

# REPORT ON FREEDOM OF ARTISTIC EXPRESSION AND CENSORSHIP IN ZIMBABWE

July 2015

## ABBREVIATIONS

ACHPR	African Charter on Human and Peoples' Rights
ACHR	American Convention on Human Rights
ACmHPR	African Commission on Human and Peoples' Rights
AIPPA	Access to Information and Protection of Privacy Act 2003
ARHRS	African Regional Human Rights System
AU	African Union
BAZ	Broadcasting Authority of Zimbabwe
CIO	Criminal Intelligence Organisation
CISOMM	Civil Society Monitoring Mechanism
CRC	Convention on the Rights of the Child
CRPD	Convention on the Rights of Persons with Disabilities
HIFA	Harare International Festival of the Arts
HRC	Human Rights Committee
ICCPR	UN International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
IPA	Interparty Political Agreement
NPA	National Plan of Action
MDC	Movement for Democratic Change
POSA	Public Order and Security Act
UDHR	Universal Declaration of Human Rights
UN	United Nations
UNESCO	The United Nations Organisation for Education, Science and Cultural Organisation
UNHRC	United Nations Human Rights Council
UPR	Universal Periodic Review
ZANU PF	Zimbabwe African National Union Patriotic Front
ZLHR	Zimbabwe Lawyers for Human Rights

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## **(i) BACKGROUND AND AIM OF CONSULTANCY**

Zimbabwe is coming up for the **United Nations Human Rights Council (UNHRC) Universal Periodic Review (UPR)** 2<sup>nd</sup> cycle in 2016. The aim is to conduct a study on censorship legislation and practices in Zimbabwe, with the purpose of submitting a UPR report to the UN Human Rights Council in January 2016 including recommendations to the Zimbabwean Government and relevant authorities. It is hoped the study will influence the current legislation and censorship practices in Zimbabwe and serve as an indicator of good practice for network partners and human rights organisations in Zimbabwe and across the African creative sector.

### **(ii) Objectives**

1. To analyse and describe provisions, articles and paragraphs in current legislation in Zimbabwe restricting and/or guaranteeing artistic freedom of expression (music, film, literature, theatre, visual arts etc.) including the production, publishing, distribution and access to take part in cultural activities).
2. To analyse and describe mechanisms and practices of (pre and post) censorship boards and authorities (such as police, institutions, syndicates, state-controlled media/broadcasting, universities etc.) regulating artistic freedom including description and analysis of existing complaints mechanisms and transparency of the decisions and work of such boards. The study shall include specific restrictions and regulations applied to cultural products and artists from other countries.
3. To describe and discuss typical examples of pre and post censorship and decisions made by censorship boards and/or authorities with regard to artistic freedom.
4. To analyse and describe Zimbabwe's ratification in practice and theory of international conventions and covenants promoting and defending artistic freedom and discuss issues related to Zimbabwe's ratifications and reservations of these specifically:

- a) The International Covenant on Economic, Social and Cultural Rights (ICESCR) – specifically article 15
- b) The International Covenant on Civil and Political Rights (ICCPR) – specifically article 19
- c) The 1980 UNESCO recommendations concerning the Status of the Artist
- d) The 2005 UNESCO Convention On the Protection and Promotion of the Diversity of Cultural Expressions
- e) The report will further discuss proposed alignment of current legislation with the new Constitution in relation to the above

The report refers to the recommendations of the report *The Right to Freedom of Artistic Expression and Creation* by Farida Shaheed, the UN Special Rapporteur in the field of cultural rights.

The study was not be limited to the above description but included any relevant information such as the use of devices used to carry out artistic censorship.

The study also took into account as inspirational background the scope of the reports:

- Censorship in the Lebanese Legal System
- Censors of Creativity
- ArtWatch Report 2013
- All That is Banned is Desired (Conference Report and Article Collection)

### **(iii) Methodology**

The consultant carried out a desk review, gathered, reviewed and analysed relevant literature and engaged in consultation with key arts and culture stakeholders, including: independent experts, academics, and international, regional and local non-governmental organisations. In particular, national reports, stakeholder reports, outcome reports and mid-term implementation

reports from the previous UPR cycle, including recommendations made to the government of Zimbabwe, were reviewed in the penultimate part of this report.

Interviews with artists and artist bodies were carried out. Semi-structured interviews were conducted with a fairly open framework to allow for focused, conversational, two-way communication. Not all questions were designed, phrased and shared ahead of time to allow both the interviewer and the person being interviewed the flexibility to probe for details or discuss issues. For the complete list of guiding questions see **Annex 1**.

Purposive sampling of interviewees was implemented and a total of 16 artists were interviewed. Purposive sampling is a form of non-probability sampling in which decisions concerning the individuals to be included in the sample are taken by the researcher, based upon a variety of criteria which may include specialist knowledge of the research issue, or capacity and willingness to participate in the research. The researcher took a decision about the individual participants who would be most likely to contribute appropriate data, both in terms of relevance and depth. For the full list of interviewed people see **Annex 2**.

#### **(iv) Executive Summary**

The project analysing the legal context of artistic freedom in Zimbabwe was commissioned by Freemuse and Nhimbe Trust as a platform to feed into the Universal Periodic Review process when Zimbabwe enters the second cycle of review following the submission of the inaugural National Report in 2011. This report examines restrictions on freedom of artistic expression in Zimbabwe. The findings and recommendations will be submitted to the United Nations Human Rights Council as part of the UPR – the UN system’s official mechanism for reviewing all member states human rights records in cycles of four and a half years. Zimbabwe comes up for ‘examination’ of its human rights record in 2016. A central part of the UPR process is qualified inputs from civil society.

The legal analysis made a number of findings. Zimbabwe practices pre-censorship of artistic production.

Censorship is a practice exercised in different jurisdictions the world over

and takes different forms and approaches. The rationale being to restrict access to and distribution of materials through which information is shared and received in the belief that society must be protected from undesirable information.

The first legislation to implement and regulate censorship was enacted in the form of two laws, one regulating obscenity and another cinematography, in the then Southern Rhodesia in 1912, culminating in one piece of legislation first in 1932, and then in 1967 in the form of Censorship and Entertainments Control Act, 1967. This is the current legislation with amendments since its enactment.

Freedom of artistic expression is a key component of the right to freedom of expression. Section 61 (b) of the 2013 Constitution of Zimbabwe says that every person has the right to freedom of expression which includes freedom of artistic expression and scientific research and creativity . It specifically provides for artistic expression thereby eliminating any



doubt about its constitutional protection.<sup>1</sup>

The full enjoyment of artistic expression is dependent on other rights such as right to access to information, freedom of association and assembly, freedom of conscience, and right to language and participation in cultural life, among others. All these rights also enjoy constitutional protection thereby fortifying the protection of artistic expression by the supreme law of the land.

The importance attached to freedom of expression, and by extension artistic expression, is one reiterated by Zimbabwean courts as one of the most important rights for individuals to achieve full development, challenge the status quo and hold public officials accountable.

Yet, freedom of expression and artistic expression is not an absolute; it is subject to the limitation provisions of Section 86 of the 2013 Constitution. Among other criteria for its limitation, laws of general application in a society

based on dignity, equality, freedom and justice may limit artistic expression.

Artistic expression enjoys protection at international level. The treaty-based human rights systems of the United Nations, the UNESCO framework, as well as African Union and sub-regional blocs, to the extent of their relevance, enshrine and protect these rights. Common in all these initiatives is the requirement that states, including Zimbabwe, conform in law and conduct to ensure that they respect, fulfil, promote and protect artistic freedom in a context devoid of discrimination against particular artists. Zimbabwe is a signatory to most of the international instruments on freedom of expression and artistic expression and constitutional provisions have fully domesticated the international law provisions, for example UNESCO AND ICC. However, consistent with its susceptibility to limitation, a number of laws, policies and public decisions have been deployed by the state to limit freedom of expression in general, and artistic expression in specific situations. The Censorship

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and Entertainments Act leads the line in terms of subjecting works of art to censorship. This Act establishes the Censorship Board responsible for censoring all manner of artistic work.

In Zimbabwe censorship, which in principle is a violation of international obligations, backdates to 1911. The grounds upon which censorship is administered, which in a way reflect expected standards of works of art in Zimbabwe, have remained the same to this day. These have been interpreted to include elastic definitions such as harm to national security, public order, public health or threat to the economy of the state. Political controversy and morality are still grounds dominating the rationale for censorship as they did in 1911.

Notwithstanding the presence of the Censorship Board, there are now numerous self-appointed censors of freedom of expression including the Police Service whose conduct in censoring artists puts the Censorship Board's record to shame.

Research has shown that the State cannot tolerate political criticism at any level. Political discussion of whatever form is thwarted not least in the arts sector. More than 90 per cent of banned artistic performances or works were declared undesirable for the political satire contained therein, which arts experts have subsequently evaluated as non-offensive. Examples of banned works have been included in the report. In these samples, political controversy dominated the grounds for censorship

However, the public, as a key component of the right to freedom of expression, has had no chance to exercise its own evaluation of the banned works and events since the practice is to censor materials before public consumption – the very essence of censorship.

There is excessive criminalisation of artistic expression with the Criminal Law (Codification & Reform) Act bent and stretched to cover artistic works. As if banning was not in itself a sufficient penalty, creators of such works were prosecuted on the basis of the content of their artistic

work thereby resulting in the prosecution striking at the core of artistic freedom as a human right.

Notwithstanding the existence of laws that protect works of art from unauthorised use (infringement) by other people, the state has failed to clamp down on piracy of works of art such as music, literature, films and other works capable of such abuse. Pirated works of art are offered for sale on the pavements in all cities and towns in Zimbabwe.

Notwithstanding the shortcomings, the State has in some instances extended a helping hand in a way by enacting legislation such as that which enabled artists to import music equipment subject to exemption from customs and excise rates.

The on-going law reform and revision (informally referred to as legislative alignment) as a government initiative, is a sign of state commitment to bringing all legislation that pre-existed the 2013 Constitution into line with the supreme law. However, whether as a result of lack of capacity or interest, amendments that have gone

through so far are cosmetic and clearly do not reflect the dramatic departure from the previous constitutional dispensation at the instance of the 2013 Constitution. A legislative response to such a paradigm shift requires substantial and genuine law reform and/or revision.

Further, the state does not seem interested in reforming the freedom of expression sector, notwithstanding recommendations that were offered under the UPR framework in 2011. This led to some respondents in this research suggesting that the prevailing oppressive scenario of unconstitutional laws must work well for the incumbent political administration.

It was further revealed that Zimbabwe has neither guidelines nor written procedure when it comes to ratification of international treaties. The procedure is at best *ad hoc* and so are the reasons for ratifying or domesticating any particular treaty. Much of the responsibility to initiate ratification lies with the line ministry to which a

treaty in question is relevant, subject to approval by cabinet and parliament.

The research produced a number of specific and targeted recommendations with the state being the primary audience. These are:

- Reform of the Censorship Board to be independent from the executive and to be constituted with a wide range of stakeholders with expertise in the arts.
- When reviewing and amending the Act, it is necessary to state the specific and relevant qualifications of the Censorship Board members.
- The Minister must adopt regulations for the Censorship Board when examining materials in terms of the Act. Other aspects to be addressed include the prescribed form for applications for examination of materials, the prescribed time within which the Board must render a decision following the lodging of an application, and generally to regulate the application process.
- Aspects of rights to a fair trial and precepts of administrative justice need to be incorporated in the Act to allow decisions of this Board to be challenged.
- There is need to amend the Act to provide for financial probity of Censorship Board, and for public reporting on the work of this Board. The board has been underfunded and on occasion has relied on the Police to enforce certain sections of the Act.
- The Censorship Act must be reformed to make provision for appeals against the Appeals
- Government must ensure that both the Censorship and Appeal Board are properly constituted and functional at all times.
- The Minister of Home Affairs must ensure that the police, at all levels, are divested of 'competence' to censor or ban events or artistic exhibitions which is the prerogative of the Censorship Board, unless they are enforcing declarations of the Board banning certain materials or events.
- The Censorship Act needs to be amended and obsolete references

such as 'Police Force', 'Attorney-General' repealed. The references should be substituted by appropriate references in line with the 2013 Constitution.

- The Broadcasting Authority of Zimbabwe (BAZ) must be reconstituted with new appointees taking oath of office in line with public leadership and governance principles in Chapter 9 of the Constitution.
- The new BAZ Board's independence must be guaranteed and respected to eliminate, as far as possible, executive interference on political grounds.
- Government must continue efforts to issue licences to community radio stations as these small broadcasters have substantial influence on the diversity and exercise of freedom of artistic expression by granting local artists access to show case their talents.
- BAZ must revise downwards the fees for licenses to ease the financial burden for applicants for community broadcasting

services. The exorbitant fees required are perceived as a deliberate move to prevent new entrants into the sector.

## Chapter 1 – NATIONAL LEGAL FRAMEWORK ON ARTISTIC EXPRESSION

### 1.1 Introduction

“Art plays a vital role in defining a nation; in giving it an identity, a history, a present, and a future. It can also be balm for a nation; it can heal and bond a nation; it can enable it to recover from trauma and live again. Art can interpret hard times and reconcile us all to them and to each other.”<sup>2</sup> According to the report of the United Nations Special Rapporteur in the Field of Cultural Rights (thereafter referred to as the Shaheed Report), ‘... art constitutes an important vehicle for each person, individually and in community with others, as well as groups of people, to develop and express their humanity, worldview and meanings assigned to their existence and development’.<sup>3</sup>

People in all societies create, make use of, or relate to, artistic expressions and creations.<sup>4</sup> In addition, respect for freedom of expression, as well as the right of access to information held by public bodies and companies, will lead to greater public transparency and accountability, as well as to good governance and the strengthening of democracy. Accordingly, laws and customs that repress freedom of expression are a disservice to society.<sup>5</sup>

Speaking to the role of art in society, an artist said the following regarding the artist (intellectual)<sup>6</sup>

‘He is the closest channel to dreams of his people. If the artist loses his dream it is a catastrophe for the people. Artistic innovation remains a continuous concern for people and it is the heart of the artist that creates innovation.

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<sup>2</sup> In a speech by former Education and Sports Minister, Senator David Coltart, delivered at the Annual Lozikeyi Lecture at the National Gallery of Zimbabwe in Bulawayo on October 29, 2010 available on <http://www.pambazuka.net/en/category.php/features/68867>, <http://www.zimbabwesituation.org/?p=21578>

<sup>3</sup> Fareed Shaheed, Report of the Special Rapporteur in the Field of Cultural Rights, pg. 1, available on [http://artsfreedom.org/wp-content/uploads/2013/04/A-HRC-23-34\\_en.pdf](http://artsfreedom.org/wp-content/uploads/2013/04/A-HRC-23-34_en.pdf) accessed 7 July 2015

<sup>4</sup> Fareed Shaheed, Report of the Special Rapporteur in the field of cultural rights, pg. 1, available on [http://artsfreedom.org/wp-content/uploads/2013/04/A-HRC-23-34\\_en.pdf](http://artsfreedom.org/wp-content/uploads/2013/04/A-HRC-23-34_en.pdf)

<sup>5</sup> [http://www.fesmediaafrica.org/fileadmin/user\\_upload/pdf/AMB\\_Methodology/Relevant\\_regional\\_and\\_international\\_instruments\\_on\\_freedom\\_of\\_expression\\_and\\_the\\_media.pdf](http://www.fesmediaafrica.org/fileadmin/user_upload/pdf/AMB_Methodology/Relevant_regional_and_international_instruments_on_freedom_of_expression_and_the_media.pdf) accessed 7 July 2015

<sup>6</sup> Freemuse *All That is Banned is Desired: Conference on Freedom of Expression Report* (2005) p28.

This innovation should be the criteria for marketing. No obstacle will prevent the artist from creating.'

