concrete surface, with some small green plants and dry twigs at the base.

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Conclusion

Eswatini’s justice sector is failing to meet the needs of its poor. As this first-of-its-kind assessment demonstrates, *emaSwati* want to use the common law courts. Eighty-nine percent of *emaSwati* stated that if legal representation were free, they would use the common law courts to resolve disputes. *EmaSwati* face a host of legal issues, the most prevalent of which concern family and land. *EmaSwati*’s concerns are pressing, too.

Fifty-eight percent of respondents stated that in the last two years they would have benefitted from some form of legal assistance, while about half of those specifically identified legal representation as the type of assistance they would have benefited from. The need for legal aid is widespread across all key demographics (age, education, gender, rural-urban residence, region, housing situation, and others).

Accessing legal assistance, however, is far too costly. Sixty-nine percent of *emaSwati* “agreed” or “strongly agreed” that the legal system is too expensive to access—the most frequently identified barrier to accessing the courts. Implementing legal aid to increase access-to-justice is broadly popular. Ninety-four percent of *emaSwati* stated that it was either “very important” (84%) or “important”

(10%) to implement legal aid.

The Government of Eswatini holds the key. With a few legislative steps, Eswatini can unlock the most common mechanisms for delivering legal aid.

Three small amendments to the LPA—on the right of appearance, advertising, and fees—would open Eswatini’s justice sector to donor-funded legal aid, allowing admitted attorneys who work for NGOs to represent clients in court, while also securing the right of private attorneys to provide *pro bono* service. Ending the ban on attorney advertising would allow legal aid providers to reach the underserved, while freeing private practitioners to compete on the open marketplace. Securing the right of attorneys to charge *any reasonable fee*—or no fee at all—would cement an existing standard while permitting market-based solutions, such as contingency fees, to increase access-to-justice.

Finalizing the Legal Aid Bill would allow for the establishment of a government-funded legal aid scheme in Eswatini. The Legal Aid Bill, however, must be accompanied by a commitment from government to adequately fund services, ensuring legal aid as independent, client-driven, and conflict-free, as representation offered by Eswatini’s private bar.

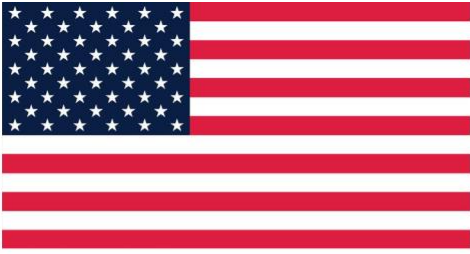
EmaSwati spoke loudly and clearly: they want access to the common law courts to help resolve their pressing legal issues, but they need help with the costs of doing so. Implementing a complement of approaches—*pro bono* service, donor-funded attorneys at NGOs, a government-funded legal aid scheme, and market-based solutions aimed at costs—will foster a legal sector better able to deliver on the Ministry of Justice’s vision of an Eswatini “where justice, the Constitution, and human rights prevail.”²⁷



²⁷ Vision, Ministry of Justice and Constitutional Affairs (available at: <https://www.gov.sz/index.php/ministries-departments/ministry-of-justice>).



Design, visualization and layout by Michèle Dean, Limeblue Design.



W A G E



ABOUT

Women & Girls Empowered (WAGE) is global programming consortium funded by the U.S. Department of State Secretary's Office of Global Women's Issues to advance the status of women and girls. WAGE is led by the American Bar Association Rule of Law Initiative (ABA ROLI) in close partnership with the Center for International Private Enterprise (CIPE), Grameen Foundation, and Search for Common Ground (Search). To account for the deeply interconnected nature of women's experiences, WAGE programs employ approaches that are highly collaborative, integrated, multidisciplinary, and inclusive, addressing WEE in the context of legal and practical barriers such as gender-based violence (GBV), conflict, and insecurity.

