

UNIVERSAL PERIODIC REVIEW ZIMBABWE 2016

Joint Stakeholder Submission

Freemuse is an independent international membership organization advocating and defending the right to artistic freedom worldwide. Freemuse has held Special Consultative Status with the United Nations Economic and Social Council (ECOSOC) since 2012.

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Freemuse and Nhimbe welcome the opportunity to contribute to the Second Cycle of the Universal Periodic Review (UPR) process of Zimbabwe. Our organizations' focus is on Zimbabwe's compliance with its commitments under international human rights instruments relating to **freedom of expression, creativity and the arts**, as well as guarantees under its own constitution, and to recommendations accepted by Zimbabwe during the first cycle of the UPR in 2011. This submission is based on interviews with local artists and a legal analysis facilitated by Nhimbe and qualified through a workshop held in Harare in October 2015 with local artists, journalists and human rights advocates.

SUMMARY

1. Zimbabwe's constitution guarantees the right to "freedom of artistic expression". The right is further protected by Zimbabwe being a signatory to the main international conventions guaranteeing the right to freedom of expression including artistic freedom.
2. However, several laws including the Censorship Act and the Criminal Law (Codification and Reform) Act limit artistic expressions, and the practices of the police and other government agencies creates an environment of fear and self-censorship.

THE UNIVERSAL RIGHT TO ARTISTIC FREEDOM

3. The freedom to create art is increasingly recognized as an important human right under international law. In a 2013 report, "The Right to Artistic Freedom and Creativity", the UN Special Rapporteur in the field of cultural rights, Ms Farida Shaheed, observed that the "vitality of artistic creativity is necessary for the development of vibrant cultures and the functioning of democratic societies. Artistic expressions and creations are an integral part of cultural life, which entails contesting meanings and revisiting culturally inherited ideas and concepts."¹
4. The right to artistic freedom and creativity is explicitly guaranteed by international instruments: most importantly, Article 15(3) of the International Covenant on Economic, Social, and Cultural Rights (ICESCR), under which state parties to the treaty "undertake to respect the freedom indispensable for . . . creative activity" and in International Covenant on Civil and Political Rights (ICCPR) Article 19(2), which provides that the right to freedom of expression includes the freedom to seek, receive and impart information and ideas of all kinds "in the form of art".
5. Furthermore, artistic freedom is protected by other fundamental rights, chiefly: liberty and security of persons; freedom of association, assembly, and movement; freedom of thought, conscience, and religion; and equal protection of the law. The exercise of artistic freedom supports these fundamental rights and freedoms by witnessing their violation and by engendering cultures that affirm the inherent and equal dignity of the person.
6. At the Human Rights Council's 30th session an oral statement joined by 57 states reaffirmed the right to freedom of expression including creative artistic expressions.²

NATIONAL AND INTERNATIONAL LEGAL FRAMEWORK

7. Section 61 of Zimbabwe's constitution provides that "every person has the right to freedom of expression, which includes . . . freedom of artistic expression and scientific research and creativity". The

¹ Farida Shaheed, UN Special Rapporteur in the field of cultural rights, "The Right to Artistic Freedom and Creativity," <http://artsfreedom.org/?p=5311>

² <https://geneva.usmission.gov/2015/09/18/hrc-statement-reaffirms-right-to-freedom-of-expression-including-creative-and-artistic-expression/>

constitution was adopted in 2013 and is a significant step in the direction of securing the right to freedom of expression in law.

8. 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 predated the 2013 constitution into line with the supreme law. However, whether as a result of lack of capacity or political will, the government continues “to ignore human rights provisions in the constitution, neither enacting laws to put the constitution into effect nor amending existing laws to bring them in line with the constitution and Zimbabwe’s international and regional human rights obligations.”³
9. The main international covenants that relate to freedom of expression, including artistic freedom, to which Zimbabwe is a party, are the Universal Declaration of Human Rights (UDHR), the African Charter on Human and Peoples’ Rights (ACHPR), the International Covenant on Economic, Social and Cultural Rights (ICESCR), the International Covenant on Civil and Political Rights (ICCPR), the Convention on the Rights of the Child (CRC), and the Convention on the Rights of Persons with Disabilities (CRPD).