Art and law have always related. Artists the world over do not enjoy unfettered freedom to produce works of art as some of them may be deemed culturally, socially, religiously or politically controversial, although not necessarily illegal. Works of art which incite violence or hatred against racial, religious or ethnic groups are invariably banned. The boundary of these laws is subjective and varies considerably from one country to another.<sup>7</sup> Freedom of expression and information are intrinsically linked to freedom of opinion, as expression of opinion and of information are key components of the public's ability to formulate opinions, and to enable them to assert their political will through a free electoral process.<sup>8</sup>

The Declaration of Principles on Freedom of Expression in Africa<sup>9</sup>, together with other international instruments, asserts that freedom of expression and information, including the right to seek, receive and impart information and ideas, either orally, in writing or in print, in the form of art, or through any other form of communication, including across frontiers, is a fundamental and inalienable human right and an indispensable component of democracy. Everyone should have an equal opportunity to exercise the right to freedom of expression and to access information without discrimination.

In Zimbabwe, as will be fully discussed later in this report, freedom of artistic expression and creativity has always been under threat. A recent example of this 'threat' is the banning by police in 2014 of a satirical film entitled *Kumasowe* citing that it highlighted an issue regarded as highly sensitive to the institution of the Police Service.<sup>10</sup> The film featured the highly publicized

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<sup>7</sup> *ibid*

<sup>8</sup> Declaration of Principles on Freedom of Expression in Africa by The African Commission on Human and Peoples' Rights. The Commission adopted the Declaration of Principles on Freedom of Expression in Africa at its 32nd Ordinary Session, in Banjul, The Gambia, held from 17th to 23rd October 2002.

<sup>9</sup> Declaration of Principles on Freedom of Expression in Africa by The African Commission on Human and Peoples' Rights. Available on <http://www.afrimap.org/english/images/treaty/africa-declaration-of-principles-on-foe.pdf>

<sup>10</sup> Available at :<http://www.thezimbabwean.co/news/zimbabwe-news/72905/police-ban-screening-of-sensitive.html>

violent clashes between members of an apostolic sect and Zimbabwe police officers. This and other examples will be used to demonstrate the administration of censorship of freedom of expression and by extension, artistic freedom in Zimbabwe.

## 1.2 Brief history of censorship in Zimbabwe

It is on record that the control of publications made its first entry onto the statute books of the then Southern Rhodesia in January 1912 through the *Obscene Publications Ordinance, 1911*.<sup>11</sup> However, the scope of statutory control was confined to 'indecent or obscene' publications. The regulation of the visual arts or media was then introduced later the same year, in the form of *Cinematograph Ordinance, 1912*.<sup>12</sup> The primary focus of this enactment was the physical safety of the premises used for exhibitions rather than the morality of the viewing from the perspective of the public profile of the time. Then came the *Entertainments Control and Censorship Act, 1932*,<sup>13</sup> which had its scope expanded to cover performances in theatres and public entertainments. This Act for the first time established the Board of Censors whose functions at that time were confined to the scrutiny of films and film advertisements. In 1967 the legislation was amalgamated in the *Censorship and Entertainments Control Act, 1967*. This is the current form of the Act with a number of amendments since the time it came into force.<sup>14</sup>

The provisions of the Censorship Act have not improved much since 1967. Over that period, Patel argues that the majority of articles censored fell victim to the morality and political theories cited above.<sup>15</sup> Many of the movies and literature that addressed sex, interracial sexual relations or marriages and homosexuality were specifically targeted after being considered undesirable to the general public.

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<sup>11</sup> Ordinance No. 14 of 1911.

<sup>12</sup> Ordinance No. 5 of 1912.

<sup>13</sup> Act No. 6 of 1932.

<sup>14</sup> See generally B Patel, 'Freedom of literary expression and censorship in Zimbabwe' (1997) Vol 1 No. XXIV 51.

<sup>15</sup> Patel, p65-67.



The political front also had its controversies. However, the trend was that 'most of the publications concerned were proscribed during the UDI period (1965-1980) and were subsequently unbanned in the years immediately after independence'.<sup>16</sup> The political censorship net caught a wide range of what was considered unpalatable content such as 'appeals to humanism and liberalism', 'nationalist writings of varying political persuasions' such as *The Struggle Continues, Handbook of Revolutionary Warfare and Class Struggle in Africa* written by Kwame Nkrumah, 'works of radical theorists, historians and commentators', and 'those works of imaginative literature which were possibly more successful in their criticism of the status quo by deploying the insidious device of interweaving political fact with social fiction'. The last category was more linked to music, art and theatre.

In the aftermath of independence and to this day, it appears 'the substantive and procedural rules of censorship have not been significantly altered since 1967 – nor has the constitutional definition of the freedom of expression'.<sup>17</sup> The only change has been in the political environment in which the exercise of executive power is carried out. The incumbent political administration have their own views on morality and political fears thereby casting censorship of all manner of material into unending controversy due to the subjectivity of the criteria used to censor it.

### **1.3 National laws regulating artistic expression**

This section deals with highlighting and evaluating legal and policy provisions that have a bearing on freedom of artistic expression. In some parts of the world, this freedom is protected as the right to 'artistic creation' or 'artistic creativity'. Others protect the right to 'artistic/creative expression', 'freedom of creation', 'artistic endeavour' or of 'cultural creativity', or make reference to 'freedom of the arts'.<sup>18</sup> The primary focus will be to demonstrate how such provisions protect or violate the freedom of artistic expression, and an

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<sup>16</sup> Patel, p63.

<sup>17</sup> Patel, p64.

<sup>18</sup> Farida Shaheed, *Report of the Special Rapporteur in the field of cultural rights: The right to freedom of artistic expression and creativity* (2013) para. 24 [Herein Shaheed Report].

evaluation of the extent to which the reform and revision of laws inconsistent with the exercise of freedom of artistic expression ought to be conducted.

### **1.3.1 Constitutional provisions**

It must be noted from the outset that freedom of artistic expression is regarded by the law as a component of freedom of expression.<sup>19</sup> Consequently, artistic expression issues are inherent when one engages freedom of expression. Freedom of expression is protected by the 2013 Constitution.<sup>20</sup> Section 61 of the Constitution now offers more detail on the scope of this right than the preceding constitutional provisions. The provision is hereby quoted verbatim:

- (1) Every person has the right to freedom of expression, which includes –
  - (a) freedom to seek, receive and communicate ideas and other information;
  - (b) freedom of artistic expression and scientific research and creativity; and
  - (c) academic freedom.
- (2) Every person is entitled to freedom of the media, which freedom includes protection of the confidentiality of journalists' sources of information.
- (3) Broadcasting and other electronic media of communication have freedom of establishment, subject only to State licensing procedures that –
  - (a) are necessary to regulate the airwaves and other forms of signal distribution; and
  - (b) are independent of control by government or by political or commercial interests.
- (4) All State-owned media of communication must –
  - (a) be free to determine independently the editorial content of their broadcasts or other communications;
  - (b) be impartial; and
  - (c) afford fair opportunity for the presentation of divergent views and dissenting opinions.
- (5) Freedom of expression and freedom of the media exclude –
  - (a) Incitement to violence;

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<sup>19</sup> Shaheed Report, para. 4.

<sup>20</sup> Section 61(1) (a) &(b) of the Constitution.

- (b) Advocacy of hatred or hate speech;
- (c) Malicious injury to a person's reputation or dignity; or
- (d) Malicious or unwarranted breach of a person's right to privacy.

From the above-quoted provision, the key components of freedom of expression include freedom to seek, receive and impart, share or communicate ideas and other information; freedom of artistic expression,<sup>21</sup> scientific research and creativity. Section 61(1) (b) specifically enshrines and therefore protects freedom of artistic expression in Zimbabwe. This right does not need to be inferred from any other provision. It is expressly provided for to reflect its recognition and importance in the Zimbabwean society. Any restrictions placed on freedom of expression would, subject to modifications, apply with similar force and effect to freedom of artistic expression. Similarly, restrictions on freedom of artistic expression have a chilling effect on the broader freedom of expression issues.

The protection of freedom of expression, and by extension artistic expression, can also further be strengthened if and when individuals have access to information.<sup>22</sup> This follows the express provisions of Section 61(1) (a), which entitle every person the freedom to 'seek' information. Section 62 of the Constitution enshrines the right to access information held by the State or any institution or agency of government provided the information is required for purposes of public accountability, exercise or protection of a right, correction of information or the deletion of untrue, erroneous or misleading information held by the state.

The Constitution, however, restricts the right to access of information in the interests of defence, public security or professional confidentiality to the extent that the restriction is fair, reasonable, necessary and justifiable in a democratic society based on openness, justice, human dignity, equality and freedom. Notwithstanding the wording of Section 62(4) limiting access to information,

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<sup>21</sup> Section 61(1) (b) of the Constitution.

<sup>22</sup> Section 62 (1), (2), (3), & (4) of the Constitution.

the grounds upon which the state may rely have to live up to the expectations of Section 86 of the Constitution, which is the general limitation clause.

The Constitution further provides for freedom of assembly and association<sup>23</sup>, freedom of conscience<sup>24</sup>, which rights, it is submitted, have a bearing on the exercise, promotion and protection of freedom of artistic expression in Zimbabwe. Inherent in artistic expression are the aspects of presentation and or exhibition of works of art. Invariably, the exhibition process involves a gathering of people participating in the event, which gathering could be arbitrarily, as appears to have been the case, interpreted as 'gatherings' in the meaning of Section 1 of the Public Order and Security Act (herein POSA).<sup>25</sup> Consequently, freedom of artistic expression would be subjected to the law on public gatherings. In summary, POSA would then require the convener of an exhibition, public entertainment or performance, to notify the police of such event at least five days to the holding of the event, failing which the event would be declared an 'illegal gathering' with criminal sanction.

In Section 60, the Constitution protects freedom of conscience, in which freedom of opinion, religion or belief and freedom to practice and propagate and give expression to their thoughts, opinion, religion or belief, whether in public or in private and whether alone or together with others, is contained. It is submitted that any work of art that represents a practice, propagation or giving expression to a thought, religion or belief falls within the ambit of Section 60 to the extent that works of art, for example, music, film, theatre and visual arts, could be used to give expression to one or all of the elements mentioned in this provision. Once this interpretation is accepted, Section 60 has a direct bearing on the enjoyment of freedom of artistic expression in Zimbabwe. Similarly, the right to language and participation in cultural life provided for by Section 63 is relevant to exercise of artistic freedom as culture is frequently given expression through works of art.

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<sup>23</sup> Section 58 of the Constitution.

<sup>24</sup> Section 60 (1), (a) (b) of the Constitution.

<sup>25</sup> Chapter 10:17.

### **1.3.2 Constitutional framework on limitation of artistic expression**

It is important to note that the Constitution<sup>26</sup> provides for limitations of rights and freedoms in which case, in advancing freedom of artistic expression, they should be exercised reasonably and with due regard for the rights and freedoms of other persons.

Subject to Section 86 of the Constitution, the right to freedom of artistic expression may be limited only in terms of a law of general application and to the extent that the limitation is fair, reasonable, necessary and justifiable in a democratic society based on openness, justice, human dignity, equality and freedom, taking into account all relevant factors.

The provision enumerates the relevant factors as including the nature of the right or freedom concerned; the purpose of the limitation, in particular whether it is necessary in the interests of defence, public safety, public order, public morality, public health, regional or town planning or the general public interest; the nature and extent of the limitation; the need to ensure that the enjoyment of rights and freedoms by any person does not prejudice the rights and freedoms of others; the relationship between the limitation and its purpose, in particular whether it imposes greater restrictions on the right or freedom concerned than are necessary to achieve its purpose; and whether there are any less restrictive means of achieving the purpose of the limitation.

### **1.3.3 Nature of law limiting artistic freedom**

Each section looks at how national legislation violates a certain international convention and violates the new constitution. It is critical to note that the import of Section 86(2) of the Constitution is that only conduct permissive by 'law' is accepted as basis for limitation. Violations at the instance of conduct devoid of legal basis cannot be justified. The rule of law dictates that governance is driven from the law and through it government execute good governance. Policies, no matter how sound they may be presented do not

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<sup>26</sup> Section 86 of the Constitution of Zimbabwe

qualify as law. This qualification is preserved for legislation, common law principles as well as customary law.

There is criteria by which laws qualify as 'law' for purposes of Section 86(2). In *Chimakure & Others v The Attorney-General Of Zimbabwe*,<sup>27</sup> the Constitutional Court of Zimbabwe dealt with 'law' for purposes of limiting a right. It emphasised that the requirement that only a 'law' can limit rights is precept of the rule of law. The court held:

The words "contained in ... any law" or "done under the authority of any law" used in s 20(2) of the Constitution have been given meaning similar to that given to such equivalent phrases as "provided by law", "in accordance with the law", "prescribed by law", "determined by law" and "in terms of law" used in international human rights instruments and constitutions of other nations. In *Chavunduka & Anor* supra at 560F it was held that "the meaning of these phrases is substantially the same".

However, the court was alive to critical elements a provision must have in order to qualify as law. These include legality, predictability, accessibility, and precision. In *August v Electoral Commission*,<sup>28</sup> a decision based on no law was taken as a clear example of a limitation that was not based or contained in a law as envisaged by the South African counterpart (Section 36 of the 1996 Constitution) to Section 86(2).

All forms of legislation including delegated legislation qualify as law while policies, programme documents and contracts do not pass muster. Common law principles developed by courts also qualify as law. In other words, the recognised sources of law other than authoritative texts are law for purposes of limiting rights including artistic freedom.

#### **1.3.4 Law of general application**

This quality of the law has not been part of Zimbabwean law prior to the adoption of the 2013 Constitution. 'General application' refers to the nature and quality of the law that qualifies to limit fundamental rights. At a formal

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<sup>27</sup> Judgment No. CCZ 6/201411, Const. Application No. CCZ 247/09

<sup>28</sup> 1999 (3) SA 1 (CC).

level, the law in question must be precise, accessible and clear for affected people to have the possibility of learning the extent to which the law affects their fundamental rights. This speaks to the form of the law.

At a substantive level, the law in question must be equally applicable to everyone in such a way that it cannot be said to be applicable to a specific group of people. The law must be devoid of arbitrary application.<sup>29</sup> Equality before the law and equal protection of the law is then amplified through this requirement of general application. That approach confirms a society based on equality.

As will be discussed later, all laws restricting artistic freedom must conform to the requirements of section 86(2) lest the decisions taken to limit it will be contrary to the Constitution, hence null and void. Further, restrictions on artistic expression based on political, religious or moral grounds in the absence of a law to back them will have to be challenged as unlawful under the 2013 Constitution. In other words, it is no longer enough simply to make reference to a law in order to limit the right. The law, especially statutes that preceded the 2013 Constitution, must earn the status of law by meeting constitutional standards of a law discussed above.

#### **1.4 Judicial decisions bearing on artistic freedom**

As demonstrated above, artistic freedom is a fundamental component of the right to freedom of expression. Freedom of expression was described as one of the most precious of all the guaranteed freedoms in the case of *In Re Munhumeso*,<sup>30</sup> where it was broadly considered to serve the following special purposes; first, it helps an individual retain his/her autonomy and to obtain self-fulfilment. This individual-autonomy argument is essential to artistic freedom as censorship acts to restrict the artist's ability to fully express him or herself to others and thus interferes with self-fulfilment i.e. his/her ability to attain the full development of his/her intellect, interests, tastes and

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<sup>29</sup> See *Dawood v Minister of Home Affairs* 2000 (3) SA 936 at page 47. See also *President of South Africa v Hugo* 1997 (4) SA 1 (CC).

<sup>30</sup> *In Re Munhumeso and Ors* 1994 (1) ZLR 49 (SC)

personality; and to override the audience's autonomy by deciding for them what is and is not suitable to experience, thus interfering with such audience's right to self-fulfilment.

Second, freedom of expression assists in the discovery of truth. It is through access to information or works of art prepared by an artist to convey a message to the public that members of the public are able to discover the truth about an issue subject to debate.

Third, it strengthens the capacity of an individual to participate in decision-making. Decision-making is a process that requires information in order for those involved to participate fully and with effectiveness. Access to information exposes errors in the governance and administration of justice in the country as well as reporting on the excesses of public power thereby facilitating enforcement of accountability.

