



# Assessment of structural, Legal, Policy and Institutional Framework for Implementation of Post Busan Agenda in Swaziland

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*Reality of Aid Africa Network - Enabling Environment in Africa*

[www.roafrica.org](http://www.roafrica.org)

By Doo Aphane

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## List of Acronyms

**ACHPR** - The African Commission on Human and Peoples' Rights

**AGOA** - African Growth Opportunity Act

**CSOs** - Civil Society Organisations

**CEDAW** - Convention on Elimination of All forms of Discrimination against Women

**CAFD** - Committee on All Forms of Discrimination against Women

**CCM** - Country Coordinating Mechanism

**CANGO** - Coordinating Assembly of Non- Governmental Organisations

**CAFOD** - Catholic Agency for Development

**COSPE** – Cooperation for Development of Emerging Countries

**EDF** - European Development Fund

**EU** - European Union

**FSBC** - Federation of the Swaziland Business Community

**FSE&CC** - Federation of Swaziland Employers and Chamber of Commerce

**ICCPR** - The International Covenant on Civil and Political Rights

**IMM** - Imbokodvo National Movement

**IDEAL** - Institute for Democracy and Leadership

**ILO** - International Labour Organisation

**MISA** - Media Institute of Southern Africa

**HURISWA** - Human Rights Society of Swaziland

**NNLC** - Ngwane National Liberatory Congress

**NED** - National Endowment for Democracy

**PACT** - People Acting in Community Together

**PEPFAR** - The U.S. President's Emergency Plan for AIDS Relief

**PUDEMO** - People's United Democratic Movement

**ROA** - Reality of Aid Network

**SNL** - Swazi Nation Land

**SACRO** - Swaziland Association for Crime Prevention and Rehabilitation of Offenders (SACRO)

**SUDF** - Swaziland United Democratic Front

**SYWN** - Swaziland Young Women's Network

**SYWF** - Swaziland Young Women's Forum

**SCCCO** - Swaziland Coalition of Concerned Civic Organisations

**SCS** - Save the Children Swaziland

**SRWA** - Swaziland Rural Women's Assembly

**SPR** - Strategic Prioritisation Retreat

**SWAGAA** - Swaziland Action Group against Abuse

**TUCOSWA** - Trade Union Congress of Swaziland

**WLSA** - Women and Law in Southern African Africa

**TDL** - Title Deed Land

**UDHR** - Universal Declaration of Human Rights

**UNDP** - United Nations Development Fund

**UNDG** - United Nations Development Group

**UN** - United Nations

**UPR** - United Nations Universal Periodic Review

**USAID** - United States Agency for International Development

## Executive Summary

The Busan Partnership for Effective Development Cooperation recognizes civil society's importance in policy formulation, development programming and implementation (including service delivery) as well as promoting and protecting human rights. At Busan, states committed to, *“Implement fully our respective commitments to enable CSOs to exercise their roles as independent development actors, with a particular focus on an enabling environment, consistent with agreed international rights, that maximizes the contributions of CSOs to development.”*

The freedoms of association, assembly and expression are integral to the nature and operations of civil society as key players and partners in any development agenda. The state thus has positive and negative obligations to, respectively, implement measures that create an enabling environment (including making engagement spaces and opportunities for engagement available) and to refrain from conduct that interferes with these rights.

## Area One: Universally Accepted CSO Rights

Section 24 of Swaziland's constitution guarantees freedom of expression and section 25, freedom of association, stipulating a number of permissible restrictions as long as they are "*reasonably justifiable in a democratic society.*" Swaziland's democratic deficits mean interpretation of this standard opens the space for imposition of unjustifiable restrictions. Laws such as the Official Secrets Act 30 of 1968, Proscribed Publications Act of 1968, Public Order Act of 1963, Sedition and Subversive Activities Act of 1938, and Suppression of Terrorism Act of 2008<sup>1</sup> severely curtail CSO operation. There has been no law reform process to bring outdated and draconian laws into conformity with the constitution and international human rights obligations. Swaziland's dual governance system means culture and tradition also influence the environment.

Laws and processes governing CSO registration differ depending on the type of CSO. NGOs do not have a specific law for registration and may be established either as associations, companies-not-for-profit or Trusts. Some NGOs view the absence of a specific law as non-recognition of their role in development and feel they lack protection as a result. Worker and employer organisations register in terms of the Industrial Relations Act of 2000.<sup>2</sup> A number of gaps exist in the law, notably the absence of legislation governing registration and operation of political parties, which are currently regarded as part of civil society.

While registration requirements and procedures under existing laws are relatively straight forward, the political climate influences the response of registration officials. Thus CSO registration may be delayed or denied without official explanation and several CSOs have taken legal action in this regard. Unregistered associations have limited recognition, exacerbating their vulnerability to arbitrary restrictions. Youth and children's organisations are subject to similar considerations, affecting recognition, free operation and opportunities for participation.

Even where registration is granted, the degree of freedom exercised by CSOs depends on whether they are recognised by and acceptable to government. CSOs working in service delivery or social issues have significant space, though it can be limited if an organisation begins to engage "political" issues or conduct robust advocacy. The space for human rights, good governance, and democracy CSOs is minimal and continuously shrinking. Harassment of CSOs as well as seizure of CSO information and property by state agents is common. CSOs have used the courts to challenge these actions but opaque verbal restrictions whose origin is unclear and lack of judicial independence have resulted in limited success.

- **CSOs Freedom of Operation**

CSOs' freedom of choice regarding mandate, partners and area of operation is based on whether the CSO addresses "safe issues" or not, although even "safe" organisations such as children's CSOs, face restriction if they engage "hard" issues of governance. Trade unions have been told to limit themselves to socio-economic issues and churches, to religion. These and

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<sup>1</sup> There is an ongoing review of the Suppression of Terrorism Act and Public Order Act and the High Court recently declared the Sedition and Subversive Activities Act and Suppression of Terrorism Act unconstitutional

<sup>2</sup> Amended in 2012 following civil society and international outcry after the deregistration of the Trade Union Congress of Swaziland (TUCOSWA) in 2012

other “political” CSOs are subject to severe restrictions under the guise of “maintaining law and order” or “protecting persons and property.” CSOs’ access to communities is tightly controlled and traditional authorities act as gatekeepers. Onerous processes are in place for permission to conduct activities and CSO movements, communications and activities are closely monitored. On suspicion of promoting “political agendas,” CSO activities can be stopped and where allowed to proceed, there is usually a heavy police presence which affects free participation in civil society activities. CSOs have limited capacity to protect themselves or each other from this interference.

Freedom of expression and access to information (including through the media) is limited for certain types of CSOs. Criticizing the governing authorities is viewed negatively and those expressing such opinions are subject to reprisals. In view of this, CSOs try to frame their messages strategically to appear non-threatening and avoid antagonizing the governing authorities. However, in doing so they acknowledge that there is a risk that their message and in turn impact, will be diluted.

- **Access to Resources**

CSOs tend to be donor funded and there are currently no legal or policy barriers to seek, secure and use resources, including from foreign sources. Nonetheless, human rights organizations are often accused of being funded by foreign agents (often Western) to conduct destabilization activities. Swaziland’s potential local resource base to support philanthropy is extremely small and there are no incentives in policy or law to promote local resource mobilization, making it difficult for CSOs to tap into this space.

## **Area Two: Policy Influencing**

There have been processes established for engagement at different levels but the extent of their inclusiveness and accessibility for CSOs depends on government, which has power to unilaterally decide who participates and what is to be discussed. CSOs are more likely to access the policy engagement space and opportunities if they are deemed “non-political.” Children’s and youth organizations are involved in these processes as long as they are deemed acceptable within the prevailing political climate. In the industrial relations sector, inclusivity is an obligation in terms of ILO agreements.

Civil society is narrowly understood as NGOs when it comes to policy engagement and there is an imbalance in terms of NGO participation as opposed to that of the rest of civil society. NGOs and their umbrella body, CANGO, have more opportunity to engage and there is a risk that their “safe” views are taken as representative of those of broader civil society. There has also been an emergence of “GONGOs<sup>3</sup>” which have greater space because they promote the status quo. “Political” CSOs have minimal space, with many of them being unregistered and hence not recognized by government.

The Country Coordinating Mechanism (CCM), which oversees HIV and AIDS, TB and Malaria work under the Global Fund is an example of an inclusive institutionalized forum. Its

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<sup>3</sup> Government-formed organisations

membership includes government ministries; local government; NGOs; FBOs, THOs<sup>4</sup>, Academia; PLHIV, traditional regiments; trade unions as well as bilateral and multilateral development partners.

CSO participation in policy discussions does not guarantee that its views will be taken into account in the finalization or implementation of policy. There is usually a difference in how far CSOs and government are willing to go in addressing issues, with government in certain instances such as law reform, having the final say. CSO participation is also affected by capacity constraints and understanding the policy engagement terrain. CSOs require policy literacy, analysis, monitoring and advocacy skills. CSOs are also not well coordinated amongst themselves or across issues thus weakening the impact they could make.

- **Access to information**

Despite the constitutional guarantees of freedom of expression, including access to information, at a practical level there is no legal framework for realizing this right. The information policy is not being fully implemented and a proposed law on access to information, published several years ago has not been finalized. Obtaining information from public bodies is a process of trial and error as there are no defined procedures and each department has its own – sometimes inconsistent – practice. Responses to information requests take time, if given at all. Public servants do not seem to understand government's obligation to make information available. They are also limited by the Official Secrets Act of 1968 from revealing certain types of information, hence are wary of giving out even the most basic information for fear of victimization.

## **Area Three: Donor – CSO relationships**

Swaziland has very few official development partners, with even fewer supporting CSO work. Private agencies and foundations grant CSOs small amounts of project funding. The country's classification as "lower middle income" and its negative governance and human rights record also affect the amount of funding that is received by civil society. The responsiveness of funding mechanisms to the CSO context priorities is weak as the nature of support does not meet CSO needs. Basic needs such as rent, transport, communication and salaries have no or limited support leading to CSO insecurity and instability.

CSOs view donor-CSO power relations as lopsided with donors having the upper hand because of their financial muscle. CSOs observe a lack of appreciation by donors of the difficult operational environment in the country and why CSOs often find donor demands difficult to fulfill resulting in donors "dumping" CSOs who have challenges instead of assisting to strengthen them. Sustainability plans are usually required by not supported by donors, who do not have initiatives to facilitate the diversification of CSOs' income. CSOs have limited access to information about funding mechanisms and their complexity challenges CSO capacities. At times, local CSOs can access funding only if they have international organisations as partners, since these are the ones regarded as having the requisite capacity

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<sup>4</sup> Traditional Healers Organisations



and systems for implementation and accountability. CSOs are concerned about the resultant competition within the sector and weakening of local civil society. While some CSOs have been part of donor policy and program development (e.g., EU, UN) and donors publish their plans and proposed partnerships in hard copy and on their websites, this information does not filter down to broader civil society. The narrow working definition of civil society to be NGOs also affects other CSO's access to information, donor policy spaces and funding.

## **Recommendations:**

### **Area One: Universally Accepted CSO Rights:**

- Institute systematic and comprehensive law reform to align laws with constitution. and regional and international human rights obligations.
- Sensitize stakeholders on each other's mandates and development effectiveness.
- Establish forums to enable periodic reporting and discussion amongst stakeholders.
- Capacity-building on development effectiveness and frameworks.
- Build capacity on funding mechanisms.
- Government must rebuild trust with CSOs and cease reprisals against CSOs.

### **Area Two: Policy Influencing**

- Continuous capacity-building on public policy formulation, drafting, analysis, monitoring and evaluation.
- Disseminate the process of public policy formulation to all stakeholders, including how stakeholders can participate in the process.
- Establish objective and timely processes that facilitate access to public information.
- Establishment of informal coalitions between sectors and across issues.
- Capacity-building on relevant sectorial policies.
- Establishment of sectorial and national forums to discuss and engage policy developments.

