



ANALYSIS OF THE NON-PROFIT ORGANIZATIONS BILL 2024: ESWATINI

PREPARED BY SIBUSISO NHLABATSI FOR CANGO

SEPTEMBER 2024

THE NON-PROFIT ORGANISATIONS BILL, 2024

1. Introduction

The Kingdom of Eswatini is currently in the process of promulgating a new Non-Profit Organizations (NPO) Law aimed at establishing a comprehensive regulatory framework for Non-Profit Making Organizations within the country. This initiative underscores a significant shift in the governance of NPOs, which play a vital role in addressing various social, economic, and environmental issues.

From the outset, it is crucial to highlight that the proposed Bill intends to create a distinct regime for the registration and operation of NPOs, departing from the current practice governed by section 17 of the Companies Act 8 of 2009. This existing framework has often been inadequate for the unique needs and functions of non-profit organizations, as it primarily caters to profit-driven entities.

The decision to develop a specific NPO law reflects a growing recognition of the importance of the non-profit sector in promoting community development, social welfare, and civic engagement. By establishing a tailored regulatory environment, the government aims to enhance transparency, accountability, and good governance within the sector.

Countries typically introduce specific NGO bills or acts when their general companies' legislation does not adequately support the registration and oversight of non-profit entities. This is often done to ensure that NPOs can operate more effectively within a legal framework that recognizes their distinct objectives, such as charitable work, social advocacy, and community service.

2. Overview

The Bill is being introduced under the auspices of addressing terrorist financing and money-laundering risks in the non-profit sector in line with the Financial Action Task Force (FATF) Recommendations.¹The FATF is an intergovernmental organization that

¹ International Standards on Combating Money Laundering and the Financing of Terrorism and Proliferation: The FATF Recommendations (Updated February 2023), Available at: <https://www.fatfgafi.org/en/publications/Fatfrecommendations/Fatf-recommendations.html>

THE NON-PROFIT ORGANISATIONS BILL, 2024

was established in 1989 to lead global action to tackle money laundering, terrorist, and proliferation financing.² However, Eswatini already possesses a robust legislative framework to combat money laundering, terrorism financing, and proliferation, which includes specific provisions for the non-profit sector. Therefore, the anti-money laundering and counter-terrorism measures proposed in the new Bill are unnecessary and do not align with the Financial Action Task Force (FATF) recommendations that advocate for a proportionate, risk-based approach. Instead, these provisions could indiscriminately limit NGOs' access to funding and resources, as well as their operational freedom.

The Bill claims to ensure that all non-profit organizations implement appropriate internal controls, including systems to identify potential terrorism financing activities. However, these objectives are vague and unjustly imply that NGOs are involved in unlawful activities. Additionally, the Bill aims to align NGO initiatives with the current economic and social context, positioning NGOs as partners of the government. This approach blurs the line between the state's role in service delivery and the independence of the non-profit sector.

If the proposed law is enacted in its current form, it will impose excessively harsh regulatory measures and grant the government unwarranted control over NGO operations, including the authority to suspend or terminate organizations. This would further undermine the independence and autonomy of civil society organizations in Eswatini, which are already functioning in a challenging environment.

THE NET EFFECT OF THE PROPOSED NGO BILL APPEARS TO BE THE ERADICATION OF THE COORDINATING ASSEMBLY OF NON-GOVERNMENT ORGANIZATIONS (CANGO) AND ITS REPLACEMENT WITH A GOVERNMENT-CONTROLLED ASSEMBLY

² FATF's 40-member body sets international standards to ensure national authorities can effectively go after illicit funds linked to drugs trafficking, the illicit arms trade, cyber fraud and other serious crimes.

THE NON-PROFIT ORGANISATIONS BILL, 2024

3. Lack of justification for the proposed NGO Bill

There is a concerning absence of justification for the proposed NGO Bill, particularly regarding the need to replace the existing framework for registering non-profit organizations under the Companies Act. The current legal regime has functioned effectively, providing a solid foundation for the registration and operation of NGOs in Eswatini. Without a clear explanation of the perceived failures of this system, the push for new legislation raises questions about the motivations behind the Bill.

The Companies Act has successfully facilitated the registration of various organizations, allowing them to operate transparently and within a legal framework. Many NGOs have thrived under this regime, contributing significantly to social development and community welfare. The lack of documented issues or shortcomings within the current system suggests that the proposed changes may be unnecessary and could disrupt the established order that has proven to be effective.