The effect of monopoly of means of communication was addressed by the court in *Retrofit (Pvt) Limited & Others v PTC and Anor*.<sup>31</sup> In that case the applicant challenged the statutory monopoly of the post & telecommunications authority which had declined an applicant a licence to operate a mobile cellular telephone service. The court held thus;

that, freedom of expression is a vitally important right that is an indispensable condition for a free and democratic society. Section 20(1) of the Constitution requires not only that persons be free to express themselves, but also that they are not hindered in the means of their expression. Interference with the means of transmission or reception of information necessarily interferes with and hinders the right to receive and impart information.

The most important part of the above ruling was the judicial approval of the fact that freedom of expression also applies to corporate bodies much as it applies to individuals. By extension, freedom of artistic expression applies to juristic persons who are desirous to communicate particular messages through works of art. One does not have to be an artist in order to enjoy freedom of artistic expression.

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<sup>31</sup> 1995 (2) ZLR 199 (SC).



As to permissible limitations of the freedom, Section 61(5) mentions incitement of violence, advocacy of hatred, malicious injury to a person's reputation or dignity and malicious breach of privacy, as grounds on the basis of which freedom of expression could be limited.

The limitation clause in various constitutions has been abused to stifle all opinions and ideas considered to be contrary to the views of those who hold power in the society. This runs contrary to how freedom of expression should be exercised as it is now well established that in a democracy an unpopular minority view of what is true or right should not be smothered by a majoritarian view of that which is true or right. If that is allowed, then freedom of expression will be an illusion. Room for expression of diverse points of view is of the highest importance, not only for those who espouse a cause or position and then defend it, but also for those who hear and pass judgment on that defence.

The belief that an opinion is false, or in any other way detestable, cannot be grounds for its suppression.<sup>32</sup> When speech or some form of artistic expression such as a play or concert is prevented from taking place or concluding by disruptive protest, the effect is just as surely an attack on freedom of speech or artistic expression as the deliberate suppression or prohibition of a speaker or artist by authorities. At the same time, however, the rights of free expression enjoyed by speakers or performers do not negate the rights of free expression of those who would protest the speech or performance.<sup>33</sup>

It is unpopular ideas, or ideas that the mainstream would like to ignore, that must be debated.<sup>34</sup> The US court in *Hustler Magazine and Another v Falwell* was of the view that there is no such thing as a false idea. Further that "if it is the speaker's opinion that gives offense, that consequence is a reason for

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<sup>32</sup>Freedom of Speech and Artistic Expression, University of Michigan  
[http://spg.umich.edu/sites/default/files/601X01\\_0.PDF](http://spg.umich.edu/sites/default/files/601X01_0.PDF)

<sup>33</sup> [http://spg.umich.edu/sites/default/files/601X01\\_0.PDF](http://spg.umich.edu/sites/default/files/601X01_0.PDF)

<sup>34</sup> In Re Munhumeso and Ors 1994 (1) ZLR 49 (SC)at 57F

according it constitutional protection".<sup>35</sup> Even the Zimbabwean courts in some instances have given expansive interpretations to the right to artistic freedom.

In *Chavunduka and Anor v Minister of Home Affairs and Anor*<sup>36</sup>, the point was also made that "mere content, no matter how offensive, cannot be determinative of whether a statement qualifies for the constitutional protection afforded to freedom of expression".

It is unfortunate that despite all these progressive judgments, artistic freedom is still heavily restricted in Zimbabwe. In June 2013 the UN Special Rapporteur in the field of cultural rights, Ms Farida Shaheed, presented a report to the UN Human Rights Council, where she mentioned that the effects of art censorship or unjustified restrictions of the right to freedom of artistic expression and creativity are devastating.

### **1.5 Other legislation impacting on freedom of artistic expression**

The Constitution is the supreme law of Zimbabwe. As partly discussed above, it provides for the bill of rights, which is a list of rights and freedoms protected therein as well as providing skeletal provisions on how to seek redress in cases of violation. The constitutional provisions are given effect by legislation enacted specifically for that purpose. This type of legislation is known as 'constitutional legislation'. Yet there exists other legislation adopted by parliament to regulate certain situations, which in its application, has a bearing on the bill of rights. This part deals with both constitutional and that other legislation that has a bearing on the exercise of freedom of expression and by extension, freedom of artistic expression.

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<sup>35</sup>Hustler Magazine and Another v Falwell 485 U.S. 46 (1988)

<sup>36</sup>2000 (1) ZLR 552 (S)

### **1.5.1 Censorship and Entertainment Control Act [Chapter 10:04]**

This statute presents itself as the premier legislation in terms of censorship of artistic works in Zimbabwe. In the long title, the Act is enacted:

to regulate and control the public exhibition of films, the importation, production, dissemination and possession of undesirable or prohibited video and film material, publications, pictures, statues and records and the giving of public entertainments; to regulate theatres and like places of public entertainment in the interests of safety; and to provide for matters incidental to the foregoing.

The Act will be reviewed in detail later in this report when dealing with censorship in Zimbabwe. However, it suffices to give a brief history of this Act and censorship practice so as to put the issue of censorship under Zimbabwean law into perspective.

### **1.5.2 Criminal Law (Codification and Reform) Act [Chapter 9:23]**

The Criminal Law (Codification and Reform) Act (herein Criminal Code) was adopted to codify and reform all common law offences into one statute. The legal position in the aftermath of its adoption is that all offences are established either in the Criminal Code or any other statute that criminalises specific conduct in the sphere of application of the Act in question.

Being the premier criminal statute in Zimbabwe, the Criminal Code has been interpreted consistently to criminalise artistic expression that is viewed as highly critical of political leadership and other state institutions and actors such as the police. The case of Owen Maseko is one good example.<sup>37</sup> In that case the artist had installed a public exhibition of various artistic expressions depicting the mass atrocities committed by government forces in Matabeleland in the 1980s. The State used various sections of the Criminal Code (sections 33 and 42) to prosecute the artist for staging the exhibition, which effectively was banned.

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<sup>37</sup> Artist who was arrested and charged using section 31 and 33 of the Criminal Codification and Reform Act to censor artistic works aimed at interrogating what happened during Gukurahundi in Matabeleland region.

The Criminal Code criminalizes the publishing of or communicating false statements prejudicial to the state.<sup>38</sup> The elements of this crime include, inciting or promoting public disorder or public violence or endangering public safety; or adversely affecting the defence or economic interests of Zimbabwe or undermining public confidence in a law enforcement agency, the Prison Service or the Defence Forces of Zimbabwe; or interfering with, disrupting or interrupting any essential service. Many artists have fallen prey to the use of this section of the criminal code especially by the police force.

Another section of the law that has been used to censor freedom of artistic expression is the one of undermining the authority of or insulting the President.<sup>39</sup> The ingredients of this insult law include, publicly making a statement (words, by an act or by a gesture) which could mean even publishing a statement in any print or electronic medium for reception by the public.

It is important to note that in most cases prosecution before the courts has been unsuccessful, and the Constitutional Court has ruled that the provisions used contravene the constitutional freedom of a person to express themselves. However, censorship continues and has also had a chilling effect on the ability of artists to develop material on political and civic affairs due to the risk of action being taken against them by the State. Artists should be able to freely criticise public figures without being fearful of criminal action being taken against them. It is therefore important to advocate for the removal of provisions that criminalise insulting the office of the President and provisions that criminalise making false statements prejudicial to the State.

Section 96 of the Criminal Code creates the offence of 'criminal defamation'. Publication of a false statement about another person, intentionally or with the likelihood that their reputation would be injured would be guilty of that offence. This offence flies in the face of freedom of artistic expression in that a person who packages public criticism in works of art faces prosecution merely on the likelihood that such a message would tarnish someone else's

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<sup>38</sup> Section 31 of the Criminal Law and Codification and Reform Act 2004

<sup>39</sup> Section 33 of the Criminal Law and Codification and Reform Act 2004

reputation. What makes the offence more untenable is the fact that private persons are rarely targeted for criticism. Public officials, who are expected to tolerate more scathing criticism, are the usual targets and practice has shown that such offences are created to protect them from accountability. One could conclude that while the legislation could be argued to be constitutional the problem in Zimbabwe is its deliberate misapplication used with impunity.

### **1.5.3 Public Order and Security Act [Chapter 11:17]**

This legislation (thereafter referred to as POSA) is not ordinarily relevant to artistic expression as it was adopted to implement the constitutional provisions on freedom of assembly and association. However, the State, represented by the police, has interpreted this legislation to ban artistic and theatrical presentations on account of the fact that people gather to participate in such exhibitions or presentations. The case in point is that of the politically charged satire *The Good President*, which tells the political history of Zimbabwe since independence (provoked serious debate for its portrayal of how Robert Mugabe has ruled the country since then). This was a product of a long-time collaboration between Zimbabwe's best known playwrights, actors, and theatre directors Cont Mdladla Mhlanga and Daves Guzha.

The play opened in the capital Harare with little incident. However, by the time the play reached the city of Bulawayo it had been banned by the Censorship Board. Heavily armed security agents attended the venue and interrupted proceedings on allegations that the play violated the POSA, and that it was a product of 'political activists masquerade as artists'.<sup>40</sup> Yet both political activists and artists have the right to freedom of expression in its wide interpretation. In the final analysis, POSA has become an integral part of the miscellany of legislation and policy framework that directly impacts on the exercise of freedom of artistic expression.

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<sup>40</sup> *Art Watch Africa* Monitoring Freedom of Creative Expression, Arterial Network Report (2013), p 122.

#### 1.5.4 Official Secrets Act [Chapter 11:09]

The Act is another piece of legislation with the potential to limit the exercise of freedom of artistic expression in Zimbabwe. The Act has provisions that seek to limit the information that may be circulated or received that can have a negative effect on the defence, public order and public safety. The Act protects state security by criminalising the communication of information that is in the possession or under one's control when such information is deemed to be a "secret official code or password or any model, article, document or information relating to or that is used in a prohibited place or relates to anything in a prohibited place."<sup>41</sup>

In cases where such a model, document or article has been made or obtained in contravention of provisions of the Act this is considered to be criminal.<sup>42</sup> Third parties entrusted in confidence with information by a person who holds office in the public service who then communicate this information commit crimes under the Act. People that are employed under the public service with access to such information, hold a contract made on behalf of the state, or contract that is to be fulfilled in a prohibited place, constitute the profile of persons whose conduct is regulated by the Act<sup>43</sup>.

We argue here that provisions of this Act are inconsistent with the international legal obligations as will be discussed later. Such provisions must be well defined on what document or article will be injurious to the well-being of the State especially in cases relating to the military and other security-related subjects. This was the import of the ruling in the *Chavunduka* case when the court held that 'statutory vagueness cannot be allowed where freedom of expression is at issue; the law must be precise enough to enable a person to regulate his conduct'. Unfortunately vagueness in legislation, either as a result of poor drafting or specific intention to unduly limit freedom of expression is what is currently prevailing.

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<sup>41</sup> Section 4(1) a of the Official Secrets Act 1970

<sup>42</sup> Section 4(1) (b) of the Official Secrets Act

<sup>43</sup> Section 4(1) (d) Official Secrets Act

Further, these provisions are susceptible to abuse thereby restricting access to crucial information that citizens need from government officials for accountability purposes and to encourage increased public participation and discussion. This Act has been used on several occasions by the executive to stop scrutiny of state action by the courts. There is no stipulated procedure for the circumstances in which this can be done, and how it is to be tested by an independent authority and therefore can be subject to abuse by authorities not wishing to have their unlawful actions scrutinised. This piece of legislation can easily be abused to restrict access to artistic material on the ground that an artist has access to official secrets.

#### **1.5.5 Access to Information and Protection of Privacy Act [Chapter 10:27]**

This Act was enacted by the legislature to –

provide members of the public with a right of access to records and information held by public bodies; to make public bodies accountable by giving the public a right to request correction of misrepresented personal information; to prevent the unauthorised collection, use or disclosure of personal information by public bodies.

As previously stated, this is another example of constitutional legislation enacted to give effect to the predecessor of Section 62 of the current Information Act – the right to access to information.<sup>44</sup> According to the Act, information can be provided on payment of a fee.<sup>45</sup> The Act also lays down categories of information that cannot be accessed. This includes client attorney privileged information, information that will be harmful to law enforcement process and national security, information relating to inter-governmental relations for negotiations, information relating to the financial or economic interests of public body or the state, research information, information relating to business interests of a third party, information relating to personal privacy.

The Act guarantees and facilitates access to information, while some sections unnecessarily restrict access to information. There is need to ensure, when amending this legislation, that provisions are made to allow for civic education

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<sup>44</sup> Section 5 of the Access to Information Act 2002

<sup>45</sup> Section 7 (a) & (b) Access to Information Act

and dissemination of diverse information without undue restriction by the State. Freedom after expression also remains elusive, with self-censorship still prevalent due to the fear of being prosecuted for expressing views critical of individuals, institutions and state policies and practices. There is need for the removal of provisions in this Act which allow for such restrictions to continue.

#### **1.5.7 Broadcasting Services Act [Chapter 12:06]**

The broadcasting law, Broadcasting Services Act (BSA), is being used to maintain a state monopoly of the airwaves. Monopolies are known to be indicators of societies where freedom of expression does not thrive. The Act establishes a Broadcasting Authority whose functions<sup>46</sup>, among many others, is to encourage diversity in the control of broadcasting services and or preservation of the national security and integrity of Zimbabwe.

The Act further provides for the powers and duties of the Broadcasting Authority of Zimbabwe, sets out the constitution of the Authority and further provides for the planning, management, allocation, regulation and protection of the broadcasting frequency spectrum and the regulation and licencing of broadcasting services and systems; to provide for programme standards; to regulate and licence signal carriers; to encourage and develop the creative arts through broadcasting content standards; to create a sense of national identity through broadcasting services.

The provisions in this Act that seek to promote freedom of expression include the establishment of a broadcasting fund whose purpose is to make grants available to local authorities or their appointed agents for them to assist needy persons to obtain access to broadcasting services.<sup>47</sup> Unfortunately, the Act has not been able to promote freedom of artistic expression and diversity with regard to the fact that it has only led to the monopolization of the airwaves therefore resulting in pre-censorship of artistic content where the content is vetted before being broadcast running the risk of exclusion if it is viewed as against the vested interests of the ruling party hegemony.

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<sup>46</sup> Section 3 Of the Broadcasting Services Act 2001

<sup>47</sup> Section 30 (b) of the Broadcasting Services Act



### **1.5.8 National Arts Council of Zimbabwe Act (Chapter 25:07)**

This legislation is one of the few that directly speaks to the aspect of arts. It was adopted for the 'establishment of the National Arts Council of Zimbabwe to foster, develop and improve the knowledge, understanding and practice of the arts in Zimbabwe; to provide for the structure and functions of the National Arts Council; to provide for a Board to manage and control the affairs of the National Arts Council; to provide for the registration and regulation of arts organisations; among other things. The National Arts Council (NAC) established by the Act is also a cultural institution; a mainstay of arts development and it works in conjunction with the then Ministry of Education, Sport, Arts and Culture. It is believed to have lobbied for 75 per cent local content on national airwaves thereby exposing local artists to more play time. On the other hand the campaign was also seen as an avenue through which the state had control over artistic expressions of these musicians whose content was determined in terms of its support for the incumbent political regime.

The main contribution of this Act to freedom of artistic expression is perhaps Part III which deals with the functions of the NAC. With only two functions, the more relevant one is to 'foster, develop and improve the knowledge, understanding and practice of the arts in Zimbabwe by encouraging the teaching and practice of the arts and their presentation, performance, execution and exhibition, to the public' as provided for in Section 15(1)(a). This provision directly impacts on the exercise of the freedom as a right as well as a profession in that artists are taught practical and other matters relating to how art is expressed through 'presentation, performance, execution and exhibition to the public'. If this objective or function is fully implemented, it would improve the effectiveness in the way artists create and share works of art with the desired audience.