### **Area Three: Donor – CSO relationships**

- Conduct an objective CSO mapping exercise to understand the CSO landscape.
- Broaden recognition and partnering with civil society beyond the NGO sector.
- Improve dissemination of donor programmatic priorities, funding frameworks.
- Conduct capacity building on the aid effectiveness agenda and processes.
- Strengthen capacity for resource mobilization, including on diversification of income generation.
- Strengthen institutional capacity of CSOs, supporting identified areas of weakness.
- Increase operational and administrative funding allocations.
- Improve donor coordination and cooperation in-country.
- Create a periodic donor-civil society consultative forum with broad representation.
- Support civil society in research, monitoring and reporting on the operating environment.

# 1. INTRODUCTION

## 1.1 Background and Introduction Information

Swaziland gained independence from Britain<sup>5</sup> in September 1968 under a constitution that made provision for a bill of rights.<sup>6</sup> Similarly to other former colonies, it inherited a dual legal system that sees Roman Dutch Common law (as modified by statute from time to time), operate side by side with Swazi law and custom. The country has a duality of courts and related administrative structures. Compounding the complexity of the political and governance environment in Swaziland is the fact of the country having lived most of its independent life of forty-eight years to date, in a state of emergency, under rule by decree. The independence constitution of 1968 was only in place for a period of about five years. This constitution also provided, amongst other things, for a multi-party governance dispensation.

The first post-independence elections were held in May 1972 with the Imbokodvo National Movement (INM) receiving close to 75% of the vote and the Ngwane National Liberatory Congress (NNLC) just above 20% (translating to three seats in parliament). This raised such discomfort in the ruling party headed by *iNgwenyama*<sup>7</sup>. In the process of challenging the NNLC victory, the candidacy of a certain Thomas Bhekindlela Ngwenya was blemished with the allegation that he was not a Swazi citizen. On deportation, he brought a court challenge, successfully setting aside the deportation order. Government's attempt at amending immigration legislation to establish a tribunal that would have the exclusive jurisdiction over citizenship matters, seizing it from the High Court, was thwarted by the Appeal Court as unconstitutional.<sup>8</sup> This was the genesis of the turbulent political state of affairs that rendered the country a non-party state to date. These developments led to the repeal of the 1968 constitution on April 12, 1973 through a Proclamation to the Nation<sup>9</sup> in terms of which the then King Sobhuza II assumed supreme power.<sup>10</sup> The basis for repeal of the Constitution was that it was alien, and led to divisive political practices incompatible with the Swazi way of life.<sup>11</sup> This laid the foundation for the absolute monarchy that Swaziland currently is.

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<sup>5</sup> Independence Order No50/1968

<sup>6</sup>Chapter 111 of Swaziland 1968 constitution

<sup>7</sup> The King in his customary capacity as the head of the Swazi nation

<sup>8</sup> Bhekindlela Thomas Ngwenya v the Deputy Prime Minister 1973 SLR 120 AC

<sup>9</sup> Also commonly referred to as the 1973 Decree

<sup>10</sup> NOW THEREFORE I, SOBHUZA II, King of Swaziland, hereby declare that, in collaboration with my Cabinet Ministers and supported by the whole nation, I have assumed supreme power in the Kingdom of Swaziland and that all Legislative, Executive and Judicial power is vested in myself and shall, for the meantime, be exercised in collaboration with a Council constituted by my Cabinet Ministers.

<sup>11</sup> See Article 3 of King's Proclamation to the Nation, 1973 (Ibid) for list of reasons given for the repeal: "(a)" that the Constitution has indeed failed to provide the machinery for good government and for the maintenance of peace and order; (b) that the Constitution is indeed the cause of growing unrest, insecurity, dissatisfaction with the state of affairs in our country and an impediment to free and progressive development in all spheres of life; (c) that the Constitution has permitted the importation into our country of highly undesirable political practices alien to, and incompatible with the way of life in our society and designed to disrupt and destroy our own peaceful and constructive and essentially democratic methods of

A new electoral system was put in place by King Sobhuza 11 in 1978<sup>12</sup>, utilising the *tinkhundla*<sup>13</sup>, as a “home grown experiment” in governance. Since politics was now out of the ambit of the ordinary citizen, let alone any organised formation, it could only be the subject at *tinkhundla*. This created much fear in the citizenry in speaking politics, criticising or questioning, which was seen by governing authorities as worse than blasphemy in Christian orthodox. This made its way into the national constitution of 2005<sup>14</sup> through Section 79 thereof, which states, “The system of government for Swaziland is a democratic, participatory, *tinkhundla*-based system which emphasises devolution of state power from central government to *tinkhundla* areas and individual merit as a basis for election or appointment to public office.” The government of the Kingdom of Swaziland accordingly uses this constitutional provision to define, support and defend the country’s political system, which is often criticised as undemocratic.

The process of crafting a new constitution started in 1996 and was finalized with adoption in 2005. Although attempts were made for the process to be consultative, it precluded group submissions. Thus, organized voices based on associating freely were subdued even in the process of crafting what was then a potentially new dispensation. It provided “*any member of the public who desires to make a submission to the Commission may do so in person or in writing and may not represent anyone or be represented in any capacity whilst making such submission to the commission.*”<sup>15</sup>

The dual legal system was imported into the constitution as follows:

252. (1) Subject to the provisions of this Constitution or any other written law, the principles and rules that formed, immediately before the 6<sup>th</sup> September, 1968 (Independence Day), the principles and rules of the Roman Dutch Common Law as applicable to Swaziland since 22<sup>nd</sup> February 1907 are confirmed and shall be applied and enforced as the common law of Swaziland except where and to the extent that those principles or rules are inconsistent with this Constitution or a statute.

(2) Subject to the provisions of this Constitution, the principles of Swazi customary law (Swazi law and custom) are hereby recognised and adopted and shall be applied and enforced as part of the law of Swaziland.

The constitution thus confirmed the dual laws as part of the country’s legal system. In practice, Swazi law and custom at times supersedes the constitution despite subsection 252(3) which provides, “The provisions of subsection (2) do not apply in respect of any custom that is, and to the extent that it is, inconsistent with a provision of this Constitution or a statute, or repugnant to natural justice or morality or general principles of humanity.”

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political activity; increasingly this element engenders hostility, bitterness and unrest in our peaceful society;...”

<sup>12</sup> Through the Establishment of Parliament Order, of 1978.

<sup>13</sup> Areas comprised of several chiefdoms which also acts as a constituency for the election of Members of the House of Assembly (Section 20, Constitution of the Kingdom of Swaziland, 2005); it is also the name of the location and physical structure of the area’s administration

<sup>14</sup> The Constitution of the Kingdom of Swaziland Act 2005

<sup>15</sup> Section 4 Constitutional Review Commission Decree No 2/1996

The country has two types of land tenure systems, being Swazi Nation Land (SNL) and Title Deed Land (TDL). SNL is communal and held in trust for the nation by the King as *iNgenyama*. It is administered from day to day by Chiefs, who are the “footstool” of the

*iNgenyama*.<sup>16</sup> TDL is divided into residential areas, farms and crown land (which is title held by the state and is also under the King’s control since 1973.<sup>17</sup> The type of tenure on which people reside has a bearing on how they can be accessed by CSOs wishing to engage and work with them. For the majority residing on SNL, organisations have to go through traditional structures to be able to work with communities. Whilst there is a sense of what should generally prevail in terms of how to go about seeking such permission, there are variations and much room for conflict due what may seem to one party, unreasonable denial. For those on title deed land, access is through municipal council structures with systems governed by statute and bye laws, therefore, having less room for variation and manipulation. CSOs work largely in rural and peri-urban communities which are on Swazi Nation Land. Therefore, their accessing of the constituencies tends to be subjected to two sets of laws, as they have to abide by laws regulating operation of the organisations and those that regulate the traditional spaces in which they work.

Civil society organisations have always operated in Swaziland. However, their role was historically more in the relief sector with a welfare orientation. These were in the main faith-based and international in outlook such as Swaziland Red Cross Society, Save the Children Fund, Lutheran World Federation, World Vision International, Girl Guides and Boy Scouts. Inaugural local established organisations had similar mandates. However, with time a new wave of organisations proliferated - in the eighties and nineties – with a new perspective that had a different nuance of a human rights-based approach. Some of the then relief organisations have since then also been steadily increasing programmes that are creating awareness on socio-economic rights and thus questioning on issues of governance. The founding of the People’s United Democratic Movement (PUDEMO) in 1983, the first political party after the Decree to the Nation in 1973 to operate openly, further tarnished the environment for CSOs on the ground as any dissent was associated with political parties hence CSOs were being labeled and dismissed as “PUDEMO.” It is against this challenging background that CSOs are operating in Swaziland.

## 1.2 Study Approach Methodology

### 1.2.1 Objective

The objective of the assessment is to:

1. Assess the structural, legal, policy space and institutional framework for the implementation of the Post Busan agenda, indicating who the main players are.

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<sup>16</sup> Swaziland Administration Act 79/1950 further confirmed and entrenched by Constitution of the Kingdom of Swaziland 2005 states at 211(1).

<sup>17</sup> Such land is regulated by the Crown Lands Disposal Act, No. 13 of 1911 and related legislation such as, the Crown Lands Disposal Regulations, 1912; The Crown Lands Act, 1949; The Crown Lands (Conditions) Act, 1968; and Vesting of Land in King Order, No. 45 of 1973

2. Propose to Reality of Aid Network (ROA) Africa, specific actions that the multi-stakeholders can take to ensure that they fully utilise the opportunities that Busan's outcome presents to promote enabling environment for CSOs, including children rights and youth organisations.

### 1.2.3 Methods

#### 1.2.3.1 Literature Review

Literature was reviewed in line with the objectives of the assessment being to;

- Assess the structural, legal, policy space and institutional framework for the implementation of the Post Busan agenda, indicating who the main players are.
- Propose Reality of Africa Network (ROA) Africa specific actions that the multi-stakeholders can take to ensure that they fully utilize the opportunities that Busan outcome presents to promote enabling environment for CSOs, including Children rights and Youth organizations.

Literature reviewed includes:

- The Constitution of the Kingdom of Swaziland, 2005
- The Decree to the Nation, 1973
- Guiding common law principles, particularly on freedoms of expression, assembly and association
- Regional and international human rights instruments
- Relevant court cases
- Media reports
- Journals
- Reports

The reviewed literature acted as a stepping stone to preparing for field work. The RoA had pronounced its focus as being three areas, within which it seeks to understand and address essential dimensions of the CSO enabling environment:

- ❖ **Area One: Universally accepted human rights and freedoms affecting children rights and youth CSOs**
  - *Dimension One:* Recognition of rights and freedoms affecting Children rights and Youth CSOs.
  - *Dimension Two:* The legal and regulatory environment, implementing rights and freedoms affecting Children rights and Youth organizations.
  - *Dimension Three:* Rights of specific groups, i.e. Children rights and Youth CSOs
- ❖ **Area Two: Policy Influencing**
  - *Dimension One:* Spaces for dialogue and policy influencing
  - *Dimension Two:* Access to information

## ❖ Area Three: Donor – CSO relationships

### 1.2.3.2 Sampling

The sampling tried to align the terms of reference which clearly zeroed in on children and youth organisations with realities on the ground. Sampling was also responsive to time frames allocated to the assessment. From the literature it was evident that justice to the assignment could only be served through combination of the organisations as the complement of children’s and youth organisations was limited. Focusing on these two could leave out empirical evidence on the assessment which could be enunciated by other civil society organisations outside these two. Literature revealed that there are much more children’s organisations than youth ones. Moreover, some of the children’s organisations have been operating for very long periods of time. Youth organisations were found to be more recent and much thinner on the ground with some having paused operations due to financial challenges. The target sample was 3 focus groups comprising:

- *Luvatsi* Swaziland Youth Empowerment Organisation
- Organisations under the children’s consortium under the Coordinating Assembly of Non-governmental Organisations (CANGO)
- COSPE Women in Network

However, only the Swaziland Youth Empowerment Network focus group discussion took place. Consequently, the number of key informants was increased. The focus group was organized with the assistance of the youth mother body, the Swaziland Youth Organisation. It comprised 8 participants, 3 women and 4 men from different parts of the country and youth networks who are members of the organization and the Coordinator, a man. The focus group took place in a conference room adjacent to the office of the organization so there was no issue for any participant in finding it as they simply converged at the head office.