RECOMMENDATIONS AND IMPLEMENTATION

10. During its First Cycle Universal Periodic Review that took place on 10 October 2011, Zimbabwe only expressed support for one recommendation on freedom of expression. Zimbabwe accepted Japan’s recommendation to “make improvements to ensure the freedom of expression, including for the mass media.”
11. Zimbabwe noted recommendations to repeal or significantly reform the Criminal Law (Codification and Reform) Act and the Public Order and Security Act (POSA) provisions that restrict freedoms of expression and assembly as proposed by the United States, Australia, Canada, Austria and Mexico.
12. Zimbabwe further noted five broader recommendations by Australia, Czech Republic, Norway, Slovakia and Switzerland on ensuring the right to freedom of expression.
13. However, articles remain within the Criminal Law (Codification and Reform) Act and the Public Order and Security Act (POSA) that severely hamper the practice of freedom of expression, as illustrated in cases detailed below. Theatre performances, movies and exhibitions have been censored, while artists self-censor due to fear of repression. These continuing problems lead us to conclude that Zimbabwe has not adhered to the recommendations to protect and promote freedom of expression made in the First Cycle of the UPR in 2011.

³ <https://www.hrw.org/world-report/2016/country-chapters/zimbabwe>

THE CENSORSHIP ACT

General statement:

14. The Censorship and Entertainment Control Act provides the circumstances and standards under which the Censorship Board is authorized to censor artistic works, thus limiting artistic expression. 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.”⁴
15. Artistic expressions can be censored if they are deemed undesirable; indecent or obscene; offensive or harmful to public morals; or contrary to the interest of defence, public safety, public order, and the economic interests of the state or public health. The standards, however, have not been clearly defined, leaving room for abuse and arbitrary decisions by the Censorship Board. ICCPR article 19(3) provides that permissible restrictions on freedom of expression must be “necessary” and “provided by law.” Clarifying these provisions, General Comment No. 34 states that a permissible restriction must be, inter alia, “the least intrusive instrument” that achieves the state’s purpose and “must be formulated with sufficient precision to enable an individual to regulate his or her conduct accordingly and it must be made accessible to the public.”
16. Artists face a difficult situation when trying to deal with the arbitrary standards of censorship in Zimbabwe. Any song, play or writing dealing with social issues has the possibility of being linked to government actions and, as a result, faces reprisals in the form of censorship. Arts activist Tongai Makawa (artist name: Outspoken) of Magamba Network notes, “all topics are controversial in Zimbabwe because if you are tackling any societal ill or problem there is always a way of tracing it back to a government or political situation, even though you are tackling things of a social nature. ”
17. Violations of the Censorship Act will result in the individual being liable to a fine or imprisonment. The Censorship Board also has powers under section 25 of the act to seize any articles for examination by the board.
18. The Censorship Board’s composition and process for making censorship decisions are not transparent. Artists have stated they have no way of knowing who is appointed to the board or what happens to a piece of art after it has been submitted for review. The website of the Ministry of Home Affairs only explains the functions of the Board, but does not provide a list of the Board’s membership.⁵
19. The Censorship Board’s decisions are in principle appealable to the Censorship Appeal Board.⁶ The relevant minister can override the decision of “the Appeal Board or to any court to which any decision, order or proceedings of the Board or the Appeal Board has or have been brought on review or appeal” if the minister believes the decision is not in the public interest.⁷

⁴ The Censorship and Entertainment Control Act <http://www.parlzim.gov.zw/acts-list/censorship-and-entertainments-control-act-10-04>

⁵ <http://www.moha.gov.zw/index.php/2014-03-26-06-08-11/2014-05-14-09-19-25/2014-03-26-06-24-01>

⁶ The Censorship and Entertainment Control Act, section 19.

⁷ *Ibid.* section 21.