#### **1.5.8.1 Statutory Instrument 136 of 2003**

This piece of legislation allows artists to import musical, broadcasting, recording and public address systems enjoying exemption from tax. This has over the years changed the face of the arts and culture in Zimbabwe as it has led to growth of television programmes, theatre, films and music. However, there are still other arts and culture sectors that would like to enjoy the same privileges. For instance, on equality basis, those who express themselves through motion pictures and or photography would expect that their respective equipment (cameras and film accessories) must also be exempt from import tax.

This legislation has the effect of promoting artistic expression in that artists get rebates or tax exemption in a way that enables them to obtain the means (equipment) through which the freedom is exercised both as a right or to facilitate professional growth. Whether or not this law is being applied in the wake of pressing budgetary deficits is something that needs to be monitored.

#### **1.5.8.2 Statutory Instrument 87 of 2006 as amended by SI 166 of 2009 (NACZ General Regulations)**

The National Arts Council of Zimbabwe (General) Regulations of 2006 (NACZ Regulations) were enabled for enactment by Section 13 of the National Arts Council of Zimbabwe Act apparently to provide for matters connected to the registration of arts promoters and organisations. The Regulations also provide for fees and levies payable in the registration process. The Amendment (SI 166 of 2009) mainly updates fees and levies from the abandoned national currency to the USD. The Regulations also provide for penalties for contravention of any penal provisions of SI 87 of 2006.

##### *Areas of concern*

On account of its narrow scope, SI 87 of 2006 has a couple of provisions that, at face value, are harmless, but have a substantive negative effect on the realisation of artistic freedom by arts promoters and organizations, and artists by extension.

### *Sections 3(3) of SI 87 of 2006 – Application for registration*

This provision deals with matters related to application for registration of arts organisations. Subsection 3 provides for a list of entities (juristic persons) in which form arts organisations must be registered for legal recognition by Zimbabwean laws before they can be eligible to register with the NACZ.

Going by principles on legislative interpretation, once a law provides for a list of items with the language used not suggesting that the list is just for demonstration purposes, and then any item excluded from the list has no possibility of inclusion.

In other words, the list is closed for organisations that are registered in a different legal regime such as a common law *universitas*. A *universitas* is a legal entity or organisation that assumes legal recognition by mere adoption of a constitution to which members subscribe, much as a partnership comes into effect by the adoption of a partnership agreement. Therefore, limiting the form in which prospective arts organisations can be registered is a form of pre-censorship. Organisations are forced to seek legal recognition through avenues over which the state has absolute control. That process could be used to screen organisations presumed distasteful.

This is an unnecessary limitation of practice of artistic expression and therefore inconsistent with the Constitution and Zimbabwe's international obligations. The provision must be reformed to allow any organisation registered by way of any lawful regime in Zimbabwean law to apply for registration under the Regulations.

### *Section 4(1) as read with 14(1) of SI 87 of 2006 – Processing Application*

The above provisions partly regulate applications for registration as an arts organisation or promoter, respectively. It appears the advice of District Arts Councils bears strongly on the outcome of the application before the NACZ. The worrying part is that once the District Arts Council is of the view that the Applicant (whether arts organisation or promoter) may not comply with the Regulations, or that its objects are not consistent with the objects of the NAC,

and that the organisation is not 'fit and suitable' for registration, then the application will receive an adverse report.

The Regulations allow for arbitrary imposition of conditions on pending applications. They do not provide for a list of criteria to be applied by the District Arts Council to determine 'fit and suitable', and as a basis for perceiving that applicant as unlikely to comply with Regulations. The law is not clear enough for prospective applicants to align their conduct to the requirements of the law. The law falls short of the basic qualities any law must have to qualify as law. At best the District Arts Council is allowed to speculate and the speculation invariably carries the day.

Accordingly, the provisions cited above go beyond what is necessary to achieve the legislative objective hence unduly limits the exercise of the right under both the Constitution and international legal obligations. It is yet another form of pre-censorship.

*Section 4(2)(b) as read with 14(2)(b) – public interest grounds*

The District Arts Council is again allowed to consider whether it would be in the public interest to register the arts organization. Based on the same reasoning above, there are no criteria laid down to determine what is and is not in the public interest. The subjectivity of public interest again exposes prospective applicants to arbitrary application of the law. Applicants have no possibility to align their organisations to the public interest criteria they are unaware of. Therefore, once again the provision does more than is reasonably necessary to achieve the legislative objective of the law. By so doing it violates artistic freedom to the extent that organisations to facilitate the exercise of the rights are arbitrarily prevented from registering and participating in the promotion of arts in Zimbabwe. The provision must be repealed or amended to include the criteria to determine 'public interest' and 'fit and suitable' organisations.

Section 12 is unlawful in that it is *ultra vires* Section 22 of the Act in that it goes beyond the criteria for restricting privileges of non-registered arts organisations. A statutory instrument must confine itself to the parameters of its Act, and not seem to amend the Act as it is doing here by additionally excluding from policy formulation unregistered arts organisations

Part IV of the Regulations pertaining to and therefore stipulating the registration of arts promoters is likewise unlawful because Section 22 of the Act requires only arts organisations to be registered, not any other entity. This is so stark in that Section 3 pertaining to the registration of arts organisations does state that it is issued in terms of section 23 of the Act. This section of the regulations understandably omits to mention which section of the Act it is being issued in terms of because there is no provision in the Act allowing it to be issued. Consequently the prohibition of arts promoters and businesses operating without being registered or licensed in Sections 13(4) and 19 are void at law, as well as the whole of Part IV, corresponding 'offences' in section 23, and paragraphs B,C and D of S I 166/2009 which levies licence fees for illicit licences.

### *Unconstitutionality*

Section 3(3)(iv)'s insistence on providing a PVO Act registration number for registering a private voluntary organisation is unconstitutional as it is not only discriminatory but limits the freedom of assembly and association guaranteed by section 58 which allows organisations to be formed by a constitution without having to necessarily register as a PVO or a trust or a company or other form.

The exclusion of unregistered arts organisations from the national arts policy consultations in Section 12(c) violates Section 13(2) of the Constitution requiring the involvement of people in formulating and implementing development plans and programmes, as well as Section 56(3) prohibiting discrimination and Section 194(1)(d) requiring public services to be provided fairly, equitably and without bias.

## **Illegality of Festival Guidelines**

The Festival Guidelines (herein Guidelines) are blatantly unlawful because they do not have any statutory basis, either in the Act or the Regulations themselves for similar reasons advanced above, namely, there is no legislative basis for registering or controlling festivals in the Act or the Regulations. They have no force of law whatsoever, yet they are draconian as they admittedly seek to curtail freedom of artistic expression to only those that the government finds desirable. Ministry officials, including the Minister, have no authority to sit at their desks and type out decrees to rule over festival organisers. Hence the notions of 'clearance' of festivals and 'registration' of festivals, as well as the requirement to submit to the ministry budgets and plans are manifestly void at law. It is strange that the guidelines actually stipulate festival registration 'in terms of NACZ Act of 1985 and SI 87/2006' when there are no provisions for such anywhere in the two statutes. They go even as far as to proscribe offences which literally hang in the air.

## **Unconstitutionality**

The Guidelines, in addition, flagrantly violate numerous fundamental rights guaranteed in the Constitution, as was pointed out in the Coalition Against Censorship Press Statement upon their promulgation. The battery of fundamental rights trampled upon include freedom of expression through demanding there be a theme, right to privacy through demanding accounts and other information, as well as political rights. It is because of the foregoing that it is recommended that a constitutional challenge, not only of the Guidelines, but also of the offending provisions of the regulations, must be instituted without delay.

### **1.5.9 The Draft National Cultural Policy of Zimbabwe 2015**

This is the leading policy document with implications for artistic expression. The policy, which will come into operation after the adoption of the Constitution, will replace the one adopted in 2007. Among other things, the policy reinforces the need to safeguard cultural heritage as a nexus of dignity. Some of the objectives of the policy are to create a cohesive and progressive

Zimbabwean society where various forms of art, culture and expression serve to showcase the diversity of the nation's heritage. The policy further seeks to create an enabling environment that allows for inclusive, equitable and vibrant participation by all Zimbabweans in arts, culture and heritage for greater social cohesion. It also encourages individuals, groups and communities to contribute towards safeguarding Zimbabwe's culture, artistic expression, and tangible as well as intangible heritage for posterity.

The guiding principles of the policy include sovereignty, equal dignity for all indigenous cultures, recognition of culture in economic development, sustainable development, unhu/Ubuntu, Pan-Africanism and African renaissance. While the policy might not really have aspects of censorship it can be a guide as to how the policy views artists and how then such artistic expression will be censored. The fact that the policy highlights sovereignty as a guiding principle leaves a lot of room for individuals to interpret sovereignty. In this case censorship needs also to be clearly addressed within the policy giving clear reasons for censorship.

## Chapter 2: LOCAL CENSORSHIP STANDARDS OF WORKS OF ART

### 2.1 Censorship and censorship standards

Censorship is generally the process(es) leading to suppression of speech, public communication or other information which may be considered objectionable, harmful, sensitive, politically incorrect or inconvenient as determined by, authorities, groups or institutions in a state. The information so censored could be conveyed through a number of media such as literary works, music, film, pictures, maps, other works of art such as paintings, sculptures and so on.

The need to censor information being shared with the public has always been based on different grounds and/or criteria. These grounds have been reduced to theories of justification of censorship in any given situation. First, the moral motivation insists on the removal of materials that are considered obscene or otherwise regarded as morally questionable. All forms of pornographic material are often censored in most jurisdictions under this rationale with criminal sanctions for possessing or in some instances offering such for sale without a licence.

Second, the military censorship theory focuses on keeping military intelligence, tactics and information confidential and hiding it from the enemy. This is used to counter espionage, which is the process of obtaining military information. This theory is often used to justify laws such as official secrets for information regarded as prejudicial to national security such as the Official Secrets Act discussed above.

Third, the political censorship ideology dictates that governments hold back information from their citizens even by intercepting communication intended for public consumption by the producers of such information. This is exertion of control over the kind of information the populace would consume and prevent free expression. Perhaps this is the most controversial ground for censorship as it is done clandestinely without revealing the actual reason by banning of certain music, publications, films and other works of art. We must state that the political theory is not a legitimate ground for censoring materials



hence the governments which practice it often hide behind other less controversial grounds such as morality or religious theories to censor information for political ends.

The *Shaheed Report* has gathered overwhelming response and support for the view that 'the suppression of political dissent, the quest for nation-building and pursuit of hegemonic policies has always been prominent reasons for art censorship'. This is notwithstanding the timeless principle of democratic accountability that 'public figures, including those exercising the highest political authority, are legitimately subject to criticism and political opposition'.<sup>48</sup> Consequently, and as is the case with Zimbabwe, one discovers the proliferation of laws that seek to punish utterances against government, head of state or key executive organs such as the police.

Fourth, the world over, the religion censorship ideology has resulted in materials considered offensive to certain religions being banned, and where authorities fail to do so, followers of that religion often take matters into their own hands by destroying the materials offending their religion. Although not common in Zimbabwe, this theory is closely linked to the morality ideology.

As generally stated above, the essence of censorship is suppression of expression. Censorship has always been practiced to the extent of almost becoming a universal phenomenon. It has surfaced in one form or another at different times in different societies governed by different systems.<sup>49</sup> Freedom of expression and censorship pull in different directions. Their aims and purposes are conflicting. It is common that for each number of people who wish to speak and spread the truth as they see it, there are that many more people who do not wish to hear it and do not want others to hear it, especially if what is said or written challenges the conventional beliefs and practices<sup>50</sup>.

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<sup>48</sup> Shaheed Report, para. 45.

<sup>49</sup> The Article 19 Freedom of Expression Handbook, International and Comparative Law, Standards and Procedures, available on <https://www.article19.org/data/files/pdfs/publications/1993-handbook.pdf>

<sup>50</sup> In Re Munhumeso and Ors 1994 (1) ZLR 49 (SC)

There are many interests that drive censorship in Zimbabwe. However, the main driving force for censorship appears to be political censorship involving intolerance to the ideas, expressions and opinions of others. This fear has manifested itself in various forms of suppression of artistic expression which is considered as dangerous or threatening security or threatening certain groups of people or individuals.

In *Re Alberta Legislation*,<sup>51</sup> the Supreme Court of Canada emphasized that freedom of discussion is essential to enlighten public opinion in a democratic state and that it cannot be curtailed without affecting the rights of the people.<sup>52</sup> Further, in deciding to restrict freedom of expression the courts in Zimbabwe should also take into account international practices and principles as well as progressive legal thoughts from other jurisdictions. Each has to make its individual contribution to the quest and attainment of a just and decent society in which freedom of expression is cherished as an indispensable value.<sup>53</sup> The ambit of freedom of expression covers not only information or ideas that are favourably received or regarded as inoffensive or as a matter of indifference, "but also those that offend, shock or disturb the state or any sector of the population. Such are the demands of that pluralism, tolerance and broadmindedness without which there is no 'democratic society'."<sup>54</sup>

There is a considerable body of case law dealing with questions that Zimbabwean society has been grappling with, such as the limits of legitimate criticism, whether erroneous statements about public figures can be regarded as defamatory in the absence of malice or reckless disregard of truth. The latter has raised pertinent questions with regards to who a public figure is? What are the criteria for determining this question? What is the permissible latitude of criticism regarding public figures?

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<sup>51</sup> [1938] 2 SCR 100

<sup>52</sup> *Nathwani v Commissioner of Police, Bombay* 78 Bom L R, 1

<sup>53</sup> The Article 19 Freedom of Expression Handbook, International and Comparative Law, Standards and Procedures, <https://www.article19.org/data/files/pdfs/publications/1993-handbook.pdf>

<sup>54</sup> *Handyside v United Kingdom*, Judgment of 7 Dec. 1976, Series A no. 24, 1 EHRR 737.

## 2.2 Standards of art in Zimbabwe – The framework

The National Cultural Policy of Zimbabwe defines arts as all forms and traditions of dance, music, visual arts, crafts, design, literature, film and theatre, which serve as a means for individual and collective creativity and expression.

The Censorship Act, which in principle violates the Constitution, spells out the standards of works of art, by providing for the limitation and circumstances which will require the Censorship Board to censor artistic works thus limiting artistic expression. Art is to be considered art if it does not fall under the following broad elements, (i) undesirable, (ii) indecent or obscene, (iii) offensive or harmful to public morals. Furthermore, if it is considered contrary to the interest of defence, public safety, public order or the economic interests of the state or public health, the board may go ahead and declare the items under this category prohibited.

The eight standards set out in the Censorship Act are the criteria the legislature wished to impose on society. However, the challenge with these standards is that they have not been clearly defined, therefore leaving a lot of room for abuse by the Censorship Board. Failure to define the standards makes the law fall short of international obligations and violates them. Any limitations of rights must be stated with reasonable clarity to enable those affected to either challenge them or conform their conduct to the law.

In Zimbabwe artistic expression that seems to go against the political norm is censored. It is important to note that the Censorship Board has also censored pornographic material which would fall in the category of indecent or obscene. There are cases where material of gays and lesbians has been censored and some gay and lesbian activists have been arrested and tried for criminal activity in the magistrates' courts. It must be stated that, even though it was a case of obscenity, once the gay and lesbian element was involved, the whole process also became a political issue on account of the centrality of same-sex relations being used as a bargaining chip during political campaigns in the run up to 2013 general elections.

The standards of public safety, public order, economic interest, public health and contrary to the interests of defence have been abused and applied to censor artistic expression. These grounds have been criticized for being blatantly vague, more particularly because the Act does not offer any definitions of these phrases. This approach in legislative drafting is contrary to the findings in the *Chavunduka* case, namely, that a law that restricts freedom of expression, and by extension, freedom of artistic expression, must do so clearly so that those who are affected by it are able to couch their conduct to conform to those legal requirements.

Artists have testified to the dilemma they face in terms of dealing with standards of censorship in Zimbabwe. They stated that any subject matter making the theme of any song, play or writing, even dealing with social issues, has the possibility of being linked to government action, hence it may attract reprisals in the form of censorship. Arts activist Tongai Makawa (Aka Outspoken) of Magamba Trust notes, 'all topics are controversial in Zimbabwe because if you are tackling any societal ill or problem there is always a way of tracing back to government or political situation even though you are tackling things of a social nature.'