4. Objects of the bill

- Provide for registration of NPO's – **Currently NPO's are registered under the Companies Act the Bill is silent on this issue.**
- Purports to provide for a framework of self-governance and self-regulation for non-profit organizations.
- Provide for a framework of raising funds and for public accounting for funds and non-profit organizations.
- Establishes a Non – Profit Organization Council in Eswatini.
- Facilitates to establish a relationship between non-profit organizations and the Government.

Controller	Means a person who owns , directs or exercises ultimate effective control over a non-profit organization	IT IS IMPOSSIBLE FOR AN NPO TO BE OWNED BY ONE PERSON or to be owned at all.
------------	---	---

THE NON-PROFIT ORGANISATIONS BILL, 2024

5. The Council: its composition and appointment

The NGO Bill provides for the composition and appointment of a Non-governmental Organizations Council. The NGO Council will consist of nine members: three members selected from a list of five persons nominated by the Coordination Assembly of Non-Profit Organizations (CANPO), one from organizations representing disabled persons, one from umbrella organization representing the private sector or charitable foundations, one person from the DPM's office, *Tinkhundla* administration, Ministry of Finance, AG's office. Registrar shall be *ex officio*.³

6. New powers of the Council and the responsible Minister

The Bill augments the substantial powers of the Council and the Minister. The Council may recommend to the Registrar to cancel the registration of NPO for failure or refusal to comply with the provisions of the Bill.⁴ The Registrar may cancel or suspend the registration of non-profit organisation amongst a number of grounds including:⁵-

- On request of the organization to be so suspended.
- Engaging in activity that is an identified risk
- Failure to submit annual reports or the accounts or returns
- Misappropriation of funds

7. New requirements for NGOs The NGO Bill places new burdens on organizations

Registration shall now be made to the Registrar of NPO's on almost similar grounds under the Companies Act but now the NPO must declare its funding sources.⁶ The Registrar has powers to refuse registration of NPO if he/she believe, *inter alia*, that the NPO has no connection with Eswatini or information provided for the registration is manifestly incorrect.⁷

³ See section 25 of the Bill.

⁴ See section 26 of the Bill.

⁵ See section 9 of the Bill.

⁶ See section 7(3) (e) of the Bill.

⁷ See section 7(4) of the Bill.

THE NON-PROFIT ORGANISATIONS BILL, 2024

8. Right of appeal

The Bill provides that an NPO may appeal to the Minister against decision made by the Registrar to refuse an application for registration or a suspension or cancelation of registration.⁸ Where a party is dissatisfied by the decision of the Minister the High Court may be approached for review.

9. Concerns over the proposed Coordination Assembly in the Eswatini NGO Bill

The Eswatini NGO Bill proposes the establishment of a new Coordination Assembly of Non-Profit Making Organizations, which raises significant concerns about its implications for the already existing Coordinating Assembly of Non-Government Organizations(CANGO).⁹ This proposal appears to undermine the established framework that CANGO has built over the years. CANGO serves as an umbrella organization for numerous NGOs in Eswatini, facilitating collaboration, resource sharing, and advocacy. Introducing a new coordinating body not only creates confusion but also threatens the operational integrity and unity of the existing non-profit sector.

The rationale behind creating a new statute to establish an organization that already exists is unclear. CANGO has been functioning effectively, representing a diverse range of organizations and providing essential support and guidance. The introduction of a competing assembly could lead to fragmentation within the sector, diluting the collective voice of NGOs and complicating their efforts to engage with government and other stakeholders. Instead of fostering a cooperative environment, this move may inadvertently sow discord among non-profits, undermining their ability to advocate for important social issues.

Moreover, the creation of a new assembly could be perceived as an effort to diminish the influence of CANGO and its member organizations. No statute should be crafted

⁸ See section 17(1) of the Bill.

⁹ See section 36 of the Bill.

THE NON-PROFIT ORGANISATIONS BILL, 2024

with the intention of sidelining or "killing" existing organizations that have demonstrated their commitment to serving the public interest. It is imperative for the government to recognize the vital role that CANGO plays in the civil society landscape and to engage in meaningful consultation with existing NGOs before enacting such legislation. A collaborative approach that strengthens rather than undermines the current framework would be far more beneficial for the non-profit sector in Eswatini.