### 1.2.3.3 Key Informants

Key informants were selected on the basis of the organization’s positioning within CSOs with most likelihood to share depth information to the assessment.

- Bantwana
- Swaziland Youth Empowerment Organisation *Luvatsi*
- Swaziland Association for Crime Prevention and Rehabilitation of Offenders (SACRO)
- Swaziland United Democratic Front (SUDF)
- Swaziland Young Women’s Network (SYWN)
- Swaziland Young Women’s Forum (SYWF)
- Swaziland Coalition of Concerned Civic Organisations (SCCCO)
- Coordinating Assembly of Non -Governmental Organisations (CANGO)
- Save the Children Swaziland (SCF)

### 1.2.3.4 Donors

The following agencies were targeted albeit with a very poor and slow response on their part:

- European Union
- United Nations Development Program (UNDP) as the UN coordinating agency
- PEPFAR
- PACT
- Republic of China (Taiwan)
- Canada Fund

### **1.2.3.5 Communication**

An email giving background information on the assessment was sent to potential respondents followed by telephone calls to secure an appointment.

### **1.2.3.6 Instruments design**

The overall and specific questions to be answered were detailed by ROA, thus what remained was framing an overarching question only. The rest of the detailed questions were used as probes during the interviews.

#### **1.2.3.10 Limitations**

Some of the sampled key informant organizations and focus groups could not be held within the challenging time frame. The assessment was also dealt a hard blow by taking place after the August SADC Summit which seemingly appropriated a lot of energy from CSOs as a number were trying to allocate interviews way ahead of the scheduled time stating that they were catching up after the summit. For some the period also coincided with the eve of preparations for International Sixteen Days of Activism against Gender-Based Violence and looming end of year. One organization had a mission with international partners for a while at the time yet it was very keen to participate. Due to the non-responsiveness of donors, there was heavy reliance on literature regarding the donor perspective of the assessment.

#### **1.2.3.11 Mitigation**

In mitigation the following was done: sampling more key informants from civil society organizations who were initially planned to be part of the focus group; giving the assessment a week's extension; offering to conduct interviews even telephonically when all else had failed. The assessment also included CSOs that are neither youth nor children's organizations for greater context. Literature on donor CSO relations was revisited after data collection to triangulate if it is in line with the findings.

## 2. KEY FINDINGS

### 2.1. AREA 1: UNIVERSALLY ACCEPTED HUMAN RIGHTS AND FREEDOMS AFFECTING CSOS

#### 2.1.1 Dimension One: Recognition of rights and freedoms affecting CSOs

##### 2.1.1.1 Freedom of Association

Freedom of association is protected in section 25 of the national constitution, which recognizes that individuals have the right to associate freely and should neither be hindered from joining nor compelled to join associations of their choice. However, the section provides that there can be limitations<sup>18</sup> placed on this right:

- i. *“in the interests of defence, public safety, public order, public morality or public health;”*
- ii. *“that is reasonably required for the purpose of protecting the rights or freedoms of other persons;*
- iii. *“that imposes reasonable restrictions upon public officers”*

Section 25(4) provides that laws made to address the following issues will not be regarded as *“inconsistent with or in contravention of”* section 25 that is, they will not be regarded as interfering with the enjoyment of the right. These are:

- (a) *for the registration of trade unions, employers organisations, companies, partnerships or co-operative societies and other associations including provision relating to the procedure for registration, prescribing qualifications for registration and authorizing refusal of registration on the grounds that the prescribed qualifications are not fulfilled; or*
- (b) *For prohibiting or restricting the performance of any function or the carrying on of any business by any such association as is mentioned in paragraph (a) which is not registered.*

Whilst the first two subsections of section 25 clearly bestow the right of freedom of association, from the third subsection begins the derogation from established rights on association, coupled with assembly with those whom s/he chooses. Subsection three begins in a fairly standard manner of protecting human rights mindful of that where X's rights ends, Y's begins, thus bringing elements of interests of defence, public safety, public order, public morality or public health. Moreover, this section is emphatic on reasonableness of derogating from one's freedom of association. What makes this otherwise objective sounding provision seem unreasonable is the whole policy and legislative framework against which this provision is to be implemented wherein the status of the 1973 Decree to the Nation has not been clearly revoked as being of no force and effect. The shakiness on which the implementation of this subsection on freedom of association was founded is evidenced by the effect of subsequent legislation to it such as the Suppression of Terrorism Act of 2008. Therefore, in effect subsection three introduces relativism using subtle means. The rest of the

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<sup>18</sup> As long as these limitations are legal and justifiable in a democratic society



section overtly derogates from the established right of freedom of association bringing clear restrictions and practices that do not derogate from the right to freedom of assembly. The unbanning of political parties when they cannot register or contest power is a contradiction in terms.

Compounding the situation is the fact of the process of drafting the country's national constitution itself did not embrace joint coalition voice. The Constitutional Review Commission (CRC) Decree<sup>19</sup> which established the Commission had terms of reference that included not taking group/formation submissions. Submissions and general participation in the process was left to individuals. The same sentiment of emphasis of individual participation and merit is mirrored in the constitution. Section 79 of the constitution provides, "*The system of government for Swaziland is a democratic, participatory, tinkhundla-based system which emphasizes devolution of state power from central government to tinkhundla areas and individual merit as a basis for election or appointment to public office.*"

In 2002, Lawyers for Human Rights Swaziland submitted a communication<sup>20</sup> to the African Commission on Human and Peoples' Rights (ACHPR) alleging violations by the 1973 Decree of, amongst others, the rights to freedom of association and assembly to which the Commission recommended, "that the state engages with other stakeholders, including members of civil society, in the conception and drafting of the new Constitution."<sup>21</sup> Subsequent litigation was instituted by National Constitutional Assembly (NCA), SNAT, SFTU<sup>22</sup>, in partnership with political entities. Amongst the remedies sought in these actions were the striking down of the constitution based on its flawed process - in the NCA case of Jan Sithole NO and Others vs. The Prime Minister of the Kingdom of Swaziland and Others<sup>23</sup>, one of the prayers was "*Suspending and setting aside the Constitution of Swaziland Act No. 01 of 2005 for a period of two years and referring to a broadly representative institution to correct its sections which do not give effect to the second respondent's obligations under the African Charter and the NEPAD declaration as well as under international human rights and international customary law.*" The NCA, in its ongoing challenge to the official constitution-making process, also began a parallel process of drafting a shadow constitution that would be a more accurate reflection of the views of the populace.

While the constitution provides for freedom of association, the government restricts this right in practice through laws and the conduct of government officials as well as traditional authorities. According to Country Reports on Human Rights Practices for 2015 United States Department of States Bureau of Democracy Human Rights and Labour "*The three main human rights abuses were police use of excessive force, including torture, beatings, and unlawful killings; restrictions on freedoms of association, assembly, and speech; and discrimination against and abuse of women and children.*" The Public Order Act of 1963 and Suppression of Terrorism Act of 2008 have been identified amongst the laws unjustifiably restricting the

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<sup>19</sup>No 1/1996

<sup>20</sup> African Commission on Human and Peoples' Rights (ACHPR), Communication 251/2002, Lawyers for Human Rights v Swaziland

<sup>21</sup> Lawyers for Human Rights v Swaziland (2005) AHRLR 66 (ACHPR 2005)

<sup>22</sup> Swaziland Federation of Trade Unions and Others vs Chairman, Constitutional Review Commission and Others, Swaziland High Court, Civil Case No. 3367/2004

<sup>23</sup> Swaziland High Court, Civil Case No. 2792/2006

freedom of association. It has been noted, for instance, that the Suppression of Terrorism Act, is “overbroad and vague” definitions of “terrorist act” and “terrorist group.” The Act was challenged as these provisions unjustifiably criminalize legitimate activism by labeling persons, organisations and action as “terrorist”, thus giving government an excuse to, either proscribe, restrict, or criminally prosecute them.<sup>24</sup> The challenge was successful and the provisions declared unconstitutional. It remains to be seen whether the current review of the law in Parliament will incorporate the implications of these developments.

In addition, there are specific pieces of legislation that pertain to the registration of different types of associations, i.e., the law registering trade unions differ from that governing the registration of non-profit companies. However, there still remain gaps in the law as not all associations are legally recognized. A glaring example of this, are political parties, which, despite section 25, as yet do not have a law that enables them to register, and freely conduct their operations (including participating in elections).<sup>25</sup> The constitution does not address the formation or role of political parties. It states that individual merit shall be the basis for election or appointment to public office. While officials argue that the constitution replaced and hence super cedes the 1973 decree that banned political parties, there are no legal mechanisms for parties to register or contest elections. In addition, several prodemocracy NGOs were banned as terrorist organisations despite their pacific nature and absence of ties to international terrorist organisations.

The constitution does not specifically mention youth in any of its provisions and those that apply to children, namely section 27 on rights and protection of the family and section 29 on children’s rights, focus more on protecting children and the duties that children have rather than on exercising the right to associate. Nonetheless, even though the constitution does not specifically mention children and youth in terms of enjoying this right, they are included as section 14(3) states, “*A person of whatever gender, race, place of origin, political opinion, colour, religion, creed, age or disability shall be entitled to the fundamental rights and freedoms of the individual contained in this Chapter but subject to respect for the rights and freedoms of others and for the public interest.*” This means that youth and children CSOs also benefit from the recognition of this right. However, it also means at the same time, that they are vulnerable to the same restrictions contained in section 25(3) and laws such as the Public Order Act and Suppression of Terrorism Act. In the latter instance, the implication is that organisations working on political issues have challenges associating. This affects mainly youth organisations (in particular those linked to political parties whose legal status remains uncertain), which have in recent years become active in engaging governance issues.

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<sup>24</sup> Maseko and Others v The Prime Minister of Swaziland and Others (2180/2009) [2016] SZHC 180 (16 September 2016)

<sup>25</sup> Political parties were banned in Swaziland in 1973, and while some exist, they operate with difficulty, are unable to register and face severe restrictions and harassment

### 2.1.1.2 Freedom of Peaceful Assembly

Section 25 of the Swaziland also protects the freedom of peaceful assembly and stipulates:

25. (1) *A person has the right to freedom of peaceful assembly and association.*
- (2) *A person shall not except with the free consent of that person be hindered in the enjoyment of the freedom of peaceful assembly and association, that is to say, the right to assemble peacefully and associate freely with other persons for the promotion or protection of the interests of that person.*

Freedom of peaceful assembly is also subject to the same restrictions applicable to freedom of association as the provisions deals with both rights. The practical exercise of this freedom is governed by laws such as the Public Order Act of 1963 which regulates authorization of peaceful assemblies by all groups for any purpose. The Act is supplemented by provisions and regulations of local government law. In terms of specific associations, the Industrial Relations Act governs worker related industrial action, complemented by the Employment Act of 1980 which also recognizes the right to strike.

- **Common concerns on the lack of protection/ violation of the freedoms of association and assembly**

It is generally acknowledged that Swaziland's legislation is largely antiquated, with many laws having been promulgated prior to independence in 1968. Amongst the resultant problems is that these laws often conflict or are inconsistent not only with universally recognized human rights standards and the relevant instruments, but also with the principles and provisions of the 2005 national constitution. Government has not yet put in place a process to ensure comprehensive law reform to align the legislation as required. Currently, laws are passed on an *ad hoc* basis, with those that are required by government being expedited through their tabling *via* a Certificate of Urgency, which enables a dispensing of normal rules and time frames for debating legislation, potentially excluding CSO participation, whilst some remain Bills for protracted periods not making it for debate, even after stakeholder consultations.