Ambiguity in censorship legislation is against the standards of limitation contemplated by article 19 of the ICCPR. Explaining the nature and extent of limitations, the *Shaheed Report* emphasizes the need for clarity and particularity when introducing limitations.<sup>55</sup> There must be a clear distinction between expression that violates criminal or civil law with the former (criminal sanctions) being the last resort. It then follows that the vagueness of the framework for standards of art as well as lack of transparency in their enforcement cannot pass the constitutional and international law requirements for them to be acceptable in a democratic society.

It is important therefore to have the responsible minister enact regulations to the Censorship Act or amendments that bring in definitions to these unclear provisions to enable artists not only to conform their works of art to it, but

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<sup>55</sup> See Shaheed Report, para. 31.

more importantly to empower them to challenge arbitrary censorship of their works in terms of the generous provisions in the bill of rights.

### **2.3 Administration of censorship of artistic expression**

The suppression of artistic expression in Zimbabwe is controlled by various bodies such as the Censorship Board, Police, and Ministry of Home Affairs. In fact, research has shown that the list of authorities and/or institutions that engage in censorship of information is now excessive. There are so many gatekeepers in dealing with dissenting views that all ministries and public institutions can, to an extent, engage in censorship of materials or articles that fall within their area of service provision. In the words of a senior government official

Censorship lies at three levels where artists submit scripts to the authorities, apply to the police for clearance and then deal with the individual politicians in the communities who are directing the police on the ground. Art must be freed from undue censorship.<sup>56</sup>

While the governance of arts and cultural activities in Zimbabwe is segmented to the ministries responsible for education, sport, arts and culture, NAC and the national gallery, censorship is mainly confined to the ministry responsible for home affairs and its respective departments.<sup>57</sup> Some of the bodies that have been created to administer arts and culture include National Handicraft Centre, NAC, National Museums and Monuments of Zimbabwe, National Gallery of Zimbabwe, and the Censorship Board. All these institutions are managed by various boards put in place by ministers responsible for the various line ministries. Some of these boards also have systems and structures that have led to censorship of freedom of artistic expression. The Censorship Board is managed by the Ministry of Home Affairs. Section 10 of the Act gives the Board power to examine any film or film advertisement either

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<sup>56</sup> 'Government steps up arts censorship' *The Zimbabwean* 23<sup>rd</sup> November 2011.

<sup>57</sup>Zimbabwe Creative civil society strategy in the formulation of a plan of action for arts and culture.

[http://www.nhimbe.org/sites/default/files/policies/LEGAL%20INSTRUMENTS%20RESEARCH%20COMPENDIUM\\_NHIMBE-NPAAC.pdf](http://www.nhimbe.org/sites/default/files/policies/LEGAL%20INSTRUMENTS%20RESEARCH%20COMPENDIUM_NHIMBE-NPAAC.pdf) accessed 1 July 2015

unconditionally or subject to any one or more of the conditions set out in section 10 (1) ( 3) which includes restriction to times and or inclusion of notices to highlight that a movie has been restricted.

Under Section 13, the Act prohibits the importation, production and dissemination of undesirable publications, pictures, statues and records. Contravention of this section will result in an individual being liable to a fine or two years imprisonment. Section 13 (2) further explains what undesirable is, which includes, indecent, obscene, offensive, harmful to public morals or likely to be contrary to the interest of defence, public safety, public order, the economic interests of the state or public health.

Section 14 states the powers of the Board to examine publications, statues, records and pictures and to declare them undesirable or to declare the publication prohibited. The Censorship Board constitutes the primary repository of control. It is empowered to examine any publication and to thereafter declare whether or not it is 'desirable'. It may also, after due notice, declare the editions of a periodical publication undesirable. The Board may also declare an 'undesirable' publication prohibited. The effect is that being found in possession of a prohibited publication is an offence.

The Board also has powers under section 25 to seize any articles for examination. The officer who is either a police official or probation officer will seize materials and forward them to the Board for examination as soon as possible and, after such seizure, the Board shall not retain the article any longer than is necessary for such examination.

While discussing aspects of administration of censorship, it is imperative to note that freedom of expression is not an absolute right. As already discussed, it is subject to limitations.<sup>58</sup> Therefore, in administration of censorship, the various institutions are mandated, by necessary implication, to take into account the principles of natural justice and protection of the right to a fair trial, thus giving artists the opportunity to defend their works of art.

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<sup>58</sup> For a list of rights that cannot be limited see Section 86(3) of the Constitution.

## 2.4 Censorship of films and recorded video or film material

Part III of the Act regulates films and recorded video or film material. Section 9 provides for the prohibition of unapproved films, inter alia, the distributing, televising, or publicly exhibiting any films unless the film or copy has been approved by the Censorship Board. Contravention of the provision will, upon conviction, result in imprisonment for a year or a fine not exceeding level six.

As a matter of procedure and competence, the Board is empowered to have access to the article in question before same could be shared with the public. If the Board sees nothing wrong with the article, it authorizes its publication subject to any conditions attached. However, once the Board decides that the article is undesirable, its publication is prohibited forthwith.

The Board has power to examine a film, or film advertisement with the right to either approve the film unconditionally or subject to conditions as laid out in section 10 (3). The Board will not approve a film if it is indecent or obscene or is offensive or harmful to public morals or is likely to be contrary to the interests of defence, public safety, public order, and the economic interest of the state or public health. Unfortunately 10(2) (b) has been abused by the Board by banning movies that critique ruling political leadership.<sup>59</sup>

The Board can also impose conditions with regard to the time the film can be screened, putting notices indicating the suitability of viewing by persons, distribution as to age (parental guidance screening). Contravention of this section shall result in a fine or/and imprisonment for one year.

On approval, the Board issues a certificate of approval of film and film advertisement for a prescribed fee. Prohibited films are published by notice in the Government Gazette, making known the decisions of the Board declaring the film to be prohibited. The Board after making declaration shall notify such person or class of persons as the Board thinks fit of the declaration.

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<sup>59</sup> Any attempts to obtain statistics from the Board are fruitless as the request for information is regarded as falling under the purview of AIPPA hence subject to unfettered discretion to provide it.

As regards foreign artistic works, any person who imports any film that has been prohibited shall be guilty of an offence and is liable to a fine not exceeding level seven or two years imprisonment. Patel however states that the judiciary has a tendency to insist on following the rules of natural justice in particular with regards to a right to a fair hearing. Therefore, in order to be in compliance with the Constitution, which provides for a right to a fair hearing, the Censorship Board needs to take into account these issues when considering such matters. This is an area for harmonization and alignment of this law to conform to the imperative provisions of the Constitution and international standards of freedom of expression.

## **2.5 Censorship of literature, pictures, statues and records**

Part IV of the Act regulates the importation, production, distribution and sale of publications including pictures, statues and records. Administratively, the Board is the primary control body. The Board under the Act is empowered to examine any publications; if any part is found indecent, offensive or harmful to public morals, such will be declared undesirable. Furthermore, if it is contrary to the interest of defence, public safety, public order, and the economic interests of the state or public health, the Board may still declare the items under this category prohibited.

The Board is not under obligation to call for objections except in the case of future periodical publications nor is it obligated to abide by the rules of natural justice.<sup>60</sup> In practice however, the Censorship Board has not considered principles of natural justice when dealing with some artistic works. The case in point is that of Tafadzwa Muzondo, the director and producer of the award-winning theatrical production entitled *No Voice No Choice*. The applicant was not given the opportunity to appeal before the Appeals Board after his play was examined and declared undesirable by the Censorship Board. He, however, resorted to challenging the failure of the Minister to constitute the Appeal

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<sup>60</sup>Freedom of artistic expression and censorship in Zimbabwe Bharat Patel; <http://archive.lib.msu.edu/DMC/African%20Journals/pdfs/Journal%20of%20the%20University%20of%20Zimbabwe/vol24n1/juz024001005.pdf> accessed 1 July 2015



Board as a violation of his right to a fair hearing within a reasonable time by taking the matter to the High Court.

It could be added here that an applicant could invoke the provision of Section 68 of the Constitution on the right to administrative justice and argue that the decision of the Censorship Board or the Appeal Board by its failure to make a decision, amounted to an administrative decision therefore subject to the requirements of a 'lawful, prompt, efficient, reasonable and procedurally fair' decision.

Furthermore, the Censorship Board also has the power to prohibit public entertainment unless approved.<sup>61</sup> In this particular case the Board has the discretion to give a certificate in respect of public entertainment. The Board has power to censor by prohibition of certain exhibitions and entertainment by notice in writing stating whether they have prohibited or permitted certain exhibition and entertainment.

## **2.6 The Appeal Procedure**

In conformity to access to justice standards, it is important to note that the decisions of the Censorship Board are appealable to the Censorship Appeal Board (CAB)<sup>62</sup>. The CAB may vary or set aside the decision of the Board.<sup>63</sup> Apart from the questions of law<sup>64</sup>, which can be referred to the Supreme Court, the decision of the Board is final. The relevant Minister can override the decision of the Board which declares a publication undesirable if he/she believes the decision is not in the public interest.

Much as the Censorship Act provides for an appeal procedure, the appeal procedure falls short of constitutional expectations in terms of effectiveness. With the State keen to unduly restrict the exercise of artistic freedom, it is desirable to introduce a new appeal procedure whereby all appeals against Censorship Board decisions are made to a court of law, preferably the

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<sup>61</sup> Section 16 of the Censorship and Entertainment Control Act

<sup>62</sup> Section 18 which establishes the appeal board in the Censorship and Entertainment Control Act

<sup>63</sup> Section 19 appeal to appeal board in the Censorship and Entertainment Control Act

<sup>64</sup> Section 20 of the Censorship and Entertainment Control Act

Administrative Court on an urgent basis. Constitutionalism maintains that courts remain the most appropriate protector of human rights and freedoms. To this a case must be made for the alignment of the Censorship Act to the extent that it must ensure the Censorship Board takes into account natural justice principles when vetting articles and those appeals against such decisions are dealt with by courts of law and not by another layer of bureaucrats.

In conclusion, research has revealed that both the Censorship Board and the Appeal Board are not functioning as envisaged by legislation. The Censorship Board works in the form of a black box where an applicant simply deposits works of art for examination and waits for the outcome without an opportunity to know whether the Board was properly constituted or a single individual presided over the application. "We need workshops on censorship so that we know our parameters." Daves Guzha

Echoing similar sentiments, Rudo Kanukamwe, a writer, testifies

I have never encountered the Board of Censors. I do understand how they work and I don't think their decisions are transparent because they are based on their job description as censors. Artists should know how the system operates.

The reason for such a state of affairs is primarily to achieve the political objective of nipping dissent in the bud by censoring all vehicles through which critical works of art are disseminated to the public. The situation works well for the censoring authorities that wish to maintain the status quo.

In many instances however, artists perform, present or exhibit their works without putting them through the censorship process. This move only goes wrong when the content of the works is then deemed inappropriate for public consumption by the barrage of gatekeepers. Once the content is deemed political, prosecution invariably follows in terms of the Censorship Act or Criminal Code. However if the ground for censorship is obscenity, banning the material is almost always the ultimate remedy.

In terms of Section 34(b) & (c) of the Censorship Act, the Minister is empowered to enact regulations to deal with, among other issues, the prescription of the

form in which applications for examination of materials must be presented to the Censorship Board. No such regulations exist, or if they do, they are not applied, resulting in an ad hoc approach to filing applications for examination before the Board. The non-functioning of the Board and absence of a regulatory framework of applications perhaps explains why prosecutions under the Act have been minimal with the state relying more on general criminal law instead.

## **2.7 The Role of the Police Service**

The police play a critical role in the investigation of materials to be subjected to censorship. For instance, in terms of Section 25(1) (b) of the Censorship Act, a police officer can summarily intercept and confiscate any material he or she thinks is a recording and submit it to the censorship process. Other officers with similar powers include a probation officer, an officer who works for the post and telecommunications corporation, or a customs officer. In any event, a senior police officer sits on the current Censorship Board, reportedly in whose office the *Kumasowe* short film was 'examined' and declared undesirable on political grounds.

As a matter of practice, the police, working together with other security agents, such as the Criminal Intelligence Organisation (CIO) and personnel in the President's Office, have continuously restricted freedom of artistic expression, largely relying on statutes that provide for related offences such as POSA, which stipulates that the police should be notified of a public gathering or any form of gathering falling under the purview of the POSA. This is despite the fact that POSA does not relate to artistic works. Admittedly though, the exhibition of certain works of art may fall within the generous meaning of 'gathering'. In fact generous interpretation of 'gathering' has always been the major criticism on how the police enforce POSA. To meet specific objectives, it appears that the police are in the habit of stretching the definition so that it covers gatherings in respect of which a police notice is not required.

The police have also interpreted this position to mean that they should approve any publication or play to be premiered. The attitude of the police has not changed with the enactment of the Constitution. As discussed in other parts of

this report, in 2014 the Law and Order Section of the Harare Central Police Station banned the premiere of the short film *Kumasowe*, arguing that the film was too sensitive to the police. The meeting to censor the film took place in a police station in the office of one of the Censorship Board members. This was a case of a single board member unilaterally executing the function of the whole Board notwithstanding that he was not the chair of the Board. The police simply 'advised' the author to approach the Censorship Board before he could show his film, well aware that at the time the Censorship Board was dysfunctional and that the screening had been scheduled for the following day.

Prior to the enactment of the 2013 Constitution, many media practitioners had to litigate in order to be allowed to showcase their artistic material. Since 2011 human rights organisations in the area of governance and human rights have interdicted the police from interfering with the staging of many short films, which would have been approved by the Censorship Board. Hence as it stands, the most effective remedy to circumvent the police has been the use of the avenue of litigation.

## Chapter 3: INTERNATIONAL STANDARDS ON ARTISTIC EXPRESSION

### 3.1 Zimbabwe ratification practice<sup>65</sup>

This part is confined to the ratification procedure or practice at work in Zimbabwe. Previous research has shown that Zimbabwe does not have a system in place. In terms of ratification and domestication of international instruments the practice is ad hoc. It is understood that the relevant Minister in whose portfolio a particular international treaty, protocol or bilateral agreement in question falls takes the whole initiative to engage in treaty negotiations. Once the treaty is finally adopted, s/he then submits the agreement or treaty to the Public Agreements Committee before signing it.

The Public Agreements Committee goes through the treaty and then prepares a report for Cabinet to consider. While deliberations before Cabinet are classified, what eventually becomes clear is that once cabinet approval is secured, the relevant Minister approaches Parliament. The relevant Portfolio and Thematic Committees are engaged in Parliament, whose role is to make necessary consultations in order to fully ventilate the benefits and inherent repercussions of ratifying or acceding to the treaty in question. These committees are critical in guiding the legislators to debate the issues from a fairly informed perspective taking into account that treaties are inherently technical by nature.

Once Parliamentary approval is secured, the Minister who sponsored the motion then approaches the Department of Legislative Drafting of the Attorney General's Office for preparation of the instruments of ratification/accession. This is the documentation signed by the President which the Zimbabwe delegation takes to or sends to the treaty ratification repository identified in that treaty as proof that Zimbabwe has ratified the treaty in question. Notwithstanding the fact that the line Ministry would have sponsored the ratification/accession process, the competence to deposit the instruments is

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<sup>65</sup> This insight was drawn from previous work conducted by the author while undertaking research on behalf of government. Accordingly, the identity of the source is treated in confidence as same has not yet been published.

the exclusive jurisdiction of the Ministry of Foreign Affairs, which is the chief attendant in Diplomatic Affairs. At this point, Zimbabwe is deemed to have ratified or acceded to a treaty, whichever is the case. What is clear from the practice is that reasons behind ratifying treaties are not known. They range from economic incentives that come with ratifying certain treaties to the need to avoid penalties at the international level if certain treaties are not ratified.

Once a treaty has been ratified, Zimbabwe immediately assumes international legal obligations arising from the treaty. As regards human rights treaties, Zimbabwe would be expected to give effect to the provisions of the treaty and to send periodic state reports to the treaty-body that oversees the implementation of that treaty. Although the direct application of the provisions of a ratified treaty does not immediately follow ratification, state obligations are assumed upon ratification.