10. Government dominance in the proposed coordination assembly: a threat to NGO independence

The proposed Coordination Assembly of Non-Profit Making Organizations in Eswatini raises significant concerns regarding its composition and the potential for government overreach. With government officials dominating this assembly, it is evident that the intention may be to exert greater control over NGOs. This dominance could undermine the independence and autonomy that non-profit organizations require to operate effectively and advocate for the communities they serve.

The involvement of government representatives in the new assembly could lead to a situation where NGOs are pressured to align their activities with government priorities, rather than addressing the needs of their constituents. This shift in focus could compromise the integrity of non-profit efforts, as organizations may feel compelled to conform to government agendas rather than pursuing their own missions. Such a dynamic threatens to dilute the diverse voices within the NGO sector and stifle critical advocacy efforts on pressing social issues.

Furthermore, the establishment of a government-dominated assembly could discourage collaboration among non-profits, as many may fear reprisals for opposing government positions. This environment of apprehension hampers the ability of NGOs to speak out on issues of public interest and diminishes their role as watchdogs of democracy. It is crucial for the government to recognize the importance of an independent civil society and to foster an environment where NGOs can operate freely, without undue influence or intimidation.

This amounts to executive overreach, and compulsory association of NGOs with executive projects, restricting NGOs' autonomy and independence. It shifts the

THE NON-PROFIT ORGANISATIONS BILL, 2024

inherent responsibility of government to provide its citizens with social services and support, to NGOs

11. Conclusion

The Bill unnecessarily restricts the establishment and operations of NGOs by imposing excessive and complex registration requirements, monitoring and inspection powers, and reporting requirements. The Supervisory Body's oversight powers are overly broad and not clearly defined, allowing for inspections without a court order; for NGOs to be directed to provide excessive documentation without a clear definition of what is required and when. Refusal of registration, suspension and termination of NGOs is at the discretion of the administrative Supervisory Body on vague and potentially arbitrary grounds. Such restrictions are not justified under international law because they are disproportionate and unnecessary in a democratic society. They also lack sufficient precision to enable NGOs to understand their obligations and comply with the law, and to avoid arbitrary, discriminatory, and authoritarian misapplication of the law.

The 'Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms' (the UN Declaration on Human Rights Defenders)¹⁰ calls on states to protect citizens' rights:

- To form, join and participate in non-governmental organizations;
- To solicit, receive and utilize resources for the express purpose of promoting and protecting human rights and fundamental freedoms through peaceful means; and to
- Freely ... publish, impart or disseminate to others views, information and knowledge on all human rights and fundamental freedoms (Articles 5 - 6).

¹⁰ Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms, Adopted 9 December 1998, By General Assembly resolution A/RES/53/144, available at: <https://www.ohchr.org/en/instrumentsmechanisms/instruments/declaration-right-and-responsibility-individuals-groups-and>

THE NON-PROFIT ORGANISATIONS BILL, 2024

However, contrary to the UN Declaration and the international human rights norms highlighted above, in its current form, the Bill will severely undermine the ability of Eswatini human rights defenders and civil society organizations to organize themselves and operate freely and independently in the defense of human rights.

Given its inherent unconstitutionality, and the risk and dangers the Bill poses to fundamental freedoms and the rule of law in Eswatini, the Eswatini Parliament should reject the Bill in its current form. Parliament should initiate broad and inclusive processes of dialogue and meaningful consultation with Eswatini civil society and other interested parties, to better understand NGOs' role, the nature of their work, the diversity of the sector, and their needs and concerns. This will allow for the drafting of new, less restrictive, more inclusive, and enabling, legislation that promotes the critical work of NGOs and ensures citizens' and beneficiaries' rights are protected, in accordance with Eswatini's constitutional and international human rights law obligations including the principles highlighted in the UN HRDs Declaration, the African Commission Guidelines, and the UN General Principles on CSOs' Right to Access Resources). Ongoing inclusive and targeted risk-based assessments and outreach may also be conducted with the non-profit sector in Eswatini to identify any risks of ML/ TF abuse, and to develop policies and effective self-regulation strategies to address these, without impacting on legitimate NPO activities, in accordance with the existing legal frameworks and international human rights standards.

For these reasons, it is imperative that the current Bill be removed from the parliamentary agenda. Instead, there should be an inclusive consultation process with the non-profit sector to develop more supportive legislation that encourages the establishment and operation of NGOs in Eswatini.