The absence of law reform has also affected laws relating to the freedoms of association and assembly, leading to expressions of concern on the impact on civil society at different levels, including the following:

- The African Commission on Human and Peoples' Rights (ACHPR) expressed concern about the situation of these rights in Swaziland. In May 2012, the Commission took a resolution on Swaziland, in which amongst other things, it called:

*"on the Government of the Kingdom of Swaziland to respect, protect and fulfill the rights to freedom of expression, freedom of association, and freedom of assembly as provided for in the African Charter, the UDHR, the ICCPR and other international and regional instruments"*<sup>26</sup>

The Commission reiterated it's concerns and recommendations to government during a

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<sup>26</sup> ACHPR/Res.216 (LI) 2012: Resolution on the Human Rights Situation in the Kingdom of Swaziland

promotional visit to Swaziland in 2016.

- A number of States Parties, under the United Nations Universal Periodic Review (UPR) mechanism, have expressed concern about the violation of both freedom of association and freedom of assembly and made recommendations to Swaziland to fulfill its international and constitutional obligations to protect these rights, including the repeal/ amendment of the Public Order Act and Suppression of Terrorism Act. The concerns and recommendations in this regard were initially raised in 2011 and were reiterated by States in 2016.
- Swaziland lost its AGOA (African Growth Opportunity Act) eligibility status in December 2015 due to concerns over the country's lack of protection and violation of human rights, in particular workers' rights and the freedoms of association and assembly. The Industrial Relations Act, Suppression of Terrorism Act and Public Order Act were specifically identified in this regard.
- In May 2015 the European Union (EU) took a resolution on Swaziland for violating these rights, also citing the Suppression of Terrorism Act and the Public Order Act as amongst the laws that violate the freedoms of association and assembly.
- In 2012, due to the severity of its violations against workers' rights, Swaziland was placed on the ILO's Special paragraph, though this status was suspended in 2013 to give Swaziland an opportunity to institute labour reforms.

It is important to note that the Suppression of Terrorism Act and Public Order Act are both currently under review. Relevant Bills of 2016 have been tabled before parliament and the responsible Parliamentary Portfolio Committee (Prime Minister's Office) availed an opportunity for members of the public, including CSOs and individuals, to make submissions to the proposed amendments. It is possible that the High Court decision declaring the Suppression of Terrorism Act unconstitutional will have an impact on the review. In the meantime, however, the limitations imposed by these laws remain and affect CSOs activities. For instance, respondents from youth CSOs noted that the effect of the law means that the police can and do continue disrupting their events or they can be denied the right to implement certain activities, such as protest marches. By the same token children's organizations are subjected to the same restrictions.

### **2.1.1.3 Freedom of Expression**

Freedom of expression is guaranteed by section 24 of the constitution, which provides:

24. (1) *A person has a right of freedom of expression and opinion.*

(2) *A person shall not except with the free consent of that person be hindered in the enjoyment of the freedom of expression, which includes the freedom of the press and other media, that is to say -*

(a) *Freedom to hold opinions without interference;*

(b) *Freedom to receive ideas and information without interference;*

- (c) *Freedom to communicate ideas and information without interference (whether the communication be to the public generally or to any person or class of persons); and*
- (d) *Freedom from interference with the correspondence of that person.*

Section 24(3) provides that restrictions of this right are permissible where:

- (a) *...reasonably required in the interests of defence, public safety, public order, public morality or public health;*
- (b) *...reasonably required for the purpose of -*
  - (i) *protecting the reputations, rights and freedoms of other persons or the private lives of persons concerned in legal proceedings;*
  - (ii) *preventing the disclosure of information received in confidence;*
  - (iii) *maintaining the authority and independence of the courts; or*
  - (iv) *regulating the technical administration or the technical operation of telephony, telegraphy, posts, wireless broadcasting or television or any other medium of communication; or*
- (c) *...[imposing] reasonable restrictions upon public officers...*

There are a number of laws that have an impact on the freedom of expression and the Media Institute of Southern Africa (MISA) Swaziland, has noted that there are over 32 pieces of legislation that restrict the exercise of freedom of expression. Amongst these is the Sedition and Subversive Activities Act, of 1938, which also been identified by the ACHPR, UN<sup>27</sup> and EU which have made recommendations on its repeal/ amendment. The continued existence of these laws means that journalists and CSOs including Youth and Children's are restricted in terms of accessing information or are at a risk of prosecution where they publish certain information. In some instances, the laws allow a journalist to be compelled to reveal their sources, which is professionally unethical for journalists. Publications such as the Guardian and Swazi Observer were closed because of alleged transgressions of the law. Amendment of the Books and Newspapers Act of 1963 was criticized as it was widely seen as restricting freedom of expression by making it more difficult to establish new publications. The Proscribed Publications Act of 1968 and the Sedition and Subversive Activities Act of 1938 criminalize certain types of expression. MISA has thus been advocating for a media landscape that is open, independent and diversified so that it can effectively play its role as the "fourth estate." This includes advocating for law reform in the areas in where undue restriction exists. One of the youths organisations reported being restricted to openly take up their issues of tackling unemployment in the media as that is viewed as exposing government's short coming in that regard. The same is the fate of children's organisations for instance in calling for the law to take its course against anyone who hinders its operation in full protection of children as per relevant legislation. Where such statements are attributed to leadership it becomes a problem for the organization as its utterances may lead undesirable consequences as per the restrictive laws.

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<sup>27</sup> UN Human Rights Council Reports of the Working Group on the Universal Periodic Review, Swaziland, 2012 and 2016

The Public Order Act of 1963 restricts expression of political organisations as follows:

9. (1) *Subject to subsection (2) no person shall —*
  - (a) *display, at a public meeting, or at a public procession or at a school, any flag, banner or other emblem signifying association with a political organization or with the promotion of a political object; or*
  - (b) *if lie is the owner, tenant, occupier or person in charge of any premises, knowingly permit the display of such a flag, banner or other emblem on or at those premises in contravention of paragraph (a).*

Common law has recently been in the spotlight where the offence of contempt of court/ scandalizing the court led to the charge, arrest, conviction and imprisonment of Bheki Makhubu, editor of *The Nation Magazine*, and human rights lawyer, Thulani Maseko for articles they had written in the magazine<sup>28</sup> which were critical of the judiciary and the administration of justice under the then Chief Justice, Michael Ramodibedi, under whose tenure the articles opined, the rule of law had been severely eroded. The two were convicted by the High Court and spent over 15 months in prison. The High Court conviction and sentences were set aside by the Supreme Court in 2015.<sup>29</sup>

## **2.1.2 Dimension Two: The legal and regulatory environment, implementing rights and freedoms affecting CSOs**

### **2.1.2.1 Legal Framework for Registration of CSOs**

Swaziland's legal regime pertaining to registration of CSOs, including children and youth organisations varies depending on the type of CSO being registered. For instance, there is no specific law governing the registration of non-governmental organisations and in practice, NGOs have historically registered either as associations, in terms of the Protection of Names, Uniforms and Badges Act 10, of 1969; company-not-for-profit, in terms of the Companies Act 8, of 2009 or Trusts, in terms of the Deeds Registry Act 37, of 1968. The past decade has seen a proliferation of CSOs working on different issues and youth and children's CSOs have been part of this growth. However, due to the uncertain legal framework for CSOs and the fact that some are not registered, it is difficult to state the exact number of CSOs in the country and hence those that are children and youth CSOs. However, an indication can be gleaned from the NGO sector. The Coordinating Assembly of NGOs (CANGO) in which most NGO are members has almost 200 members. CANGO works through thematic consortiums and its Children's Consortium has 28 members. However, it is important to note that the majority of these are organisations that are concerned with children's issues as part of their broader mandates as opposed to organisations such as Save the Children Swaziland and Bantwana ("children") whose focus is children. Youth CSOs mainly exist outside the NGO sector where it is more difficult to ascertain their numbers, in particular because many of them are active in the governance/ political arena and hence are not registered. Of the youth and children CSOs that are registered, their registration spans the spectrum of the legal regime as some are associations, some are Trusts and some are companies-not-for-profit. A notable difference is SACRO which was originally registered by government (represented by the

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<sup>28</sup> In the February and March 2014 editions of the magazine

<sup>29</sup> *Maseko and Others v Rex (18/ 14) [2015] SZSC 03 (29 July 2015)*

Ministry of Justice and the Correctional Services), which continues to be involved in various aspects of the organisation's operation from governance to project implementation. SACRO is amongst the few organisations that receive a subvention from government.

While some respondents were weary of having an NGO law as this can be used to restrict CSO operations under the guise of regulation, some were of the view that the absence of a specific law for NGOs makes them vulnerable and that it results in NGOs having to comply with laws such as VAT and other custom's charges yet these are usually not part of NGO funding and government has agreed with donors on waiving it for non-profit work. A respondent from a children's CSO stated that the lack of legal protection for CSOs results in their susceptibility to "bullying" by the authorities and places them in a position of having no course if their work is unjustifiably constrained. Bantwana

Trade Unions are registered in terms of the Industrial Relations Act 1, of 2000. However, there have been challenges in this regard. Government has historically been hostile to trade union activities and in 2012 the Trade Union Congress of Swaziland (TUCOSWA) was deregistered after announcing at its launch the same year that it would boycott national elections. Government claimed that the deregistration was not political but administrative, due to a lacuna in the law that did not provide for the registration of federations. Following TUCOSWA and CSO advocacy as well as international outcry<sup>30</sup> against this denial of freedom of association, TUCOSWA was re-registered on 12<sup>th</sup> May 2015, following the promulgation of the Industrial Relations (Amendment) Act 11, of 2014. In addition to TUCOSWA, this enabled the re-registration Federation of Swaziland Employers and Chamber of Commerce (FSE&CC), and Federation of the Swaziland Business Community (FSBC), which had also been deregistered. It is also important to note that in Swaziland, political parties are not legal – and there is no enabling legislation for their operation - hence those that do exist are not registered and currently regarded as being part of civil society.

- **Objectivity and transparency of registration procedures**

Inasmuch as the law provides for objective registration criteria, the application of the law is subjective, depending on the work of the organisation – if the organisation is perceived to have a "political" agenda (these would primarily be organisations advocating for human rights, democracy and good governance), the registration application may either be delayed or denied without official written reasons being given. Recent examples are the Human Rights Society of Swaziland (HURISWA) and Institute for Democracy and Leadership (IDEAL). Having attempted registration since 2013, IDEAL took the matter to court in February 2016 after being informed that it could not be registered because the word "democracy" in its name would offend the country's authorities. The Attorney General ultimately conceded and IDEAL has now been registered.

This sensitivity to political issues is pervasive and youth organisations such as the Swaziland Youth Congress (SWAYOCO) have not been able to register because of their political nature. Respondents from a youth empowerment organisation Luvatsi Swaziland Youth Empowerment Organisation shared the difficulty in registering because of the "sensitivity" of the issues it proposed to deal with, such as governance and democracy. The mandate of the

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<sup>30</sup> including from organisations such as the African Commission on Human and Peoples' Rights (ACHPR); International Labour Organisation (ILO), United States and European Union (EU)

organisation is “To empower youth to raise its voice on social, economic, political and cultural issues that affect them without fear through dialogues, summer schools where in-depth training on topical issues such as human rights, entrepreneurship, sexuality and the national constitution, campaigns i.e. youth unemployment.” When initially attempting to register, the organisation’s founders were informed that the acceptable objectives were that of promoting development. Legal action had to be taken and the matter was ultimately resolved and the organisation was ultimately registered as a company-not-for-profit.

While there are clear laid down procedures in the relevant laws, the process is not transparent in that applicants do not know what happens from submission of the application to the granting or refusal of registration. Further, there are few clear time frames laid down for the process but they are generally not complied with by the registration authority. The only avenue of appeal available has been the courts.

