

# POSITION PAPER

## AN ANALYSIS OF THE NATIONAL ARTS COUNCIL OF ZIMBABWE ACT [CHAPTER 25:07] – CONSTITUTIONAL ALIGNMENT

### 1. Executive Summary

It is already three years since the Constitution of Zimbabwe was amended and yet there have not been meaningful measures taken to harmonise existing legislation with it. There is an urgent need to address gaps and weaknesses in old pieces of legislation. Although it is clear that reviewing of legislation in line with provisions of the Constitution is one of the constitutional obligations of the government, civil society has to play a role in making sure that this is done effectively and urgently. The commissioning of this position paper by the Zimbabwe Institute is a step in the right direction to push and demand for the alignment of pieces of legislation to the Constitution. It is a crucial process towards the implementation of the Constitution.

The debate around the need to amend the National Arts Council Act of 1985 has been ongoing prior to the enactment of the National Constitution of Zimbabwe (2013). The debate has focused mainly on the governance structures as well as the mandate of the National Arts Council of Zimbabwe. For instance, in 2010 at the National Indaba, the National Arts Council of Zimbabwe Director, Elvas Mari explained, ‘since 1985 the National Arts Council of Zimbabwe (NACZ) has had District Arts Councils and board members appointed by the minister country wide. However since 1998 these structures have not been functional due to the lack of funding to sustain them. At both these levels, there was no administrative staff but rather volunteers, which is an ineffectual way of running a serious administration. The national board was made up of reps from within and without the provinces. The Government could not afford allowances for all these district and provincial members so from 1999 when the first 9 member board was appointed, it did not reflect what was in the Act.’ This reflection clearly points to the urgent need to amend the Act so as to provide for a strong governance structure that can effectively run the institution.

Other issues raised by players in the arts sector include the appointment of chair and vice chair on the board where the current Act provides for the minister to appoint a chair person opening opportunities for nepotism. While the current management of the National Arts Council has been proposing for the amendment of the Act to give the Council powers to levy the arts sector and promoters as a way of raising funds in the absence of enough government funding, artists and promoters have bemoaned these sentiments. The levies that are currently being charged by the National Arts Council are too much as they tend to be detrimental to the development of the sector. The arts sector is already limping and any additional levies will cripple the operations of artists and negatively affect the development of the sector.

Since 1985, the National Arts Council of Zimbabwe (NACZ) ACT [CAP: 25:07] (the 'Act') has provided the regulatory framework for government control, regulation and supervision of the arts in Zimbabwe. The Act has not been amended in spite of the fact that studies have shown its serious limitations and shortfalls which have been discussed by stakeholders in the arts sector at several forums. While many shortfalls of this Act are a result of its poor application or misapplication, there are many aspects of it being outdated and too limited to capture developments in the arts sector as well as its inability to accommodate the many crucial aspects of the Constitution of Zimbabwe Amendment No. 20.

This Position Paper is being prepared in the context of aligning the National Arts Council of Zimbabwe Act with the Constitution of Zimbabwe Amendment No. 20. The Position explores the key issues which the Amendment Bill should seek to regulate; assesses whether the Act sufficiently gives effect to the relevant constitutional guidelines relating to the establishment, functions and duties, funding and powers to be exercised by such an organisation and provides clear recommendations on what needs to be done for the Act to be brought in conformity with the Constitution, particularly how the Act can be improved to give sufficient effect to the relevant constitutional guidelines pertaining to establishment, functions and duties of such a Council.

This process should also be informed by other legislation that have an impact on the National Arts Council Act as they have a bearing on the Act. The following are some of the laws that have bearing on the National Arts Council Act:

- Broadcasting Services Act Chapter 12:06
- Censorship and Entertainment Control Act
- Copyright and Neighboring Rights Act Chapter 26:05
- Education Act Chapter 25:04 of 1987 as amended in 2006
- Immigration Act Chapter 4:02
- National Gallery Act Chapter 25:09
- National Library and Documentation Service Act Chapter 25:10
- Printed Publications Act Chapter 25:14
- Zimbabwe Revenue Act Chapter 23:11
- Tourism Act Chapter 14:20

In order to give effect to the constitutional provisions, Zimbabwe should also ratify international conventions and meet its international obligations in the area of arts and culture.

### **3. Methodology**

The review of the Act is being conducted in three broad stages:

- Research and development of a model that will modernize the framework for the promotion of the arts and artists in Zimbabwe;
- Targeted consultation inviting input from select acknowledged arts experts to ensure wider input regarding the proposed new Act; and
- Finalization of the Position Paper and reporting to the Zimbabwe Institute, the commissioners of this Position Paper.

### **4. Constitutional Provisions for the Arts**

The interpretation of the provisions of the National Constitution of Zimbabwe (2013) should be in line with commitments Zimbabwe pledged through ratifying international conventions. Section 34 of the National Constitution (2013) states that the State must ensure that all international conventions, treaties and agreements to which Zimbabwe is a party are incorporated into domestic law.

