

BY PRIORITY AIRMAIL

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Ministry of Justice and Constitutional Affairs
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Amsterdam, 22 October 2020

Your Excellency,

Lawyers for Lawyers is an independent and non-political foundation which seeks to promote the proper functioning of the rule of law by pursuing freedom and independence of the legal profession. We support lawyers worldwide who face reprisals, improper interferences or unreasonable restrictions in the execution of their profession. Lawyers for Lawyers was granted Special Consultative status with the UN Economic and Social Council in July 2013.

The International Commission of Jurists (ICJ) promotes and protects human rights through the Rule of Law, by using its unique legal expertise to develop and strengthen national and international justice systems. Established in 1952 and active on the five continents, the ICJ aims to ensure the progressive development and effective implementation of international human rights and international humanitarian law; secure the realization of civil, cultural, economic, political and social rights; safeguard the separation of powers; and guarantee the independence of the judiciary and legal profession.

Lawyers for Lawyers and the International Commission of Jurists are concerned about proposed legislation to regulate the operations and functions of the legal profession in Eswatini that would severely undermine the right to an independent lawyer.

According to our information, a Bill that the Government of Eswatini is reportedly seeking to introduce in Parliament would establish a Legal Services Regulatory Authority which would be responsible for issuing practising certificates to lawyers, disciplining lawyers in case of unethical conduct, developing and enforcing performance standards for legal practitioners in Eswatini. The proposed Legal Services Regulatory Authority would constitute up to 10 members of which only one would be appointed by the legal bar association (Law Society of Eswatini).

We have been informed that there has been insufficient consultation with the members of the legal profession or the Law Society of Eswatini on the proposed legislation.

Bar associations must be independent from government and other executive and private interests. Such independence must be protected in both law and in practice. In order to ensure the independent and effective functioning of the legal profession, self-governing professional associations of lawyers must also have sufficient competencies and powers relating to the legal profession to be able to protect and strengthen it. These include

powers in relation to the qualification and continuing education of lawyers, access to the legal profession and competence in relation to disciplinary proceedings against lawyers.

If enacted into law, the bill may set a dangerous precedent for other countries in the SADC region, especially at this time when lawyers in other parts of the region are being persecuted by their governments.

The proposed legislation does not comply with international and regional standards and directly affects the legal profession. There are a number of international legal obligations and standards, which are applicable to Eswatini.

Eswatini ratified the International Covenant on Civil and Political Rights (ICCPR) on 26 March 2004. The right of everyone to access to a lawyer as an essential element of a fair trial is guaranteed by Article 14 ICCPR.¹

The United Nations (UN) Basic Principles on the Role of Lawyers² (Basic Principles) provide in part:

Preamble. Whereas professional associations of lawyers have a vital role to play in upholding professional standards and ethics, protecting their members from persecution and improper restrictions and infringements, providing legal services to all in need of them, and cooperating with governmental and other institutions in furthering the ends of justice and public interest.

16. Governments shall ensure that lawyers (a) are able to perform all of their professional functions without intimidation, hindrance, harassment or improper interference (...) and (c) shall not suffer, or be threatened with, prosecution or administrative, economic or other sanctions for any action taken in accordance with recognized professional duties, standards and ethics.

24. Lawyers shall be entitled to form and join self-governing professional associations to represent their interests, promote their continuing education and training and protect their professional integrity. The executive body of the professional associations shall be elected by its members and shall exercise its functions without external interference.

28. Disciplinary proceedings against lawyers shall be brought before an impartial disciplinary committee established by the legal profession, before an independent statutory authority, or before a court, and shall be subject to an independent judicial review.

¹ 1. All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law.

2. Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law.

3. In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality: ...

(b) To have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing; ...

(d) To be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it; ...

² The UN Basic Principles on the Role of Lawyers provide a concise description of international norms relating to the key aspects of the right to independent counsel. The Basic Principles were unanimously adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders in Havana, Cuba on September 7 1990. Subsequently, the UN General Assembly “welcomed” the Basic Principles in their ‘Human rights in the administration of justice’ resolution, in a resolution that was adopted without a vote on December 18 1990 in both the session of the Third Committee and the plenary session of the General Assembly.

In a recent unanimous resolution³, the UN Human Rights Council recognized that “an independent legal profession” is among the “prerequisites for the protection of human rights and the application of the rule of law and for ensuring fair trials and the administration of justice without any discrimination”.

The Human Rights Council specifically expressed its concern “about situations where the entry into or continued practice within the legal profession is controlled or arbitrarily interfered with by the executive branch, with particular regard to abuse of systems for the licensing of lawyers.”⁴ It recommended that any domestic legislation should “provide for independent and self-governing professional associations of lawyers” and should “recognize the vital role played by lawyers in upholding the rule of law and promoting and protecting human rights”.⁵

In view of the above, Lawyers for Lawyers and the International Commission of Jurists (ICJ) respectfully urge you to immediately:

1. Withdraw the proposed legislation and respect the independence of the lawyers to regulate themselves.
2. Comply with the international legal obligations of Eswatini to ensure that members of the legal profession can carry out their professional functions without harassment and improper interference.

Thank you for your immediate attention to this very important matter. We are confident that the government of Eswatini will give this case the attention it deserves and we will continue to monitor this case closely.

Your sincerely,

Sophie de Graaf
Executive Director
Lawyers for Lawyers

Kaajal Ramjathan-Keogh
Director of the Africa Regional Programme
The International Commission of Jurists (ICJ)

A copy of this letter was sent to:

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³ UN Human Rights Council, Resolution 44/9 on Independence and impartiality of the judiciary, jurors and assessors, and the independence of lawyers, adopted on 16 July 2020, <https://undocs.org/A/HRC/RES/44/9>, Preamble.

⁴ Ibid.

⁵ Ibid, operative paragraph 15.