Supportive examples:

20. A case illustrating the lack of transparency and arbitrariness of the Censorship Board's decisions is the ban on the play *No Voice No Choice*. In 2012, the Censorship Board issued a notice that the play had been banned in Zimbabwe. The director and producer, Tafadzwa Muzondo, had undertaken to perform at the Intwasa Arts Festival on 18 September 2012. Because of the ban, the play could not be performed. The director had approached the Censorship Board seeking a censorship certificate to enable his play to be performed to public audiences. He was advised to pay \$25.00 for the application fee and the certificate fee, as the assessors at the Board had first assured him that his play would not be prohibited. Tafadzwa Muzondo was not given the opportunity to appeal before the Appeals Board. He subsequently resorted to challenging the failure of the Minister to convene the Appeal Board as a violation of his right to a fair hearing within a reasonable time by taking the matter to the High Court. However, High Court Judge, Justice Gurainesu Mawadze, ruled that the urgent chamber application filed to lift the ban before the Intwasa Arts Festival could not be treated as urgent.⁸
21. In 2015, the Censorship Board denied certification to screen the international film *50 Shades of Grey* in its original form. Cinemas decided not to show a heavily censored version of the film according to SterKinekor, a local film distribution company. The cinemas argued that the heavy censorship would compromise the integrity of the film. Shortly after the global release of the film, pirated copies of the film were widely available on the black market.

THE CRIMINAL LAW (CODIFICATION AND REFORM) ACT

General statement:

22. Being the premier criminal statute in Zimbabwe, the Criminal Law (Codification and Reform) Act⁹ has been interpreted consistently to criminalize artistic expression that is viewed as critical of political leadership and other state institutions and actors, such as the police.
23. Section 31 of the Criminal Law (Codification and Reform Act) criminalizes the publishing of or communicating false statements prejudicial to the state and provides for the imposition of a fine of up to \$5000 or imprisonment of up to 20 years. 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”. The police often refer to section 31 in connection with the detention of an artist or the ban of an act of artistic expression, according to artists interviewed for this report.
24. Section 33 of the law criminalizes artistic and other expressions “undermining the authority of or insulting the President”.

⁸ See Tafadzwa Muzondo & EDZAI ISU Theatre Arts Project v Board of Censors & Co-Ministers of Home Affairs HC 10 024/12 and

http://archive.kubatana.net/html/archive/artcul/121025tm.asp?sector=ARTCUL&year=2012&range_start=1

⁹ Criminal Law (Codification and Reform Act),

https://www.unodc.org/res/cld/document/zwe/2006/criminal_law_codification_and_reform_act_html/criminal_law_codification_and_reform_act.pdf

25. It is important to note that in many cases, the prosecutions before the courts have been unsuccessful, and the Constitutional Court has ruled that the provisions used contravene the constitutional freedom of a person to express themselves. However, censorship remains, and has 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.
26. According to artists interviewed for this report, the police intimidate or harass artists from expressing dissent on social, economic and political concerns of citizens. The use of criminal law to censor art has resulted in significant self-censorship by many artists.
27. Section 96 of the Criminal Law (Codification and Reform) Act establishes the offence of “criminal defamation”. The section establishes that any person who publishes a false statement about another person, intentionally or with the likelihood that their reputation would be injured, will be guilty of criminal defamation and liable to a fine and imprisonment for a period of up to two years.
28. The Constitutional Court in 2016 ruled that Section 96 of the Criminal Law (Codification and Reform) Act was unconstitutional, as it did not comply with the rights to freedom of expression and freedom of media, as well as access to information, protected in Sections 61 and 62 of the constitution. The ruling came in relation to an application filed in 2015 by MISA (The Media Institute of Southern Africa) Zimbabwe.

Supportive example:

29. In 2015, the Supreme Court upheld the ban on artist Owen Maseko’s installations that were originally removed in 2010 from the National Gallery of Zimbabwe in Bulawayo. Maseko's exhibition consisted of various artistic expressions depicting mass atrocities committed by government forces in Matabeleland in the 1980s. Maseko was subsequently arrested by Central Intelligence Officers and detained for six days in Bulawayo’s Central Police Station. The State used sections 31 and 33 of the Criminal Law (Codification and Reform) Act to prosecute the artist for staging the exhibition.
30. “Writers have resorted to social themes, such as domestic violence and religion, for fear of being labelled anti-government if they chose topics, such as politically motivated human rights violations, corruption by high ranking government or public officials, and police brutality, given the politically charged environment currently obtaining in Zimbabwe,” according to Beaven Tapureta from Writers International Zimbabwe.