The laws provide objective procedures which are not onerous and strictly speaking, as long as applicants comply with the requirements registration should be straight forward and speedy. However, there may be “unspoken” political considerations in relation to the mandate of the organisation. Because of this uncertainty, CSOs tend to use lawyers to register even though it is possible to do so themselves.

#### **2.1.2.2 CSO Operations: Free from interference?**

In the context of the political environment Swaziland, freedom of choice regarding mandate, partners and area of operation is tightly controlled and is based on whether the CSO plans to deal with “political” issues which can include, any human rights, democracy, good governance, advocacy and mobilisation. Such organisations have stigma associated with them hence other “safe” CSOs may be reluctant to partner with them. Even where successful in establishing operation, implementation of activities by CSOs perceived to have a political agenda is often made difficult by prevention of access to communities or meeting venues. Even “safe” organisations face difficulties when dealing with “unsafe” issues. A case in point is that of a young women’s organisation which was embroiled in questions when it supported a young woman who was challenging the election’s boundaries commission during elections<sup>31</sup> and another who was challenging her Chief and Others<sup>32</sup> during the same period. As a result, some organisations avoid issues that may lead to interference.

In general, over the past decade the freedom of CSOs to carry out their mandates has been severely eroded. It goes without saying that in pursuing their various mandates from service delivery, provision of civic education or dialogue forums, access to the populace, including specific programme target audiences/ beneficiaries, is fundamental. It is largely this access that has been curtailed, and although the law is sometimes cited, e.g., police forcing entry into meetings under the guise of “maintaining law and order” or “for the protection of persons and property”, the restrictions on CSO activity are largely influenced by the tense political situation in the country.

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<sup>31</sup> <http://www.ipsnews.net/2013/08/swazi-chiefs-shut-women-out-of-parliament/>

<sup>32</sup> Jennifer DuPont-Shiba v. Chief Magudvulela Dlamini and Others Case No1342/13



Amongst the practical constraints placed on CSOs is physical access to communities – in particular in the rural areas. Swaziland’s administration starts at chiefdom level, to *inkhundla*, region, and national level. Both government and traditional authorities have suspicious and negative attitudes towards civil society and hence have begun to tightly control access to communities. For instance, organisations wanting to access grassroots communities must go through an onerous process of acquiring permission from a wide range of players from the Ministry of Tinkhundla Administrator to the Regional Administrator to the chiefs. This can be a lengthy process with no possibility of pushing for a speedy response as this could be regarded as culturally offensive.

Secondly, the mandate of the organisation also determines access to communities. An organisation working on water and sanitation, income generation, or HIV and AIDS is more likely to have easier access than one working on human rights, or a trade union. In 2008, government sought to prevent SCCCO from conducting civic/ voter education in preparation for the elections, challenging its “charitable” status and arguing that it was actually a political organisation. The court stated, “*Nor are we persuaded by the argument of learned counsel that the first applicant cannot pass the test of a charitable trust merely because it included among its objects, the carrying out of civic education (which enterprise is said to include voter education)...It is our view that the objects of the first applicant, including, inter alia, the carrying out of civic education, including voter education do not sin against the nature of the charitable trust or alter it into a political organisation.*”<sup>33</sup>

Access to information and the media is another practical constraint, where certain types of organisations and their representatives are not permitted to be interviewed or to disseminate information using the media, whose landscape is dominated by government. The electronic media is almost completely owned and controlled by the state and print media constantly vulnerable to threats and intimidation with the most recent case being that of Bheki Makhubu and Thulani Maseko referred to above. Their conviction and imprisonment sent shock waves within the journalism community and was an effective example of reprisals by the state as it served as a “warning.”

Due to the political situation in the country, the authorities have an adversarial attitude towards organisations working on issues such as democracy and human rights. These organisations constantly face interference with and disruption of their activities and harassment of their staff and members. A respondent from children CSO Bantwana stated, “*If an organisation is willing to go with the flow, making minimal requests and demands for change, it tends to operate without interference. However, where it is questioning, requiring answers from government then things become very different to a point where it fails to operate freely.*” Meetings, prayer services, protest marches, seminars, and other activities have been stopped; even where the activity has been allowed to proceed, there has been a heavy police presence – both uniformed and plain-clothed. Leaders of CSOs have been harassed<sup>34</sup> and CSO communications and movement limited or monitored. A respondent from a youth CSO stated

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<sup>33</sup> Swaziland Coalition of Concerned Civic Organizations Trust and Others v Elections and Boundaries Commission and Others (2783/2008) SZHC 114 (26 March 2009)

<sup>34</sup> Vincent Ncongwane, Secretary General of the Trade Union Congress of Swaziland (TUCOSWA) has been prevented from leaving his home or placed in police detention to prevent him attending workers’ May Day celebrations

that they were convinced that the state had photographs of civil society members as their members were always harassed or targeted by the police. Other respondents in the youth focus group related experiences of intimidation and harassment by the police. **Luvatsi**

CSOs have tried to use the courts to challenge some of these actions and have had mixed results. Contributing to this is that it is often difficult to trace the source of the instruction to stop activities as no written instruments are produced. Another challenge for CSOs is the independence of the judiciary and interference with its affairs by the executive which tends to want to restrict CSO activities. A respondent noted. *“Inasmuch as they are not necessarily expecting justice from the courts, we at least expect to have the opportunity to confront issues through the justice delivery system.”*

### **2.1.2.3 CSO expression of views and advocacy**

Swaziland has a closed and restrictive political environment with legal and political barriers that hinder free expression of issues by CSOs, in particular on issues related to governance, including policy. Swaziland’s dual governance system means that Swazi law and custom and its different structures also have an impact on the legal and political environment. Essentially, any view critical of government or traditional authorities is viewed negatively and those expressing such opinions subject to reprisals. Laws such as the Sedition and Subversive Activities Act of 1938, Public Order Act of 1963 and Suppression of Terrorism Act of 2008 limit free expression and have been used to intimidate, arrest and imprison CSO actors. CSO activities are closely monitored and there is always the possibility of the activity being disrupted if government or the police are of the view that it is engaging political issues.

The element of duality manifests strongly in CSO work in rural communities where chiefs and traditional authorities act as gatekeepers in terms of access to community members. In order to gain access organisations must present themselves and their work as non-threatening, and preferably promoting socio-economic development in some way. A youth organisation stated, *“Where organisations are perceived as “political”, permission may be denied for activities and even where access to the community has been granted, there are usually members of the police present, creating a tense atmosphere and resulting in people not freely expressing themselves. Even if the issues are raised by participants such as AGOA, you cannot engage the issue as you risk the meeting being closed.”*

Trade unions are often told by government to stick to socio-economic and workers’ issues and not stray into the political arena. Vocal churches are often told that politics is not their concern and that they should limit themselves to matters of religion. Children’s organisations noted that while, their work is regarded as “safe”, and the environment creates difficulty for addressing “sensitive” issues and policy matters which involves questioning and at times criticising the governing authorities.

Respondents from young women’s organisations stated that CSOs have to *“speak in tongues or disguise the work”*, explaining that CSOs have to find *“a way of crafting the issues in a non-threatening way because you cannot call a spade a spade when dealing with contentious issues such as sexual and reproductive rights.”* Other organisations limit themselves – a children’s organisation stated, *“Some issues we do not push to the end because we ourselves tend to*

self-censor”, making example of the Children’s Courts being “recently closed nicodemously but CSOs, in particular those dealing with children’s issues, have not addressed this yet the country has a serious problems of violence against children.” This was echoed by another children’s organisation that explained that how far CSOs push an issue depends on its sensitivity. “Safe” organisations usually have a good relationship with government and at times do not want to risk this by antagonising government. The respondents acknowledge that this manoeuvring has the effect of diluting the issues CSO should be addressing and how it does so.

Peer support amongst CSOs was raised by respondents as a weakness on the side of civil society. One respondent stated, “We have examples of CSOs and their members/ staff being harassed and have observed the lack of support and protection from other CSOs, including those whose mandates are to protect human rights, e.g., LHRS.” Another respondent made an example of the NGO Children’s Consortium, stating that “At times we are held back by collaborators i.e. when taking action as a Children’s Consortium under CANGO..., reason is because our organisations neither have the same understanding on issues. Another respondent made an example of the case of Jennifer du Pont, a former MP who was excluded from nomination processes for the 2013 national elections because she is a widow. The respondent noted how du Pont and those trying to assist her were not supported by other CSOs.

A respondent from children’s rights CSO aptly summed up the legal and political barriers that hinder a CSO’s ability to engage in public policy activity and/or advocacy as follows: “Regarding the environment it depends on what the CSO is bringing to the table to government. For instance, when we bring relief, i.e., food for distribution then we are talking and we are good friends whose agenda is well understood by government. Therefore, generally for those organisations working on safe issues which are around relief, all is well. What government cannot stand is that part of our work which is seen as political and questioning of government in terms of spending. It is the human rights agenda which makes government react negatively towards us, yet it is the core of our mandate. This is partly why government is working on the Public Order Bill lately. It will curtail our freedoms of association and assembly as CSOs and our constituencies. Government has a discomfort because the level of questioning by organisations is heightening, for example, Church Forum was previously known as purely addressing HIV and AIDS issues from a church perspective of service provision, but lately it is boldly part of associations that question the status quo.”

#### **2.1.2.4 Access to resources**

Currently CSOs are not prohibited by any laws or policies from raising funds from different sources. However, in Swaziland’s closed political context, government and traditional authorities have accused CSOs of being funded by foreigners to push destabilising and destructive agendas. Swaziland’s potential resource base - donors, companies, churches, individual philanthropy - is extremely small. There are few local donors; companies tend to support government or projects associated with royalty; and the economic and employment situation is such that few people have sufficient disposable income to support CSO causes. Since there are no incentives in policy or law to promote local resource mobilisation, CSOs find it difficult to tap into a space where resources are clearly diminishing.

### **2.1.2.5 Restrictions on the rights to assemble peacefully, to criticise and make claims on government**

In addition to the tense political climate in Swaziland, the right to peaceful assembly may be curtailed by laws such as the Public Order Act of 1963, and Suppression of Terrorism Act. Assemblies convened by workers' organisations are governed by the Industrial Relations Act which sets out processes for protest action; however, at times government attempts to restrict the exercise of this right by accusing trade unions of going beyond their socio-economic mandate and "straying" into politics. An example is the 2015 TUCOSWA meeting that was forcefully and violently disrupted – TUCOSWA leaders and members were assaulted and their property damaged.

CSOs are able to gather and openly criticise government to a certain extent, which is determined by the degree to which they discuss issues of Swaziland's lack of democracy and promote human rights. That said, criticism of the monarchy and traditional authorities and structures tends to be more sensitive. There are cases such as Workers' May Day 2014 where, even though the gathering was allowed, two political activists from a then "proscribed" political organisation were charged under the Sedition and Subversive Activities Act and Suppression of Terrorism Act for comments made and songs sung while addressing workers. Gathering to make claims against government are also subject to similar legal, cultural and political restrictions. During these gatherings, incidents of harassment, excessive force and arrest are common, as occurred in the 2012 march to parliament, where marchers were intimidated and harassed by security officers preventing them from approaching the parliament gates to deliver a petition.

### **2.1.3 Dimension 3: Rights of Specific Groups**

It is important to understand the Swaziland context - historically the relationship between government and civil society has been an adversarial one, with government and traditional leadership seemingly not understanding the advocacy and "watchdog" role of civil society. Although the constitution guarantees the freedoms of association, assembly and expression, in reality many civil society organizations do not enjoy them. Organizations working on issues of human rights are particularly vulnerable to reprisals. Threats, intimidation, harassment, detention, arrest and physical and verbal assault by the State and its agents are common in the disruption of the work of such CSOs.