### **3.2 International law on freedom of artistic expression**

The right to freedom of expression is guaranteed by a number of international and regional human rights treaties, as well as under customary international law. However, this diversity of sources does not reflect a diversity of ideas about what the right means: freedom of expression is a universal right, so its meaning is largely the same in every treaty. Any differences relate mostly to how it is enforced. The main international covenants that relate to freedom of expression including artistic freedom which Zimbabwe is a party to, are the Universal Declaration of Human Rights<sup>66</sup> (UDHR), the African Charter on Human and Peoples Rights<sup>67</sup> (ACHPR), the International Covenant on Economic, Social and Cultural Rights<sup>68</sup> (ICESCR), International Covenant on Civil and Political Rights<sup>69</sup> (ICCPR) and the Convention on the Rights of the Child <sup>70</sup> (CRC) and article 30 of the Convention on the Rights of Persons with Disabilities calls for measures providing persons with disabilities the

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<sup>66</sup> Zimbabwe is bound by the UDHR by virtue of being a member of the United Nations

<sup>67</sup> Zimbabwe signed the ACHPR on 20 February 1986 and ratified it on 30 May 1986

<sup>68</sup> Zimbabwe signed and acceded to the ICESCR on 13 May 1991

<sup>69</sup> Zimbabwe signed and ratified the ICCPR on 13 May 1991

<sup>70</sup> Zimbabwe signed the CRC on 8 May 1990 and ratified it on 11 September 1990

opportunity to develop and utilize their creative, artistic and intellectual potential.<sup>71</sup>

### 3.3 The UNESCO framework

Zimbabwe is a signatory to the UNESCO's Recommendations concerning the Status of the Artist (UNESCO Recommendations), and the UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expression, ratified in 2008 (UNESCO Convention). These instruments help to create and sustain a climate encouraging freedom of artistic expression and the material conditions facilitating the release of creative talents. The UNESCO Convention calls on states to formulate and implement their cultural policies and to adopt measures to protect and promote the diversity of cultural expressions.

Although the term artistic freedom *per se* is not used in the text of the UNESCO Convention, it is clear that its intent, notably by virtue of the first of its 'Guiding Principles', already mentioned, resonates fully with the belief that it is essential to protect the freedom of expression in a range of culture-related domains. The Preamble of the Convention also reaffirms that 'freedom of thought, expression and information, as well as diversity of the media, enable cultural expressions to flourish within societies'.

The UNESCO Convention further provides for measures to promote cultural expression to create, produce, disseminate, distribute and have access to their own cultural expressions, paying due attention to the special circumstances and needs of women as well as various social groups, including persons belonging to minorities and indigenous peoples<sup>72</sup>.

As a matter of fact, by 1980, the UNESCO's Recommendation on the Status of the Artists had already stipulated that 'freedom of expression and communication is the essential prerequisite for all artistic activities' and enjoined Member States to 'see that artists are unequivocally accorded the protection provided for in this respect by international and national legislation

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<sup>71</sup> Zimbabwe ratified this instrument in September 2012.

<sup>72</sup> Available on <http://unesdoc.unesco.org/images/0014/001429/142919e.pdf> accessed on 4 July 2015

concerning human rights.' The issues embraced include the education of artists, labour and social rights – including rights to establish independent unions and the free international movement of artists and the stimulation of public and private demand for the fruits of artists' activities.

The UNESCO framework provides for a number of obligations imposed on contracting states, including Zimbabwe, which are paraphrased and summarised as follows:

- (i) Endeavour to promote in their territory the creation of an environment which encourages individuals and social groups to create, produce, disseminate, distribute, and have access to their cultural expressions, paying attention to the special circumstances and needs of women and social groups, including persons belonging to minorities and indigenous peoples on the one hand, and, on the other hand, to have access to diverse cultural expressions within their territory and from other countries of the world;
- (ii) Ensure information sharing and transparency by providing appropriate information in their reports to UNESCO every four years on measures taken to protect and promote the diversity of cultural expressions;
- (iii) Foster the public understanding of the importance of the diversity of cultural expressions through educational and public-awareness programmes;
- (iv) Acknowledge the fundamental role of civil society in protecting and promoting the diversity of cultural expressions by encouraging the active participation of civil society in efforts by Parties to achieve the objectives of the Convention;
- (v) Incorporate culture into sustainable development and strengthen international co-operation in support of developing countries by several means, for instance, by strengthening their cultural industries, building their capacities to develop and implement cultural policies, technology transfer, financial support and preferential treatment for



their artists and other cultural professionals and for their cultural goods and services.

The UNESCO Recommendations Guidelines 3, 6 and 8 are dedicated to freedom of artistic expression. Guideline 3 provides in part that states have

‘a duty to protect, defend and assist artists and their freedom of creation. For this purpose, they should take all necessary steps to stimulate artistic creativity and the flowering of talent, in particular by adopting measures to secure greater freedom for artists, without which they cannot fulfil their mission, and to improve their status by acknowledging their right to enjoy the fruits of their work’.

It is submitted that this Guideline anticipates that the State will be actively involved in the development of talent in Zimbabwe. There is a specific duty to protect, defend and assist artists in the event of situations threatening their freedom to create works. Facilities must be availed to ensure artists fully develop. One could say the establishment of relevant institutions such as the NAC, mandated to advance arts in Zimbabwe, is part of the fulfilment of the obligation, but so far Zimbabwe has not submitted its state report.

The high levels of piracy in Zimbabwe and government's hesitant efforts to deal with it are worrying developments. The problem has grown to the extent that the Parliamentary Committee on Arts and Culture held a public hearing on Wednesday 14<sup>th</sup> July 2015 where the NAC gave evidence on the issue of piracy. Government would be failing to protect and defend artists if it fails to deal with piracy. Piracy is a clear sign that artists are not able to ‘enjoy the fruits of their work’.<sup>73</sup>

Guideline 8 deals with the elimination of discrimination in the area of arts. No ground, listed or analogous, must be permitted resulting in discrimination in relation to ‘... opportunities to acquire and develop the skills necessary for the complete development and exercise of their artistic talents, to obtain employment, and to exercise their profession’. This research has revealed

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<sup>73</sup> The Convention Concerning the Protection of the World Cultural and Natural Heritage which it ratified in 1975, Berne Convention for the Protection of Literary and Artistic Works, ratified in 1981, Cultural Charter for Africa (Port Louis, 1976), ratified in 1988 and Protocol to

strong sentiments to the effect that political affiliation plays a key role in the selection of artists to perform or showcase their talent at occasions such as 'national galas'.

Furthermore, such events discriminate on the basis of sectors, as musicians and dancers are usually invited and paid for their performances, yet such forums could accommodate different categories of artists. Those perceived to be critical of the government are usually not invited thereby censoring their work to conform to political priorities that have no moral or legal basis.

### **3.3.1 Recommendations in tandem with international obligations (UNESCO, UPR and international treaty framework)**

Government must make deliberate efforts to give effect to the obligations arising from the UNESCO Convention and UNESCO Recommendations regarding ensuring the full development of talent as well as defending, protecting and respecting artistic expression in the following ways:

- Government must take all measures necessary to clamp down on piracy of both local and international works of art by enforcing laws such as the Copyrights and Neighbouring Rights Act [Chapter 26:05], and the Patents Act [Chapter 26:03]. This way government fulfils its obligation to ensure artists 'enjoy the fruits of their work'.
- Government of Zimbabwe must take steps to encourage political pluralism by eliminating the practice of discriminating against artists critical of certain policies or political figures when extending invitations to artists to perform at state and/or state-related events.
- Before subjecting itself to the next cycle of the review, the Government of Zimbabwe must implement recommendations from the inaugural UPR framework National Report specifically encouraging it to reform and revise laws on freedom of expression to bring these laws in line with international legal obligations.
- Vague insult provisions in Section 96 of the Criminal Code (criminal defamation) must be repealed.

### **3.4 International law on freedom of artistic expression**

On the regional front, Zimbabwe is a signatory to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights, entry into force in 2004.

The Universal Declaration of Human Rights (UDHR) contains, in Article 19, the first and most widely recognised statement of the right to freedom of expression and it states that:

'Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers'.

The UDHR is not a binding treaty but a recommendatory resolution adopted by the UN General Assembly. Through time and universal acceptance, however, much of the UDHR has risen to the level of customary international law, including Article 19, and is therefore binding on all states now as a peremptory norm. The UDHR under article 27 also provides that everyone has the right "to enjoy the arts". Article 20 declares the right to peaceful assembly and association, including the right not to be compelled to belong to any association. These rights are limited by Article 29, which permits restrictions "solely for the purpose of securing ... respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society." Moreover, the rights set forth in the UDHR "may in no case be exercised contrary to the purposes and principles of the United Nations".

In terms of exact provisions that speak to the issue of freedom of expression in relation to freedom of artistic expression article 15 (3) (ICESCR) provides

1. The States Parties to the present Covenant recognize the right of everyone:
  - (a) To take part in cultural life;
  - (b) To enjoy the benefits of scientific progress and its applications;

(c) To benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author.

2. The steps to be taken by the States Parties to the present Covenant to achieve the full realization of this right shall include those necessary for the conservation, the development and the diffusion of science and culture.

3. The States Parties to the present Covenant undertake to respect the freedom indispensable for scientific research and creative activity.

4. The States Parties to the present Covenant recognize the benefits to be derived from the encouragement and development of international contacts and co-operation in the scientific and cultural fields.

The right to freedom of expression under article 19 (2) of (ICCPR) includes the freedom to seek, receive and impart information and ideas of all kinds 'in writing or in print, in the form of art, or through any other media of his choice'. In General Comment No. 34 concerning Article 19, the United Nations Human Rights Committee (herein UNHRC) elaborated on the nature of state obligations regarding freedom of expression and provided for a spectrum of ideas and/or information that is covered and therefore protected by Article 19 as follows:<sup>74</sup>

"Paragraph 2 requires States Parties to guarantee the right to freedom of expression, including the right to seek, receive and impart information and ideas of all kinds regardless of frontiers. This right includes the expression and receipt of communications of every form of idea and opinion capable of transmission to others, subject to the provisions in article 19, paragraph 3, and article 20. It includes political discourse, commentary on one's own and on public affairs, canvassing, and discussion of human rights, journalism, ***cultural and artistic expression***, teaching, and religious discourse. It may also include commercial advertising. The scope of paragraph 2 embraces even expression that may be regarded as deeply offensive, although such expression may be restricted in accordance with the provisions of article 19, paragraph 3 and article 20". (emphasis added).

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<sup>74</sup> General Comment No, 34, para. 15.

While the list of the different types of information that is protected under freedom of expression, we argue here that the main contribution of the quoted passage from the General Comment No. 34 is the clarification on the parameters of the freedom. The UNHRC stated that ‘this right includes the expression and receipt of communications of every form of idea and opinion capable of transmission’. It is perhaps needless to add that artistic expression is also included on the basis of the provisions of article 19(2) which mentions ‘form of art’.

While the UNHRC did not deal with many individual complaints on artistic expression, the case of *Shin v South Korea* remains its flagship decision and it speaks to Zimbabwe on the point that artistic expression is a core component of freedom of expression.<sup>75</sup> In this case the complainant painted a painting to convey a message to his audience. However, he was arrested on allegations that his painting constituted an ‘enemy-benefiting expression’, which meant supplying information or in a way supporting an enemy of the state. He was tried and convicted of the charge, sentenced to community service and his painting was destroyed by the state.

On approaching the United Nations Human Rights Committee (herein UNHRC) with a complaint after exhausting all remedies, the UNHRC committee found South Korea in violation of Article 19(2) of the ICCPR to the extent that the complainant was prosecuted for the painting. That finding was based on failure by the state to limit the freedom in line with the requirements in the ICCPR, namely, that the law limiting the freedom on grounds of national security must be specific as to how national security was threatened. The UNHRC found as follows:

“The Committee observes that ***the picture painted by the author plainly falls within the scope of the right of freedom of expression protected by article 19, paragraph 2***; it recalls that this provision specifically refers to ideas imparted ‘in the form of art’ . . . Even if the infringement of the author's right to freedom of expression, through

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<sup>75</sup> Communication No. 926/2000, *Shin v. Republic of Korea*, Views adopted on 16 March 2004.

confiscation of his painting and his conviction for a criminal offence, was in the application of the law, the Committee observes that the State party must demonstrate the necessity of these measures for one of the purposes enumerated in article 19 (3). As a consequence, any restriction on that right must be justified in terms of article 19 (3), i.e. besides being provided by law it also must be necessary for respect of the right or reputations of others, or for the protection of national security or public order (ordre public) or of public health and morals ('the enumerated purposes')".  
(emphasis added)

In the same literature, the UNHRC emphasized the three requirements imposed by paragraph 3 of Article 19, with which any restriction must comply. The committee highlighted that when a state party imposes certain restrictions on the exercise of freedom of expression, these may not put in jeopardy the right itself. The permissible conditions where restrictions may be imposed are that the restrictions must be 'provided by law'; they may only be imposed for one of the purposes set out in sub-paragraphs (a) and (b) of paragraph 3; and they must be justified as 'necessary' for that state party for one of those purposes.<sup>76</sup> Article 20 requires states parties to prohibit by law (though not necessarily to declare criminal) any propaganda for war and any incitement to discrimination, hostility or violence on national, racial or religious grounds.<sup>77</sup>

On its part, Article 31 of the CRC provides that children have the right to "rest and leisure, to engage in play and recreational activities appropriate to the age of the child and to participate freely in cultural life and the arts". It would not be ambitious to extend the content of General Comment No. 34 to this provision regarding the issue of arts among children. In other words, if the painting in the *Shin* case had been prepared by a child within the ambit of the definition in the CRC, the UNHRC or the Committee on CRC could have arrived at the same conclusion of establishing a violation of Article 19(2) of ICCPR or Article 31 of CRC.

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<sup>76</sup>Report of the Human Rights Committee to the General Assembly, 38th Sess., Supp. No. 40, 1983 (A/38/40), Annexe VI, General Comment 10.

<sup>77</sup> Ibid.

## **Regional law on freedom of artistic expression**

On the regional front, Zimbabwe is a signatory to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights, entry into force in 2004.

At regional level, Article 9 of the ACHPR provides that every individual has the right to "express and disseminate his opinions within the law". Article 9 differs from the protection afforded by other treaties in that it does not expressly include a right to receive ideas or to impart information. Article 9 is also unusual in that it does not include any express restrictions. However, paragraph 1 of the African Commission on Human and Peoples' Rights Declaration of Principles on Freedom of Expression in Africa (2002),<sup>78</sup> which has the same status as a general comment, makes reference to the individual elements as contained in the ICCPR and Constitution.

In terms of the ACHPR the right to freedom of expression is limited in terms of articles 27, 28 and 29 of this Charter. Therefore, in exercising one's freedom of expression, the individual must have due regard to the rights of others, collective security, morality and common interest. Further the individual has a duty to respect and consider fellow beings without discrimination, and to maintain relations aimed at promoting, safeguarding and reinforcing mutual respect and tolerance. The individual is also called upon not to compromise the security of the State whose national or resident he or she is.<sup>79</sup> These provisions are often raised by the State to justify the infringement or limitation of the right to freedom of expression.

However, in enjoying one right to freedom of expression, the constitutional rights of others must be protected. The ACHPR does not explicitly protect the freedom to hold opinions without interference. Further, it does not expressly protect the right to impart information or to receive opinions and ideas, but as

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<sup>78</sup> *Compendium of key human rights documents of the African Union* (2010) 361.

<sup>79</sup> Bharat Patel *Freedom of Literary Expression and Censorship in Zimbabwe, Zambezia 1997* . - Available on <http://archive.lib.msu.edu/DMC/African%20Journals/pdfs/Journal%20of%20the%20University%20of%20Zimbabwe/vol24n1/juz024001005.pdf>

already demonstrated above, these elements are read into the provision whenever it is being interpreted.