THE BROADCASTING SERVICES ACT

General statement:

33. The Broadcasting Services Act (BSA) is being used to maintain a state monopoly of the airwaves. The Act establishes a Broadcasting Authority whose function, among others, is “to encourage diversity in the control of broadcasting services” and “preservation of the national security and integrity of Zimbabwe”.¹⁰

¹⁰ Broadcasting Services Act 2001 Section 3, <http://www.wipo.int/edocs/lexdocs/laws/en/zw/zw036en.pdf>

34. Numerous provisions of the Act breach the right to freedom of expression as guaranteed by international instruments. These include provisions seriously limiting the independence of the broadcast regulator (Part II of the Act), provisions granting the Minister vast direct powers in the area of broadcast regulation (Section 46 of the Act), provisions restricting, rather than promoting, pluralism and diversity in broadcasting, and provisions imposing unrealistic or unwarranted restrictions on the content of what may be broadcast.
35. The Act has not promoted freedom of artistic expression and diversity. Instead it has led to the monopolization of the airwaves resulting in pre-censorship of artistic expressions. Artistic content risks being excluded from broadcasting if it is viewed as against the vested interests of the ruling party.
36. Amnesty International on 20 May 2015 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.”¹¹
37. The Broadcasting Services Act under Section 10(1)(a) states that a community radio or television station “shall not broadcast any political matter.” This clause aims at restricting community radios to non-political programming only. The definition is overbroad and risks limiting artistic and other legitimate expressions.

PUBLIC ORDER AND SECURITY ACT (POSA)

General statement:

38. The Public Order and Security Act (POSA) was adopted to implement the constitutional provisions on freedom of assembly and association. The State, represented by the police, has abused this legislation to ban artistic and theatrical presentations on account of the fact that people would gather to participate in such exhibitions or performances.
39. The police, working together with other security agents, such as the Central Intelligence Organisation (CIO) and 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 police should be notified of a public gathering, or any form of gathering, falling under the purview of the POSA.

Supporting examples:

40. The film *Kumasowe* concerns the violent clashes in May 2014 between members of an apostolic sect and Zimbabwean police. In August 2014 the police banned the premiere of the film because it dealt with a “sensitive issue”.¹² The day before the scheduled premiere, the police “advised” the filmmaker to approach the Censorship Board, which in practical terms equalled a ban because the dysfunctional Censorship Board would not be able to issue a decision in time.

¹¹ <https://www.amnesty.org/en/latest/news/2015/05/zimbabwe-radio-stranglehold-gagging-freedom-of-expression/>

¹² <http://www.state.gov/documents/organization/236634.pdf>

41. Many of the cases that involve the police detaining artists or banning exhibitions or screenings are never reported by artists, who will often have an interest in not creating more negative attention around their person or artistic expressions. Many cases are therefore neither publically known nor registered.

RECOMMENDATIONS

51. In accordance with international standards and respecting the 2013 constitution, Zimbabwe should abolish the Censorship Act and any prior-censorship bodies or systems where they exist and use subsequent imposition of restrictions only when permitted under article 19 (3) and 20 of ICCPR. Such restrictions should be imposed exclusively by a court of law.
52. Replace the Censorship Board and other bodies censoring or regulating artistic expressions with a classification board mandated to issue age recommendations to protect children.
53. Repeal section 31 (criminalizes the publishing of, or communicating, false statements prejudicial to the State), section 33 (criminalizes insulting the office of the president) and section 96 (criminal defamation) of the Criminal Law (Codification and Reform) Act.
54. 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.
55. Improve 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 decrease the fees for licences to ease the financial burden to applicants for community broadcasting services. The exorbitant fees required are perceived as a deliberate move to prevent new entrants into the sector.
56. Repeal or significantly reform the Criminal Law (Codification and Reform) Act and the Public Order and Security Act (POSA) provisions that restrict freedoms of expression and assembly as proposed by the United States, Australia, Canada, Austria and Mexico during Zimbabwe's 2011 UPR.
57. Take measures, including training of national and local police, to ensure the Criminal Law (Codification and Reform) Act and the Public Order and Security Act (POSA) are not abused by the police to limit artistic freedom of expression in violation of the 2013 constitution and Zimbabwe's international obligations.