There is a clear divide in terms of how CSOs are treated in Swaziland. CSOs that deliver services and provide relief such as food aid and assist orphans are generally treated more favourably than CSOs dealing with advocating for issues of human rights and democracy. Youth and children's organisations are subjected to the same mandate distinctions. In certain cases, it is possible that a single organisation may be acceptable for service delivery but not for calling for accountability on budgetary issues. "Permission" for awareness-raising and sensitisation activities such as campaigns may be determined by which CSO is hosting the activity and what it will be about.

However, even organizations working on “safe” issues - such as women’s rights, children’s rights and HIV and AIDS - find themselves restricted in terms of their advocacy where government finds their messages “too sensitive” such as in cases where it relates to criticism for lack of government performance of its human rights obligations regarding these groups or questioning of government expenditure on areas that are not priorities for the populace which is facing a multiplicity of socio-economic challenges: poverty, high unemployment, HIV and AIDS and its attendant challenges, and drought which has exacerbated hunger and food insecurity. A young women’s organization was under much scrutiny when it supported a young woman whose nomination during parliamentary elections in 2013 was disqualified because of her dress code (pants) and another whose chief allegedly instructed the community not to vote for her because she had recently been widowed. Some respondents reported an incident of an organization which ended up requesting another to conduct its activities under a certain project as the former could not get permission to access certain communities after repeated requests.

- **Reprisals against human rights defenders and CSOs**

The following human rights defenders are recent examples of the state’s reprisals against dissent.

- Mar. Bheki Makhubu, Editor, *The Nation Magazine*, was unjustifiably convicted and imprisoned for contempt of court for articles he wrote criticising the then Chief Justice in respect of a deterioration in the rule of law and administration of justice.
- Mar. Thulani Maseko, human rights lawyer, wrote similarly critical articles in *The Nation Magazine*, and was also convicted and imprisoned.
- Mar. Siphon Gumedze, then Project Coordinator, Lawyers for Human Rights (Swaziland) was threatened with strangulation for participating in a peaceful march in the United States during the US-Africa Summit in 2014.
- Mar. Vincent Ncongwane, Secretary General, Trade Unions Congress of Swaziland (TUCOSWA), similarly threatened as Mr. Gumedze above. He also faces frequent monitoring and detentions as a labour leader.
- Mr. Muzi Mhlanga, Swaziland National Association of Teachers (SNAT), severely assaulted while taking photographs of police’s forceful entry into a TUCOSWA meeting. It was reported that the devices used by Mhlanga to take the photographs were destroyed.
- Members of *Luvatsi* Swaziland Youth Empowerment Organisation were subjected to an early morning raid at their homes and were placed in police detention without charge, during which they were verbally and physically assaulted.
- Leaders of the Swaziland United Democratic Front (SUDF) are systematically subjected to harassment, assault and arrest.

The following are examples of CSOs and recent reprisals against them:

- Catholic Church, Lutheran Church – Prayer services on various social justice and human rights violations stopped or monitored by heavy police presence; intimidation of leaders.
- Swaziland Coalition of Concerned Organisations (SCCCO) – surveillance of and presence at community meetings and other activities; disruption of community meetings by police or community authorities; monitoring of communication and movement; intimidation.

- Trade Union Congress of Swaziland (TUCOSWA) – deregistration; disruption of activities; harassment; arbitrary detention; arrest of leaders.
- *Luvatsi* Youth Empowerment Organisation – disruption of activities; surveillance of activities and movement; intimidation.
- Swaziland United Democratic Front (SUDF) – stopping of activities; harassment; surveillance of activities and movement; arbitrary detention; arrest of leaders.
- Swaziland Rural Women’s Assembly (SRWA) – disruption of activities; intimidation.
- Political Parties – Harassment and intimidation of members; arbitrary detention of party leaders; inhibiting free operation, including disruption of activities and preventing access to the media.

## 2.2. AREA TWO: POLICY INFLUENCING

### 2.2.1 Dimension 1: Spaces for Dialogue and Policy Influencing

Processes for engagement have been established at different levels by government for the discussion of various socio-economic issues on an ad hoc basis. However, the extent of their inclusiveness and accessibility for CSOs is largely dependent on government’s recognition of the CSO and determination of its relevance to the engagement, where the agenda is set by government. Government’s power to unilaterally decide who participates and what is to be discussed results in exclusion of many CSOs. A respondent from a youth organization that empowers youth on a variety of issues including human rights and democracy explained that “it has been necessary for the organization to repackage its mandate to speak generally about supporting young people to meet their needs, promoting their livelihoods and responsibility. This is so that we do not become targets of exclusion because the mere mention of political and human rights is an issue for government.” As with other CSOs, organisations of marginalized groups such as children and youth are more likely to access the policy engagement space if they are deemed “non-political.”

That said, even a non-political organization may find itself excluded from processes where it starts to raise the “hard” issues of governance. A children’s CSO respondent stated, “we advocate under a challenging environment on children’s rights. Government is always suspicious of us. The good thing is that we are known have been on the ground and therefore, get to be invited to most policy forums. Even with strategies for implementation and other technical areas, we are consulted by government. We played a significant role in the processes of drafting and consultation of the Child Protection Act and are working with the DPM’s office on the Implementation of Guidelines of the Child Protection Act since 2016 February. However, we are included as long as the policy does not involve the budget or finances - finances are a no-go area.”

There has been a growth in sectors establishing their own stakeholder forums where government and non-state actors participate both on an *ad hoc* basis and for on-going processes. For example, The Prime Minister, in establishing the Task Force on Human

Trafficking and People Smuggling (amongst whose functions was overseeing the drafting of anti-human trafficking legislation and dealing with related policy issues), included representatives of women and children's rights NGOs such as Save the Children Swaziland, Swaziland Action Group Against Abuse (SWAGAA) and Women and Law in Southern African Africa (WLSA). NGOs working on gender issues in Swaziland engage on a frequent basis with the Gender and Family Issues Unit (under the Deputy Prime Minister's Office), an on-going example being the formulation of the proposed Sexual Offences and Domestic Violence Bill.

Similarly, children's rights organisations, such as Save the Children and SACRO participated in the formulation of the Child Welfare and Protection Act as part of the law's Technical Working Group. This has also been a result of Parliament beginning to call for public submissions on proposed legislation, which are processes that are open to all. In this regard it is interesting to note that political parties such as PUDEMO and NNLC made submission to parliament during the public hearings on the Public Order and Suppression of Terrorism Bills.

Another area where engagement is institutionalised is within the labour relations sector where the tripartite stakeholders – namely, government, labour and employers – are obligated to work together by commitments made at the ILO. In this regard, the tripartite engages within the Labour Advisory Board which advises the Minister of Labour and Social Security on various industrial relations issues including, "...proposals for any new legislation relating to employment or industrial relations...and taking action in regard to.... measures to provide for the implementation or recommendations or ratification of international labour conventions."<sup>35</sup> The Social Dialogue forum is another space where the tripartite have continuous engagement on socio-economic issues. A respondent from a human rights and democracy CSO was of the view that trade unions are fortunate because government has no choice but to involve them in certain policy and decision-making processes, stating, "However, trade unions are better placed because ILO operates through a tripartite, thus they necessarily have to be invited to the table where decisions are made."

Nonetheless, there is a clear imbalance in CSOs' access to such opportunities - NGOs and their umbrella organization, CANGO have better opportunity to participate in policy processes related to their particular sector and at national level. Other types of CSOs do not have the same kind of access, one respondent noting, "Most organisations have no direct access to policy-making forums save through CANGO, and even then, it will be a strategic meeting or two. Or through other organisations that participate in such forums, being those that are viewed by government as "less harmful" like the SWAGAA and Council of Swaziland Churches (CSC)." Related to this is the narrow definition of civil society used by government in engaging CSOs. Some respondents noted that "there seems to be misunderstanding that the CANGO coordinates civil society yet it only represents and coordinates NGOs, and even then, not all NGOs are CANGO members." Concern was expressed that CANGO's participation in policy processes was taken to be that of civil society, which has the potential to distort CSO views as CANGO as its membership man oeuvre within safe spaces and are not as robust as other CSOs in tackling political and human rights issues.

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<sup>35</sup> Section 24, Industrial Relations Act, 2000

Respondents were also concerned about what they referred to as “GONGOs”<sup>36</sup>, stating that these types of organizations are always included in policy and decision-making processes because they support and promote the status quo. A respondent from a human rights CSO stated, “There is pseudo type of space in Swaziland through forums such as the Smart partnership Dialogue. It’s a ploy to show the world that there is engagement and that CSOs participate freely, when in actual fact, the space is full of the so-called GONGOs and dissent is stifled.”

There are however, a few examples of policy and decision-making forums that are more inclusive. Amongst these is the Country Coordinating Mechanism (CCM) which oversees HIV and AIDS, TB and Malaria work under the Global Fund. This is a standing committee whose membership includes national government ministries and departments; local government structures; NGOs; FBOs, THOs<sup>37</sup>, Academia; PLHIV, traditional regiments; trade unions. Bilateral and multilateral development partners supporting HIV/ AIDS related work are also represented on the CCM. CSOs are able to participate more meaningfully in this space, although they experience other challenges such as resource constraints to attend the very meetings and inadequate communication means.

Children’s rights and youth organizations are involved in these processes as long as they are deemed acceptable within the prevailing political climate. The exclusion of certain organizations is not necessarily official and CSOs noted that even where broad consultation is officially provided for, the responsible government agency will exclude certain groups. An example was shared by a youth organization who stated that even though the National Youth Policy provides for involvement of groups beyond the government established Swaziland Youth Council, in practice, this is not done.

Even where there has been consultation of CSOs, there is no guarantee that their views will be taken into account in the finalisation of policy. Some sectors such as gender and children do engage with relevant government ministries and departments and thus do have an opportunity to receive feedback and monitor progress on policy implementation. However, there is usually a difference in how far government and CSOs are willing to go in addressing an issue and this results in some of CSOs’ concerns not being taken on board. For instance, CSOs (including children and youth organisations) working on the Sexual Offences and Domestic Violence Bill do not agree with government on certain clauses in the Bill which CSOs want included<sup>38</sup> but which may put the passing of the law in jeopardy because government does not see the issues in the same way. Another example is TUCOSWA and other CSOs (including youth organisation), which engaged extensively with government on the amendment of the Suppression of Terrorism Act and Public Order Act yet the proposed amendment Bills did not fully reflect their contributions.

- **CSO Capacity Initiatives**

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<sup>36</sup> Organisations formed by government or traditional authorities

<sup>37</sup> Traditional Healers Organisations

<sup>38</sup> Including the criminalisation of marital rape, stalking and flashing



CSOs sometimes provide for training of their staff on conducting advocacy, including policy engagement at a sectoral level. CANGO, for example has had a programme for its members on policy advocacy. Development partners also sometimes provide technical assistance or training on policy issues. However, there is much room for improvement as these are usually once-off initiatives that have no follow up and hence skills are not continuously strengthened. It is important to also appreciate that initiatives do not have to be limited to training - CSOs require means beyond training to adequately fulfill their mandate.

CSOs require better coordination in terms of their work so that they can pool their efforts as well as engage from a position of strength with partners at different levels. Improved coordination would ensure that CSO representation is more inclusive and that engagement with government and development partners is from a point of unity and strength. An interesting model in this regard is being piloted under COSPE's project on fostering communication and cooperation amongst non-state actors. Amongst the project's initiatives is working with CSOs on the Universal Periodic Review (UPR) process in which thematic clusters – including a Youth and Children's Rights Cluster - are working together to engage the relevant government agencies on recommendations from Swaziland's UPR report. With time this approach has the potential to develop into an effective platform for participation. CSOs could also convene periodic meetings, e.g., quarterly, with their stakeholders like government, development partners and donors to discuss issues and report progress. There is also room to upscale and refine efforts of the Gender Consortium in preparing the 2008/2013 Convention on Elimination of All Forms of Discrimination against Women Shadow Report with the support of CANGO, COSPE and International Commission of Jurists (ICJ). The gender consortium was consulted by the Gender Unit during preparation of the national State Party report but went ahead with its shadow report to impress on the areas that were not reflected in the national report. This too could get to a point whereby the gender consortium engages the gender department and relevant government departments periodically to nudge them where they are falling short in meeting benchmarks at international, regional and sub-regional levels and gaps in mooted policies and legislation.