### **3.5 Limitation of freedom of expression**

Before venturing into the normative content of limitations as well as the system in practice in Zimbabwe, it is imperative to demonstrate the length and breadth of groups of people affected by restrictions of artistic expression. On the profile of potential victims of limitations of artistic expression, the *Shaheed Report* concluded thus:

Obstacles to artistic freedoms impact on the enjoyment of rights by a wide range of people: the artists themselves, whether professionals or amateurs, as well as all those participating in the creation, production, distribution and dissemination of artwork. They include authors, musicians and composers, dancers and other performers, including street performers, comedians and playwrights, visual artists, authors, editors, film producers, publishers, distributors, directors and staff working in libraries, galleries, museums, cinemas or theatres, curators and organisers of cultural events. Audiences may also be affected. It is important to recognize the artistic freedoms of all persons when they participate in cultural life or wish to engage in creative activities.<sup>80</sup>

In other words those people, who are not artists themselves but are in a way involved in the 'creation' and 'dissemination' of artwork, are victims of the violation of artwork. With this understanding, it is now contextual to deal with the law on limitations of freedom of artistic expression. The right to freedom of expression and artistic freedom as enunciated in the above covenants is not an absolute right. Article 4 of ICESCR authorizes "limitations as are determined by law only in so far as this may be compatible with the nature of these rights and solely for the purpose of promoting the general welfare in a democratic society".

Under article 19 of ICCPR, the right to freedom of expression, including in the form of art, may be subject to certain restrictions that are provided by law and are necessary (a) for the respect of the rights or reputations of others; or (b) for the protection of national security or of public order, or of public health or

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<sup>80</sup> Shaheed Report, para. 44.



morals. Similar provisions can be found in various conventions and treaties that provide for the right to freedom of expression. Though these provisions seem clear, what constitutes a justifiable limitation to the right to freedom of expression in terms of the above covenants has been interpreted differently in different jurisdictions. Unfortunately in some jurisdictions the limitations have been interpreted broadly thereby severely limiting the right to freedom of expression and consequently artistic freedom.

Comparatively, the European Court on Human Rights (ECtHR) finds that even if the speech shocks or offends it can be protected speech; defamation of a public official or a well-known celebrity is often a protected speech because for a democracy it is important to discuss public matters and to have alternative opinions. In 1986 the ECtHR in the case of *Lingens v Austria* decided that a politician should accept more criticism than ordinary people, and cannot make a journalist not criticize him, by referring to the necessity to protect his reputation. Consequently, libel laws which allow the prosecution of journalists who criticize public personalities shall be balanced with freedom of the press. In this landmark *Lingens* case, the European Court stated that:

Freedom of the press affords the public one of the best means of discovering and forming an opinion of the ideas and attitudes of political leaders. More generally, freedom of political debate is at the very core of the concept of a democratic society ... The limits of acceptable criticism are, accordingly, wider as regards a politician as such than as regards a private individual. Unlike the latter, the former inevitably and knowingly lays himself open to close scrutiny of his every word and deed ... and he must consequently display a greater degree of tolerance.<sup>81</sup> The Radio programs in Rwanda on, 'Radio Mille Collines' which fuelled the Genocide in 1994 provide proof that freedoms should be exercised with responsibility and restrictions. But, these restrictions shall be grounded by legitimate reasons, which shall be examined by courts.

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<sup>81</sup> *Lingens v. Austria*, Application no. 9815/82, Judgment, Strasbourg, 8 July 1986, available on <http://portales.te.gob.mx/internacional/sites/portales.te.gob.mx.internacional/files/CASEOF%20%20LINGENS%20v%20AUSTRIA.pdf> accessed 7 July 2015

It must also be noted that violations of artistic expression are not limited to state conduct directed towards the artist *per se*. They also apply to acts targeted at the public;

Hence, removing creative expressions from public access is a way to restrict artistic freedom. Ironically enough, restrictions are often imposed in the name of the public which, however, is prevented from making its own judgement.<sup>82</sup>

As a general rule or approach to limitations, the limitation of freedom of artistic expression must resort to limitations when it is absolutely necessary to do so. The greatest challenge, and therefore a threat to artistic expression is the inappropriate application by the government of restrictions otherwise allowed by international law.<sup>83</sup> For instance, as argued in various parts of this report, while a restriction in the interest of public security is permissible in international law, governments often cast a wide net to say expressions critical of government policy are therefore a threat to national security without pointing out the precise legal aspects of why the artistic expression would have that effect.

### **3.6 Consistency with the international standards**

Upon ratifying the international and regional human rights and related instruments, Zimbabwe accepted and assumed two kinds of obligations: (1) to adopt such legislative or other measures as may be necessary to give effect to the rights protected by the treaty, and (2) to remedy violations of those rights. Thus, Article 2 of the ICCPR states that:

Where not already provided for by existing legislative or other measures, each State Party ... undertakes ... to adopt such legislative or other measures as may be necessary to give effect to the rights recognized in the present Covenant.

Further Zimbabwe undertakes in accordance with ICCPR and similarly-worded treaties:

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<sup>82</sup> Shaheed Report, para. 5.

<sup>83</sup> Shaheed Report, para. 41.

- a. To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity;
- b. To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system;
- c. To ensure that the competent authorities shall enforce such remedies when granted.

The typology of international human rights obligations is four-fold, namely, to promote, protect, respect and fulfil each and every human right or freedom enshrined in those instruments. Depending on the nature of the right in question, State behaviour and conduct must conform to at least any one of the verbs above. Clearly the state must promote artistic expression in line with the Guidelines of the UNESCO Recommendations so that artists fully develop. Artists must be protected from situations that threaten their ability to be creative. Respect for artistic expression means refraining from interfering with artistic works as well as their presentation or communication. Yet, minimal intervention is expected in fulfilling this freedom.

As to prevailing practice, restrictions on artistic freedom are linked to existing laws and regulations, but can also be the outcome of a fear of physical or economic coercion. In Zimbabwe, the main hindrance to the enjoyment of artistic freedom is over regulation of the right. Further there are public institutions seemingly established and empowered to prevent free expression. These include the Broadcasting Authority of Zimbabwe (BAZ), responsible for licensing broadcasters, the Media and Information Commission (MIC), which oversees the licencing of journalists, and the Monitoring and Interception of Communications Centre (MICC), which operates the country's programme of communications surveillance. Legislation such as AIPPA and Broadcasting Services Act make it mandatory for media practitioners (journalists and media houses) to be registered, pay licence fees and also limit the content of information they can circulate.

The Censorship Act<sup>84</sup> has been applied repeatedly to ban all forms of art perceived to be 'politically offensive'. The grounds for banning published material, for instance, are spelt out in sections 13 and 33 of the Act. The grounds upon which restriction could be exercised have already been discussed in detail above. The government's continuing failure and/or refusal to issue community radio licences to all but commercial operators remains conduct inconsistent with its international obligations that require it to facilitate the dissemination of information through all possible channels. The government is accused of granting licences to applicants with links to state-owned companies or those with government ties.

Amnesty International on 20 May 2015<sup>85</sup> stated that "Not only have the government supporters been the only ones to receive licences, but those attempting to set up independent services have been arrested and targeted simply for trying to educate, inform and offer a platform for debate. This is a violation of freedom of expression."

The Criminal Code creates the crime of criminal defamation and other vague offences in the form of insult laws such as sections 31 and 33, (insulting the office of the President) and communicating falsehood. The courts in the case *Nevanji Madanhire and Nqaba Matshazi v Attorney-General*<sup>86</sup> displayed an unwillingness to completely strike off criminal defamation from the Criminal Code as it declared that particular case only required the court to look at criminal defamation in terms of the previous Constitution and went on to declare the crime unconstitutional in terms of that Constitution.

It is submitted that the Constitutional Court missed an opportunity to advance the right to freedom of expression by allowing a technicality to limit the scope of its judgment. It must be stated that nothing prevented the Court from requiring the parties to address the argument of constitutionality within the

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<sup>84</sup> Censorship and Entertainments Control Act [Chapter 10:04]

<sup>85</sup> <https://www.amnesty.org/en/latest/news/2015/05/zimbabwe-radio-stranglehold-gagging-freedom-of-expression/>

<sup>86</sup> CCZ-02-14.

bounds of the 2013 Constitution rather than putting public funds to waste by convening a court session to deal with provisions of a spent constitution.

The Interception of Communication Act gives government unlimited power to monitor communications by eavesdropping on their communications. The consciousness that communications are taped and listened to triggers self-censorship thereby violating freedom of expression. The *Zimbabwe United Nations Universal Periodic Review Stakeholders Report* published in 2011 revealed that in the period 2000-2011 over 45 journalists had been subjected to torture and harassment by the state. Not much progress has been made to stop this behaviour by the state. Itai Dzamara, a journalist and civil rights activist, was abducted by suspected state agents on 9 March 2015 and is still missing. This instils fear which severely limits all forms of dissent including artistic freedom. A combination of restrictive provisions and lack of adequate protection is stifling the enjoyment of freedom of expression and artistic freedom in Zimbabwe.

However, the government has made a few reforms that bolster enjoyment of artistic freedom. In compliance with the Constitution and the international covenants it ratified, the government of Zimbabwe lifted a ban on international media organizations such as the BBC, CNN, e.tv and the Guardian newspapers, among others. It has also partially dropped the requirement that journalists have to be accredited to work in the country. The reforms made to date are few and do not go to the root of the problem. There is still more that the government of Zimbabwe needs to do to fully comply with its international obligations and the obligations stemming from the Constitution.

### **3.7 The Universal Periodic Review Process**

It is now common knowledge that Zimbabwe underwent the Universal Periodic Review (UPR) framework marked by the consideration of the maiden National Report in October 2011. In the aftermath of the presentation of the National Report, a number of countries that participated came up with 177 recommendations of which government formally agreed to implement 130 and rejected the rest. These recommendations dealt with different types of rights

and different groups of people in respect of which treaties and protocols have been adopted under the UN framework.

Relevant to this report are recommendations pertaining to freedom of association. It is important to note that freedom of expression and by extension artistic expression, produced as least seven recommendations out of the 177. In Recommendation No. 158, it was couched as follows:

Repeal or significantly reform the Public Order and Security Act, the Access to Information and Protection of Privacy Act, and criminal code provisions that restrict freedoms of assembly and expression

The Zimbabwe government however rejected a recommendation specific to freedom of expression, which would have upheld its international obligations to respect the rights to freedom of expression, assembly and cease arrests, harassment and detention of individuals with different views.

In 2012 the government of Zimbabwe, in consultation with stakeholders came up with a National Plan of Action (NPA) for the implementation of the accepted recommendations with clear timelines and outcomes. The NPA was meant to then feed into the Mid-Term Report which was submitted in June 2014. As this report was submitted, other stakeholders provided shadow reports analysing the extent to which recommendations had been implemented.

The *Mid-Term Report* looks at the measures taken by government to implement the UPR recommendations. The report makes reference to *challenges* which remain in terms of fully achieving the outcome of implementing the recommendations as they are clustered. It further proposes the way forward in terms of envisaged action and/or activities to achieve full implementation in the short and long term.

As regards to freedom of expression, the *Mid-Term Report* does not address measures taken or outstanding in order to ensure full implementation. While in the National Plan of Action government undertook to issue broadcasting licences to community radios, in the report it makes reference to ZBC Radio stations as examples of existing commercial radio stations. It also claims that

government had processed over 20 community radio station licences at the time of submitting the Report.

As is the norm, the Zimbabwe civil society organisations inputted the mid-term process by producing reports such as the *Zimbabwe Civil Society Organisations Mid-Term Report of the Universal Periodic Report*<sup>87</sup>, produced and submitted to the UPR process as a shadow report. The contents of this report and those of other stakeholders were utilised by the UPR secretariat in preparing the *Zimbabwe Mid-Term Assessment Report* in August 2014.

The above three reports which appear to be the most comprehensive literature on the subject so far have concluded that issues of reforming legislation and state conduct inconsistent to exercise of freedom of expression has been 'partially implemented'. They acknowledge the insertion of section 61 of the Constitution as guaranteeing freedom of expression and freedom of the media.

However, these reports make no specific reference to artistic freedom such that this aspect of freedom of expression has not been specifically addressed notwithstanding its persistent violation as discussed in the earlier parts of this report.

Further, when analysing laws that need to be reformed, there is no attempt to make reference to how artistic freedom is affected by such as POSA, AIPPA and the host of national legislation discussed above. Furthermore, there is no mention of the Censorship Act as one of the laws in need of much needed reform and revision to mitigate the violations that are a result of its current form.

It appears the omission to make specific reference to artistic freedom emanated from the fact that none of the participating countries during the UPR process made specific mention of the need to address freedom of artistic expression. The recommendations were addressing freedom of expression at large.

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<sup>87</sup> Report available at:

The *Civil Society Report* above acknowledges government efforts to accelerate ratification of treaties.<sup>88</sup> However, the report noted that key instruments such as Optional Protocols to the Convention on the ICCPR and ICESCR still need to be ratified to facilitate the protection of various civil and political rights as well as economic, social and cultural rights. For purposes of this report, it is submitted here that these instruments are key, in that upon ratification Zimbabwe acknowledges the competence of respective treaty-bodies to receive individual complaints alleging violation of any right enshrined in the principal conventions. In other words, individual artists would be able to approach these international mechanisms to seek redress in the event that national remedies are unavailable as a result of restrictive laws.

The silence of the literature on freedom of artistic expression (from National Plan of Action to CSOs Report) must also be attributed to ineffective intervention in the UPR process by relevant CSOs and other stakeholders such as artist bodies. The UPR process in Zimbabwe is one example where government has sought to collaborate with other stakeholders in moving the agenda forwards although challenges still remain. Artist bodies could have taken matters into their own hands by ensuring that artistic expression has specific mention and a specific plan to adopt measures against censorship at the time the National Plan of Action was being adopted.

Speaking generally on the role of artist bodies in promoting artistic freedom, Chamunorwa Mashoko, Creative and Artistic Director, Harare International Carnival, notes that artist organisations in Zimbabwe to some degree have not yet been very vocal compared to media organisations when it comes to advocating for freedom of artistic expression because of fear of suppression. There is need for artists' organisations to learn from mainstream media organisations on how to advocate and lobby for freedom of artistic expression. Even though initially not involved, artistic organisations have taken initial steps towards achieving this goal.

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<sup>88</sup> See page 1 of the Report.



It has been noted that it is mostly non-governmental organisations that have sought to promote freedom of artistic expression in Zimbabwe as explained by Rudo Kanukamwe, a writer, when she says, 'governmental organisations strictly seek to promote art which is politically correct or purely commercial.'

Therefore, in view of the above lost opportunity, this report could not have been produced at a better time than this where it seeks to feed into the next cycle of the UPR process. It will serve to expose the issue of artistic freedom, extent of violations and measures that need to be adopted to address censorship if it cannot be abolished. This intervention will ensure that artistic freedom will be specifically addressed in future endeavours to improve the promotion and protection of freedom of expression.

## Chapter 4: EXAMPLES OF WORKS OF ART THAT HAVE BEEN CENSORED IN ZIMBABWE

### 4.1 Introduction

This part is a collection of examples of works of art that have been censored in Zimbabwe. By no means is the list exhaustive as there are several other examples that have not been given sufficient public coverage by the media. Other examples include the banning of some songs on Leonard Zhakata's 'Hodho' album; Thomas Mapfumo's 'Chimurenga Rebel' album not being played on state radio stations; Robson Banda's 'Tisakanganwe Chinyakare' banned as encouraging tribalism and so on.

#### Case 1

**Who:** Silvanos Mudzvova and Rooftop Promotions

**When:** 5 January 2011

**Where:** Chimanimani – Cashel Valley

**What happened:** Six actors, a driver and project coordinator were arrested and detained for 48 hours in Cashel Valley and taken to court for performing a play titled *Rituals* by Rooftop Promotions. The actors notified the police of provisions of POSA which protects theatre and film performers from being arrested yet they got locked up. The actors were then charged for criminal nuisance under section 46 of POSA which entailed beating drums wantonly and disturbing the peace of the community whereupon they were ordered to pay a fine of \$20.