- **Capacity gaps among stakeholders**

Amongst the capacity gaps that exist are the following:

- Lack of coordination between and amongst government ministries and departments and with their sectoral stakeholders.
- Low policy literacy and analysis skills amongst CSOs.
- Research skills for the gathering and analysis of empirical data for purpose of making evidence-based recommendations.
- Conducting relevant research and information sharing of captured cases for proof for policy development.
- Inaccessibility to CSOs of public policy information including processes thereof.
- Skills for monitoring and evaluation of government policy development, implementation and inclusion.
- Skills for conducting policy advocacy, including use of ICTs in advocacy initiatives.
- High staff turnover, leaving organizations with newcomers who are not trained in key areas of their work.
- Limited connections with similarly minded civil society organizations and spaces in the region and globally.

## 2.2.2 Dimension 2: Access to information

According to the United Nations Human Rights Committee, “To give effect to the right of access to information, States parties should proactively put in the public domain Government information of public interest. States parties should make every effort to ensure easy, prompt, effective and practical access to such information. States parties should also enact the necessary procedures, whereby one may gain access to information, such as by means of freedom of information legislation.”<sup>39</sup>

Section 24 of Swaziland’s constitution guarantees freedom of expression, which includes “freedom to receive ideas and information without interference” which can be implied to encompass the right to *access* to information. However, there is no legal framework for realizing this right at a practical level. While the Ministry of Information, Communication and Technology has adopted a policy that provides for access to information, it is not being fully implemented. An Access to Information Bill was published by the Ministry more than six years ago yet remains unfinalized for several years, meaning that the uncertainty around this area will continue in turn frustrating CSOs’ work. It is important to note that one of civil society’s key concerns with the Bill was that it seemed to make the process of obtaining information more onerous and would impede, rather than promote access to information.

CSOs reported that obtaining public information from public bodies is a process of trial and error as there seem to be no defined procedures and each department has its own practice which is not usually consistent, depending on what type of information and who is asking for it. There is no guarantee that request for information will be responded to, let alone a positive response given. At times, CSOs report, access information may ultimately be obtained through personal relationships with senior government officials, rather than objective procedure that processes information requests in a consistent manner.

Contributing to this opaqueness in accessing information is that public servants do not seem to understand government’s obligation to make information available to the populace. As a result, they are wary of giving out even the most basic information. Civil servants are limited by the Official Secrets Act of 1968 from revealing certain types of formation. However, CSOs note that there is also the element of fear that influences the conduct of government officers due to the country’s political climate. CSOs note that there are cases “*of civil servants responsible for taking decisions being overzealous or fearing victimization because of past instances an example of publishing a history book for schools which covered material that was not cleared by powers that be.*” The never-ending process of consulting with superiors means that in many instances’ response are never received even after complying with all requirements such as formalizing requests in writing.

## 2.3 AREA THREE: DONOR – CSO RELATIONSHIPS

### 2.3.1 Responsiveness of funding mechanisms to the programmatic priorities of CSOs

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<sup>39</sup> United Nations Human Rights Committee, General Comment No. 34, Article 19 (international Covenant on Civil and Political Rights): Freedom of Opinion and Expression, 2011

Swaziland has very few official development partners. Amongst these is the United Nations, comprised by the UN agencies operational in Swaziland, namely, UNDP, FAO, WFP, WHO, UNICEF, UNAIDS, UNESCO, ILO, UNODC and UNFPA. Each agency has its own thematic areas of focus with the UN Country Team being coordinated by UNDP. In addition to the UN, are the Arab Bank for Economic Development, European Union, Global Fund for AIDS, TB and Malaria, Japan (JICA), Republic of China (Taiwan), United States of America (PEPFAR) and World Bank.<sup>40</sup> The UN, EU, US and Taiwan are the only resident donors. The UN, EU, Global Fund, JICA, and PEPFAR also fund or partner with civil society. Some civil society organizations put it thus, “the small local base of donors with defined mandates that exclude certain programmatic mandates makes donor relations and funding a very difficult terrain.” It also means that civil society has to actively seek external funding, using peer contacts or researching on the internet, which was also highlighted as a challenge in that there is limited capacity in using ICTs for mobilizing resources.

There are also individual external government agencies, private agencies and foundations that give small amounts of project funding, such as USAID; CDC; British High Commission; Canada Fund; AusAID; National Endowment for Democracy (NED); Open Society Initiative for Southern Africa (OSISA); Catholic Agency for Development (CAFOD); Afrika Kontakt; and Bread for the World. All of these donors work with children and youth CSOs who are eligible for support as long as their mandates and programmes fit within the donors’ areas of interests. Swaziland’s classification as a lower middle income and its governance and human rights situation have negatively affected the amount of funding that is received by civil society, as some donors’ policies exclude the country receiving funding based on these factors. A respondent from a children’s organization noted, “Wherever we go to raise funds we are informed about the country’s usage of resources on things that are not priorities, such as purchases of new cars for hosting SADC, which was an extravagant expense.”

Civil society notes that the other potential local funding sources such as the corporate sector, are not as available as they are in other countries. A respondent from a children’s CSO Bantwana noted that, “There is no local business that is big enough to support philanthropy - for example, banks in Swaziland are “branches” of South African banks and do not invest in a high level of corporate social responsibility in Swaziland. Private foundations such as Coca Cola that could support CSO work exercise their philanthropy through funding organizations established by royalty, such as those of princes and princesses as even reported by media.”

The responsiveness of funding mechanisms to CSO priorities is weak. Inasmuch as there is agreement on some of the “substantive” thematic priorities identified by donors, the nature of support does not fully meet CSO needs. As an example, a respondent from a youth CSO noted that “Donor money is now being largely invested in health, in particular HIV and AIDS, but even then, the money that is available is in clinical areas yet many peoples are still negative and hence CSO priorities in this area are around prevention and other empowerment programmes to reduce vulnerability such as gender inequality and law reform.”

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<sup>40</sup> United Nations, Mid-Term Review of the United Nations Development Assistance Framework (UNDAF) for Swaziland, 2011-2015, November 2013

Respondents also raised the following additional issues relating to what they see as a disconnect between CSO and donor priorities:

### **2.3.2 CSOs Institutional capacity**

Swaziland civil society has been experiencing a number of challenges in recent years that have adversely affected the ability of many organizations to operate, let alone pursue their mandates effectively. The lack of resources is central the weakening of civil society in that it has led to serious capacity constraints: organizations have difficulty staying operational – basic needs such as rent, transport, communication and salaries<sup>41</sup> tend to have no or limited support as donors focus on project funding rather than the resources, including human resources that make effective implementation possible. Consequently, CSOs have these basic needs as their priorities. Thus, funding that supports organizational development, from governance, to administration and monitoring capacity would complement actual programme implementation and in turn lead to greater impact. It would also enable greater cooperation amongst civil society because at the moment, as noted by a respondent, “The donor base is so small that as CSOs we even stop complementing each other because there is so much competition amongst us for the limited resources.” The youth organization’s felt that the lack of resources was double edged for them because they were suffering the same fate as other CSOs. Additionally, their organisations were fairly new with little to demonstrate as past track record, yet competing for funding with long established organizations. One of the youths organisations had actually suspended operation due to funding constraints, whilst the other one was struggling to get seed money to fully establish its operations after registration and doing ad hoc work...

It was noted that the issue of capacity also relates to ensuring the existence and strengthening of organizational systems of accountability for compliance with CSO-donor contractual obligations. Respondents noted weaknesses on the civil society side that affect availability of funding, such as misuse/ mismanagement of funds and non-reporting by CSOs. However, a concern raised in this regard, was that “Donors tend to watch the space until it’s too late instead of reprimanding as soon as things do not go as per agreement. They should act whilst there is room for taking corrective measures – there is too much emphasis on end of term evaluations after which donors dump the organization because things have gone wrong.” Respondents were of the view that donors should support CSOs experiencing challenges by trying to understand the causes and taking measures to assist before it is too late.

### **2.3.3 Donor appreciation of CSO operational environment**

Another respondent stated, “At times donors do not have a holistic appreciation of the context in which we operate as these (capacity constraints) are the very issues CSOs need to confront yet there is no funding for this type of work.” An unregistered organization that works on promoting multi-party democracy noted that because of its mandate and consequent lack of registration because of the hostile environment, it does not have access to capacity-building initiatives and hence does not understand requirements such as “log frames” hence it is difficult for them to comply. He felt that only donors who are empathetic to the plight of Swazis and understand the hostile environment were willing to assist.

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<sup>41</sup> Civil society has lost a lot of the staff in whom capacity had been invested to donor agencies, simply because of better terms and conditions of employment that civil society actors cannot compete with

This links to the legal recognition of CSOs working on contentious issues in that donors usually do not support unregistered organisations yet the political environment does not allow certain organisations to register. The SUDF, which advocates for the legalization of political parties (a “contentious” issue) and establishment of multi-party democracy, stated that due to this, it cannot be funded directly thus its funds are held by another organization that is not regarded as too “political.”

#### **2.3.4 Donor-CSO power relations**

According to the respondents partnerships with donors are “lopsided.” A respondent from a children’s CSO stated, “They always have the power to decide on issues of the terms of the partnerships hence the partnerships are negotiated from an unequal plane. At times we find that donors are not funding in our areas of work. We then fit ourselves in what they are doing.” Another respondent, also from a children’s CSO echoed this concern, “Our relationship with donors is that of unequal. They dictate terms and it’s a matter of take it or leave it. As a result, we are forced to work on issues that are not at the core of our mandate nor reflective of needs on the ground. For instance, LGBTI issues have become very popular with donors. Some donors are very clear that we have to profess to support them and work on their issues. However, this is not a felt need for us. Basically, with donors, if you do not oblige to want, they want, you are out, you cannot survive... It is just a saying that donors are our partners - they have the say, we don’t.”

#### **2.3.5 Length of funding cycles**

CSOs were of the view that the project-based model of funding has an adverse effect on their work. Respondents noted that project proposal turn-around times are lengthy yet most funding cycles are short, starting from periods of about six months with multi-year funding having been significantly reduced over the years. They raised the concern that as a result, impact on the ground is limited because when a project has ended, there is no support for building onto what was essentially a foundation laying phase and just as a project is taking off, it has to be abandoned, affecting achievement of project objectives and scratching the surface of intended project benefits. It was noted that the end project cycles mean the loss of necessary human resources as some staff are supported only for the duration of the specific project. This depletes CSOs institutional knowledge and capacity, which are very difficult to replace as funding hardly comes with adequate resources for administration and staff. This issue has affected all the CSOs interviewed, including the youth and children CSOs.

#### **2.3.6 Appropriateness of funding mechanisms to CSO**

According to some of the development cooperation frameworks of locally based development partners, CSOs have been part and parcel of identifying national priority areas for funding and identifying areas in which civil society organisations – mainly NGOs - can participate as implementing partners on projects. Donors also publish their plans and proposed partnerships in hard copy and on their websites. Whilst donors may see this as effectively being inclusive and transparent, CSO experience is not one that reflects this view, illustrating a serious disconnect in this area between donors and CSOs.