**What was the charge and under what act:** Criminal Nuisance under Section 46 of POSA

**What was the final outcome:** Judge dismissed the case. Witnesses said they saw no problem with the performances and that they actually enjoyed them.

**Alternative sources that can verify the story:** Rooftop Promotions

**Links to news coverage:**

[archive.kubatana.net/html/archive/artcul/110107rp1.asp?sector..](http://archive.kubatana.net/html/archive/artcul/110107rp1.asp?sector..)

## Case 2

**Who:** Silvanos Mudzvova/ Rooftop Promotions

**When:** 18 February 2011

**Where:** Centenary and Bindura in Mashonaland Central Province

**What happened:** Rooftop actors were arrested and detained overnight and transferred to Bindura for performing the play *Rituals* despite having won the same case against the State in Cashel Valley two months prior. The actors were later released after 48 hrs.

**Charges:** Fictitious Charge Section 33 of the Criminal Law and Codification and Reform Act 2004 – undermining the authority of the President

**Final outcome:** Aleck Muchadehama of Zimbabwe Lawyers for Human Rights went to get the actors released. The release would not have been possible without the involvement of the media.

**News coverage:** The Zimbabwean

<http://www.thezimbabwean.co/2011/02/qritualsq-perseveres-in-mashonaland-central/>

Alternative sources that can verify the story: Zimbabwe Lawyers for Human Rights

## Case 3

**Who:** Freshlyground

**When:** 4 May 2014

**Charge:** No charge

**What happened:** The South African band Freshlyground due to perform at Harare International Festival of the Arts (HIFA) were not allowed to leave the airport. According to a news report the reason was because of their 2010 video that mocks the president of Zimbabwe *Chicken to Change*.

**Sources**

<https://www.newsday.co.zw/2014/05/04/zimbabwe-deports-freshly-ground-mugabe-video/>

**Outcome:** They returned to South Africa

**Case 4**

**Who:** Tafadzwa Muzondo

**When:** August 2012

**Where:** Masvingo

**What happened:** His play titled *No Voice No Choice* was banned from being performed in Masvingo due to its message of a political nature. The play got some reprieve. the ban was effected again when the play was to be performed at Intwasa Arts Festival koBulawayo.

**Charge:** It will incite audience against the spirit of national healing and reconciliation [ what is the charge]

**Alternative sources that can verify the story:** Zimbabwe Lawyers for Human Rights

<http://www.changezimbabwe.com/index.php/news-mainmenu-2/1-latest/4204-banned-unbanned-banned-qno-voices-no-choiceq>

## Case 5

**Who:** Bev and the Sexy Angels

**When:** 2013

**What happened:** Beverly Sibanda, a pole dancer, was arrested for indecent dancing. It was alleged that she took a member of the audience and made him a part of her act and this is illegal under the Censorship Act. She would be allowed to go into the audience and interact.

**Final outcome:** She was detained for a night in prison. The policemen asked her to dance in her cell for them while she was detained. It went through the court and the Censorship Act was used.

**Charge:** Charged with indecency under Censorship Act

**Coverage:** Zimbabwean press coverage

<http://zimbabwe24sevennews.blogspot.com/2014/06/bev-censored.html>

## Case 6

**Who:** Owen Maseko

**When:** March 2010 – 9 April 2015

**What happened:**

his Gukurahundi atrocities art exhibition at the National Gallery of Zimbabwe in Bulawayo was banned in 2010 and the case stretched till 2015 when the Supreme Court made a ruling.

**Charge:** undermining the authority of and insulting the President and causing offence to persons of a particular race or religion.

**Final outcome:** The Supreme Court ordered him to remove the exhibition from the art gallery and not to put it up again in a public space anywhere in the country.

**Alternative sources that can verify the story:** Zimbabwe Lawyers for Human Rights

**News coverage:** nationwide coverage in the Zimbabwean press

[http://www.newzimbabwe.com/showbiz-21763-](http://www.newzimbabwe.com/showbiz-21763-Gukurahundi+exhibition+pulled+down/showbiz.aspx)

[Gukurahundi+exhibition+pulled+down/showbiz.aspx](http://www.newzimbabwe.com/showbiz-21763-Gukurahundi+exhibition+pulled+down/showbiz.aspx)

<http://www.osisa.org/openspace/zimbabwe/censorship-trials-and-tribulations-artist>

### Case 7

**Who:** *Zambezi News*

**When:** 2014

**What happened:** Michael K, a leading actor with *Zambezi News*, a satirical news show, was approached by state security agents who threatened to deal with him for working on a regime change agenda. This occurred following the launch of a season of *Zambezi News*.

**Final outcome:** DVDs of *Zambezi News* seasons were confiscated by the police and state security agents.

**Charge:** No charge

### Case 8

**Title of work:** *50 Shades of Grey*

Name of artist:

**When:** 10 February 2015

**Where:** Zimbabwe

**What happened?** The Censorship Board of Zimbabwe, according to Ster Kinekor Zimbabwe, denied the cinema the right to screen the American blockbuster movie, *50 Shades of Grey*. In an official announcement Ster

Kinekor Zimbabwe posted on their facebook page on the 10th of February 2015 that the film *50 Shades of Grey*, which premiered in many countries in February 2015, would not be screened at Ster Kinekor, Sam Levy's Village.

**What was the motivation for censorship or attempt of censorship?**

The Zimbabwean Censorship Board denied certification to screen the film, in its original form, based on the explicit nature of intimate scenes contained within the movie. [ America cbs- zim bans 50 shades of grey]

**What was the final outcome:** Ster-Kinekor decided not to screen the movie

**Links to news coverage:**

[8:28:32 AM] Ronald Moyo: <http://www.newzimbabwe.com/showbiz-20641-Zim+censors+Fifty+Shades+of+Grey%E2%80%99/showbiz.aspx>

**Alternative Source:**

<http://www.nhimbe.org/article/banned-screening-%E2%80%98fifty-shades-gre%E2%80%99>

**Case 9**

**Title of Work** *Kumasowe*

**Artist-** Silvanos Mudzvova

**When-** 7 August 2014

**What happened?** The film was about the highly publicized violent clashes between members of an apostolic sect and Zimbabwe Republic Police officers. The police did not cite the law when they banned the showing of the film but said it was still a sensitive issue to the police.

## **What was the charge?**

**Final Outcome?** The film was on YouTube but was not screened in front of an audience again.

## **Chapter 5: CONCLUSION AND RECOMMENDATIONS**

### **5.1 Conclusion**

This report has established that censorship of works of art including foreign ones has been in place in Zimbabwe since the beginning of the 20th century. Since then the practice has been one of pre-censorship where authorities demand access to works of art before the public has access. However, this is not strictly the practice as in many cases artists are apprehended during presentation of their works of art once the authorities judge the work to be unpalatable to them.

Among the leading grounds for censorship, the political dimension has been used to muzzle artists in Zimbabwe. The desire by politicians to eschew public scrutiny has resulted in laws being enacted to criminalise utterances or expressions that criticise the state and its leadership. These laws, including those adopted to deal with censorship per se, continue to exist notwithstanding the 2013 Constitution specifically protects artistic freedom.

Zimbabwe ratified key instruments to promote the protection of artistic freedom. However, the ratification process in practice is ad hoc and deprives stakeholders of any realistic opportunity to influence the process since it is 'closed' to public participation. Apparently, it entirely depends on interest at stake from the perspective of government.

International instruments on artistic freedom have been domesticated wholesale through constitutional provisions. However, the challenge remains in mobilising commitment on the part of government to offer protection that is consistent with international and national legal principles. Art continues to be restricted by the application of inappropriate grounds for limiting the freedom.



The use of criminal law to censor art has resulted in self-censorship by many artists.

The censorship framework is fraught with serious legal and administrative difficulties. The legal framework is clearly out of sync with both constitutional and international frameworks. In particular the laws lack particularity in terms of aspects of art that offend certain elements of public security, public health, morality and so on, so as to guide artists as they engage in creative works.

On the face of it censorship is administered on the basis of objective criteria. Of concern rather is the censorship process. Government is secretive about information regarding the Censorship Board, it appears the institution is poorly funded, incompetently constituted and the Appeal Board is non-functional.<sup>89</sup> This results in the police and security agents effectively taking over censorship of works of art with no legal basis to do so, hence they readily resort to criminal laws to justify their involvement. Police censorship is disguised as law enforcement. Consequently, it was argued that the legal framework needs to be reformed and revised to sync with the Constitution as a matter of urgency.

Similarly, government adherence to the UNESCO framework leaves a lot to be desired. While art is part of school curriculums at all levels of education in Zimbabwe, the assistance provided to professional artists does not live up to UNESCO framework expectations. Artists do not receive sufficient protection of their works from government. Piracy is rife and openly practised. The institutional support of artists is generally weak. Their rights are championed by organisations established among artists themselves. These include the Coalition against Censorship in Zimbabwe (CACZ); Zimbabwe Theatre Association (ZiTA), Bulawayo Arts Forum (BAF), Visual Artists Association Bulawayo (VAAB); Zimbabwe Music Rights Association; Zimbabwe Union of Musicians; Zimbabwe Applied Arts and Crafts Association; Zimbabwe Women

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<sup>89</sup> It has already been mentioned that the Board's composition is so secretive that even journalists are not able to obtain information on the Board. On its part, the website of the Ministry of Home Affairs only contains functions of the Board instead of providing a list of the Board membership as well.

Writers Association. Although government established the NAC, it appears overwhelmed by its mandate resulting in limited effectiveness.

Accordingly, recommendations issued by Farida Shaheed, the UN Special Rapporteur in the Field of Cultural Rights, are applicable in Zimbabwe almost in their entirety. Some of them have been summarised below.

## **5.2 Recommendations to Government**

- Reform the Censorship Board to be independent from the executive and constitute it with a wide range of stakeholders with expertise on works of art.
- The practice of pre-censorship must be abolished from the procedure of administering censorship by the Censorship Board.
- When reviewing and amending the Act, it is necessary to state the specific and relevant qualifications of the Censorship Board members in Section 3 of the Censorship Act.
- The composition of the Censorship Board in Section 3 of the Censorship Act must be multi-stakeholder including representatives from art organisations.
- The Minister must adopt regulations to regulate the Censorship Board when examining materials in terms of the Act. Other aspects to be addressed include the prescribed form for applications for examination of materials, the prescribed time within which the Board must render a decision following the lodging of an application, and generally to regulate the application process.
- Aspects of rights to a fair trial and precepts of administrative justice need to be incorporated in the Act to allow decisions of this Board to be challenged.
- There is need to amend the Act to provide for financial probity of the Censorship Board, and for public reporting on the work of the Board. This is due to the fact that the Board is underfunded and sometimes ends up relying on the police to enforce certain sections of the Act.
- The Censorship Act must be reformed in Section 20 to make provision for appeals against the decisions of the Appeal Board.

- To ensure that both the Censorship and Appeal Board are properly constituted and functional at all times.
- The Minister of Home Affairs must ensure that police, at all levels are divested of 'competence' to censor or ban events or artistic exhibitions which is the prerogative of the Censorship Board, unless they are enforcing declarations of the Board banning certain materials or events.
- The Censorship Act needs to be spruced up cosmetically by repealing obsolete references such as 'Police Force', 'Attorney-General' substituting for appropriate references in line with the 2013 Constitution.
- Standards of censorship such as 'national security', 'public health', public morality' and 'public order' must be clearly defined in the definitions part of the Censorship Act (Section 1) so that limitations of artistic freedom conform to international law parameters.

### **5.3 Reform of the broadcasting services sector**

- The Government must reconstitute the Broadcasting Authority of Zimbabwe (BAZ) with new appointees taking oath of office in line with public leadership and governance principles in Chapter 9 of the Constitution.
- The independence of the new BAZ board must be guaranteed and respected to eliminate, as far as possible, executive interference on political grounds.
- Government must continue efforts to issue licences to community radio stations as these small broadcasters have substantial influence on the exercise of freedom of artistic expression by granting local artists access to showcase talents.
- BAZ must revise downwards the fees for licences to ease the financial burden for applicants for community broadcasting services. The exorbitant fees required are perceived as a deliberate move to prevent new entrants into the sector.

#### 5.4 Recommendations adapted from the Shaheed Report

- Artists and all those engaged in artistic activities should only be subject to general laws that apply to all people. Such laws shall be formulated with sufficient precision and in accordance with international human rights standards. They shall be made easily accessible to the public, and implemented with transparency, consistency and in a non-discriminatory manner. Decisions on restrictions should clearly indicate motives and be subject to appeal before a court of law.
- Zimbabwe should abolish prior-censorship bodies or systems where they exist and use subsequent imposition of liability only when necessary under article 19 (3) and 20 of ICCPR. Such liability should be imposed exclusively by a court of law. In other words the Censorship Board must be divested of pre-censorship competences.
- Classification bodies or procedures may be established for the sole purpose of informing parents and regulating unsupervised access by children to particular content, and only in the areas of artistic creation where this is strictly necessary due in particular to easy access by children. The Censorship Board must be vested with classification competences in the place of pre-censorship.
- Decision makers, including judges, when resorting to possible limitations to artistic freedoms, should take into consideration the nature of artistic creativity (as opposed to its value or merit), as well as the right of artists to dissent, to use political, religious and economic symbols as a counter-discourse to dominant powers, and to express their own belief and world vision.
- States should abide by their obligation to protect artists and all persons participating in artistic activities or dissemination of artistic expressions and creations from violence by third parties. States should de-escalate tensions when these arise, maintain the rule of law and protect artistic freedoms.

- There is need to ease regulation and control of public space by government to ensure that the marginalised also have access to the use of the same facilities. The clearance system, being the most common proof of control, must be abolished.

## ANNEX 1:

### Proposed semi structured interview questions

- 1) Can you briefly describe yourself, work and organizational affiliation in the arts sector in Zimbabwe?
- 2) Can you briefly describe the situation of freedom of artistic expression in Zimbabwe?

#### **Sub questions**

- 1) Which topics are controversial and why?
- 2) Which topics are not dealt with and why?
- 3) Have the "controversial"/dangerous issues changed over the past four years? In which ways?
- 4) Has Zimbabwe adopted any policies enhancing or impinging on freedom of artistic expression in the last five years?
- 5) In your view, what are the main challenges faced by artists in promoting freedom of expression?
- 6) What instruments and strategies have been adopted by authorities in order to suppress freedom of artistic expression?
- 7) What is the role played by artists' organisations and bodies in promoting freedom of expression?
- 8) Can you share a specific story on how the state of freedom of expression has impacted on your work as an artist working in Zimbabwe?
- 9) What do you suggest should be done to improve the situation of artistic freedom of expression in Zimbabwe?
- 10) Have you had encounters with censors? Do you understand how they work? Are their decisions transparent? Do artists in general know how the system operates?

### **Semi structured interview questions for arts institutions**

- 1) What is your funding policy on art that is considered harmful, dangerous or offensive?
- 2) Have you funded controversial art before (that which is considered harmful, dangerous and offensive to the government)? If yes, did you receive any condemnation of the art?
- 3) Do you have procedures in place for dealing with controversies over funded art?
- 4) Do you have any recommendations on protecting free artistic expression in the funding process?

## ANNEX 2:

### List of Interviewees

Stephen Matinanga	Hivos Southern Africa
Chipo Muvezwa	Culture Fund of Zimbabwe Trust
Chirikure Chirikure	Poet
Ian White	Pamberi Trust
Cont Mhlanga	Amakhosi Cultural Centre
Raisedon Baya	Intwasa Arts Festival koBulawayo
Tongai Makawa	Magamba Trust
Farai Monro	Magamba Trust
Albert Nyathi	Zimbabwe Music Rights Association
Beaven Tapureta	Writers International Network Zimbabwe
Phillip Mpofo	Writer
Plot Mhako	Jibilika Dance Trust
Alouis Sagota	Dzikwa Trust
Chamunorwa Mashoko	Harare International Carnival
Dizzy Don	Hip Hop Artist
Pauline Gundidza	Mafrique

(End of Document)