CSOs noted that in many cases, that funding processes are often very complex and challenge CSO capacities. They viewed some of the funding as tantamount to being inaccessible. One respondent from a child rights CSO summed it up by saying, “There is only Global Fund and EU that fund with significant amounts. However, both have stringent conditions which NGOs find challenging to understand and implement. However, most organisations just cannot make the requirements which affects access to funds.” Respondents also noted that the dynamic of an increasing number of international NGOs operational in the country and how this affects local organisations in terms of funding. In some instances, local organisations can access funding only if they have an international organization as a partner, since these are the ones regarded by donors as having the requisite capacity and systems for implementation and accountability. Alternatively, the funding is outside the jurisdiction of CSOs beyond certain countries or regions. CSOs had an expectation that international NGOs would bring funding from home not compete for the same available locally. Some of the international organisations named in this regard include FHI360, Palms for Life, COSPE and HC3.

It was noted that in the EU’s last funding cycle, of the six grants awarded, only one local organization was awarded a grant on its own. Other organisations had to partner with external partners such as the Catholic Foundation for Overseas Development (CAFOD) and the International Commission for Jurists (ICJ). The sense of frustration was summed by two organisations as, “We just do not know how to please donors and get the funds” and that donors such “EU has a lot of money but “it is not for us - the money is clearly not for local CSOs but for their organisations, e.g. COSPE (an international NGO from Italy).”

### **2.3.7 Initiatives by donors for facilitating diversification of CSOs’ income sources**

Issues of diversification of funds are intimately linked with those of organizations’ sustainability, which according to respondents is a key concern expressed by donors. In this regard, a respondent noted, “We are far from working on sustainability with donors,” noting that, “Donors usually require that organisations include a sustainability plan in their project proposals. However, there is then no support given to for implementation of that plan.” The limited support in this area is illustrated by the EU’s recent project cycle in which it provided capacity building to CSOs on accessing funding. However, this capacity has been *ad hoc* and has been limited to specific EU Calls for Proposals thus focused on funding opportunities and processes from the EU. While appreciated by CSOs, it was felt that this kind of narrow support hence does not contribute to diversification efforts.

Another constraint to diversification is that donors do not support income generating activities by CSOs, thus contributing to the perpetuation of dependency, which, in turn some CSOs feel, puts their survival at the mercy of donors, making them donor-driven rather than responsive to the needs they know exist on the ground. One respondent, stated that some organisations have become have become “sunflower organisations”, following where the funding is and adapting accordingly. Respondents decried that this syndrome has negative effects on organization’s work, morale and above all their constituencies.

### **2.3.8 Donor processes for CSO policy engagement on donor strategies at all levels**

Existing policy engagement on donor strategies is limited to a few locally-based donors,

namely the UN and EU, which are the ones who have more resources available to CSOs. Challenges with donor-civil society engagement have been noted by donors themselves. According to the Mid-Term Review of the United Nations Development Assistance Framework (UNDAF) for Swaziland, 2011-2015, “The UN system’s engagement with civil society was narrow and mostly confined to the NGO sector as implementing partners. There was some capacity building of civil society and some engagement with civil society in advocacy. The UN-Civil Society Advisory Forum held much promise when it was launched, but did not live up to its mandate. Balancing seemingly competing interests of Government and civil society is not an easy task. The UN system, however, has a convening power that it can draw on to facilitate constructive dialogue between parties? In view of this, it was recommended that, “The UNCT, under the leadership of the Resident Coordinator, should embark on expanding its range of partnerships. In this regard, the Civil Society Advisory Committee should be resuscitated and the Memorandum of Understanding should be finalized as a matter of priority. Partnerships with the private sector should be pursued, with the view to engaging them in job creation, development of small and medium enterprises and corporate social investment. The ILO has existing relationships with the peak employer body and chamber of commerce that can be built on.”

Informed by the issues raised in the mid-term review, the UN undertook a Strategic Prioritization Retreat (SPR) in October 2014 “with the objectives of identifying key priorities for the UN’s support to Swaziland. The resultant medium-term strategic plan of the United Nations in Swaziland “represents an integrated response to supporting the people of Swaziland to achieve their national priorities as set out in the National Development Strategy (NDS) and other strategies, and the development aspirations reflected in the national post-2015 development agenda.” According to the UN, “Participants included: high level Government officials, representatives of the civil society, implementing partners, the UNAIDS Regional Director representing the Regional Director’s Team (RDT), the UNCT and its technical arm. The SPR was facilitated by United Nations Development Group (UNDG).”

### ***2.3.9 Donor engagement framework with CSOs***

Government’s development partners and donors tend not to engage often with CSOs, as in the case of the Taiwanese Embassy that stated that its partnership is with government and that it does not engage with civil society.<sup>42</sup> Currently, it is the Global Fund, EU and UN who seem to engage with civil society on a frequent, though largely *ad hoc* basis. The Global Fund engages with civil society through the national Principal Recipients when new “Rounds” of funding require the submission of national proposals. It also engages where there are changes to its “funding architecture.”

With the EU, engagement has been two-fold: firstly, when there are new funding cycles under their European Development Fund (EDF) and also on a bilateral basis on CSOs’ specific thematic areas of operation. The UN has a similar engagement with NGOs, consulting on national priorities and reporting on progress on different thematic areas. However, despite these frequent meetings, civil society seems to feel that their views are not ultimately taken into account. Another limitation is the current narrowness of the working definition of civil

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<sup>42</sup> Interestingly, however, the Embassy does fund and support initiatives established or supported by members of the royal family

society, by the UN for example, which engages mainly with NGOs for programs and support yet there are many other types of CSO.

There is also a difference between the knowledge and expectations of donors and those of CSOs. On one hand, it seems donors feel there is sufficient consultation, inclusiveness and openness in their engagement with CSOs yet CSOs state there is no clear information and what information does exist, is not accessible. For instance, while the UN is confident that it is strengthening engagement, CSOs feel that it has gradually retreated from engaging with CSOs and is rather strengthening its relationship with government to the detriment of civil society's work.

CSOs' concern on the challenging operating environment cannot be overstated as they believe this contributes to donors not appreciating how civil society works and the practical challenges faced by CSOs. Interestingly, in its future programming – articulated in its 2016-2020 plans - the UN proposes to respond to capacity constraints as raised by government about its own capacity issues, "The UN system's primary approach to delivering on the UNDAF will be to support the Government of Swaziland and its partners to develop sustainable capacity to achieve development results in the areas that the country has prioritized. Capacity development will focus on the institutional as well as individual capacities for programming, implementation, monitoring and evaluation. This is in response to the concern raised by the Government that it has developed several policies, but lacks the necessary capacity to implement these effectively." The capacity support for civil society seems limited to knowledge and skills on executing programs rather than support to the operational expenses that organisations need for survival.

### 3. RECOMMENDATIONS

The space for civil society operation in Swaziland is constrained by the political situation in which the state is hostile to dissent and therefore has had a historically acrimonious relationship with CSOs, particularly those working in the areas of human rights and governance. That the constitution provides for the rights to association, assembly and expression, does not guarantee that CSOs can freely carry out their mandates. Therefore, while differences exist in terms of the mandate of different CSO actors, the operational environment place similar constraints on them all. Therefore, the following recommendations envisage that youth and children CSOs would be included in all the initiatives proposed. While the recommendations are applicable to all civil society actors, their implementation can be designed to focus specifically on youth or children CSOs since the same issues emerged from the study.

#### *3.1 Area One: Universally accepted human rights and freedoms affecting children rights and youth CSOs*



Generally, Swaziland’s legislation is outdated with most of it predating independence in 1968, hence an institutionalised, systematic and comprehensive law reform process is urgent. This would also deal with the uncertain legal framework for civil society organisations with a view to enable operations, rather than constrain them and provide appropriate protections in view of the role of civil society plays in contributing to development. One respondent explained that in the current situation, CSOs are hardly protected by the law and are therefore “bullied.” Additionally, the following could contribute:

- Sensitisation of stakeholders on each other’s mandates and development effectiveness for mutual understanding of each other’s work and greater cooperation;
- Establishment of a forum to enable periodic reporting and discussion amongst stakeholders;
- Continuous capacity-building on development assistance frameworks discourse.

Government should take the lead in the creation of an enabling environment as many of the issues that require addressing are within the ambit of government’s responsibilities such as law reform. CSOs operate in an environment of fear where government and its agencies can quickly and easily retaliate against a CSO and its leaders and the latter have limited recourse. Therefore, government has to rebuild trust with civil society and allay fears of sanction for being involved in CSO work, starting with stopping the harassment of CSOs and their leaders, members and staff.

### *3.2 Area Two: Policy Influencing*

The following could make CSO policy engagement more effective:

- Continuous capacity-building on public policy formulation, drafting, analysis and advocacy for implementation.
- Disseminate the process of public policy formulation to all stakeholders, including participation in the processes.
- Establishment of sectorial and national thematic forums to discuss policy developments in that sector, making provisions for inter-linkages.
- Establishment of informal coalitions between sectors and across issues.
- Holistic capacity of CSOs in advocacy and lobbying to enable them to go beyond being trained.
- Establish objective and timely processes that facilitate access to public information.

### *3.2 Area Three: Donor – CSO Relationships*

The Donor-CSO relationship, while functional, continues to be faced with challenges as demonstrated above. These can be addressed through:

- Conducting an objective participatory CSO mapping exercise to understand the CSO landscape and which CSOs work in which areas. This will enable donors to appreciate the extent of individual freedom and autonomy allowed to the different organisations, freedom to form associations and what they are focusing on.
- Broadening recognition and partnering with civil society beyond registered NGOs and their umbrella organisations. This would also promote interaction amongst various CSOs operating at different levels.
- Improving dissemination of donor programmatic priorities, funding frameworks, and how CSOs can access funds. Following the CSO mapping, the priorities would probably be more aligned with needs of CSOs.
- Conducting capacity-building on the aid effectiveness agenda and process, including agreements and plans adopted in Paris, Nigeria and Busan, with a view of strengthening civil society's participation in this agenda at the national, regional and international levels.
- Strengthening capacity and support for resource mobilization, including on diversifying funding sources.
- Strengthening institutional capacity of CSOs, supporting identified areas of weakness.
- Increasing operational and administrative funding allocations.
- Improving donor coordination and cooperation in-country to identify synergies, strengthen complementarities and avoid duplication of efforts.
- Creation of a donor-civil society consultative forum with representation from a broad section of civil society (the forum could be convened periodically, e.g., quarterly).
- Supporting civil society in researching, monitoring and reporting on the operating environment.
- Improving and increasing sharing and accessibility of development data gathered.

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## 5. LIST OF RESPONDENTS

### FOCUS GROUP

Name	Organisation	Contact
Sizwe Vilakati	Luvatsi	(+268) 78175448
Mndeni Nhlabatsi	Luvatsi	(+268) 76185020
Thabo Zwane	Luvatsi	(+268) 76629323
Colani Nhleko	Luvatsi	(+268) 76387993
Colani Motsa	Luvatsi	(+268) 76337208
Ngcebo B. Mavuso	Luvatsi	(+268) 76956591
Sakhile Dlamini	Luvatsi	(+268) 78288969
Nontobeko Ntimba	Luvatsi	(+268) 76080325

### KEY INFORMANTS

Name	Organisation	Designation	Email	Contact
Thulani Earnshaw	Bantwana	Director	thulani_bantwana@swazi.net	(+268)25052848/ (+268) 76182451
Sizwe Vilakati	Swaziland Youth Empowerment (Luvatsi)	Director	Vilakatisizwe@gmail.com	(+268) 78175448
Desmond Maphanga	SACRO	Director	sacromanziniandmbabane@yahoo.com	(+268) 7615 5427
Lucky Dlamini	SUDF	Treasurer	luckycndlamini@gmail.com	
Senelile Khumalo	SYWoN	Board Member		(+268)76313041
Nonhlanhla Nelisiwe	SYWF	Director		(+268) 7663 1002 (+268) 7839 6009 (+268) 7663 1002
Alfred Mndzebele	SCCCO	Director	mndzebelealfred@gmail.com	(+268)78282602
Sibongile Dlamini	SCF	Child Protection Officer		(+268) 2404 2573
Mphile Sihlongonyane	CANGO	Programs Officer	cango@cango.org.sz	(+268) 24049283