Zimbabwe is party to 1980 Recommendation Concerning the Status of the Artist. Section III (6) of the Status of the Artist argues Member States to see that artists are unequivocally accorded the protection provided for in this respect by international and national legislation concerning human rights. Section IV of the same document gives special emphasis to the provision of education and training to artists as well as provision of resources in the form of grants for creation, showcasing of artworks and mobility of artists by State Parties.

Zimbabwe also ratified the 2005 UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions in 2008. Through Article 6 (e) of that Convention the government obligated itself to creating measures aimed at encouraging non-profit organizations, as well as public and private institutions and artists and other cultural professionals, to develop and promote the free exchange and circulation of ideas, cultural expressions and cultural activities, goods and services, and to stimulate both the creative and entrepreneurial spirit in their activities.

**These give special emphasis on the need for artists to have their rights guaranteed and protected by the government.**

#### **4.1 Founding Values**

Section 3 of Chapter 1 of the Constitution sets out in a broad manner the founding cornerstones governing all the facets of government agencies including quasi-government organisations. Section 3 of the Constitution therefore sets the tone for the constitutional requirements which must be met by the substantive provisions of the National Arts Council of Zimbabwe Act.

Section 3 of the Constitution of Zimbabwe Amendment Act No. 20 provides as follows:

(1) Zimbabwe is founded on respect for the following values and principles –

- (a) *Supremacy of the constitution*
- (b) The rule of law
- (c) *Fundamental human rights and freedoms*
- (d) *The nation’s diverse cultural, religious and traditional values*
- (e) The recognition of the inherent dignity and worth of each human being
- (f) *The recognition of the equality of all human beings*
- (g) *Gender equality*
- (h) *Good governance, and*
- (i) *Recognition and respect for the liberation struggle”*

(Italics added for emphasis)

It is clear from the italicised values and/or principles that they pertain to the affairs of National Arts Council of Zimbabwe. Thus the proposed amendments and or inclusions in the Act will chiefly focus on the said areas. Broadly, the areas that need to be addressed in the Act relate to gender equality, good governance, equality of all human beings amongst others.

In view of Section 3 of the Constitution as expanded, we provide below our analysis and recommendations for the proposed amendments to the National Arts Council Act in an effort to align same to the provisions of the Constitution.

#### **4.2 Good governance**

Section (9) of the Constitution states that the State must adopt and implement policies and legislation to develop efficiency, competence, accountability, transparency in all institutions and agencies of government at every level and in every public institution and in particular (a) appointment to public offices must be made primarily on the basis of merit.

#### **4.3 Provision of Funding**

Section 9 (2) The State must ensure that all institutions and agencies of government at every level, in particular Commissions and other bodies established by or under this Constitution, are provided with adequate resources and facilities to enable them to carry out their functions conscientiously, fairly, honestly and efficiently. Currently the National Arts Council of Zimbabwe operates under acute budget constraints to a point where its mandate of funding artists has fallen away. The current National Arts Council Act provides for funding of arts associations by the Council but this funding is not being availed by the government.

#### **4.4 Cultural Diplomacy and Regional Integration**

Section 12 (2) The State must promote regional and Pan-African cultural, economic and political co-operation and integration and must participate in international and regional organisations that stand for peace and the well-being and progress of the region, the continent and humanity. Under this section it has to be noted that the government is yet to ratify the Pan-African cultural policy documents such as the Charter for African Cultural Renaissance and this hinders implementation of provisions that benefit artists in this Convention.

#### **4.5 Freedom of Expression**

Section (11) of the Constitution states the state must take all practical measures to protect the fundamental rights and freedoms enshrined in the declaration of rights which is Chapter 4 and to promote their full realization and fulfillment.

Section (61) on freedom of expression and freedom of media states that every person has the right to freedom of expression which includes ( b) freedom of artistic expression and scientific research and creativity. Currently the National Arts Council Act does not guarantee this freedom and yet there has been many violations of this right. Freedom of expression is also guaranteed through the UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions and the Belgrade Recommendation on the Rights and Status of Artists (1980) which the government is Party to. Section III (6) of the Status of Artist (1980) provides that, 'Since freedom of expression and communication is the essential prerequisite for all artistic activities, Member States should see that artists are unequivocally accorded the protection provided for in this respect by international and national legislation concerning human rights.' To add onto this, "The issue of artistic freedom is crucial to any nation. It is not just' about the artists' rights to express themselves freely, it is also a question of the rights of citizens to access

artistic expressions and take part in cultural life — and thus one of the key issues for democracy.”<sup>1</sup>

The government should therefore abide by their obligation to protect artists and everyone participating in artistic activities or dissemination of artistic expressions and creations from violence by third parties. Currently the government is violating this provision, especially at festivals where festival organisers have to pay the police for protecting artists and audiences participating in their festivals. The government should de-escalate tensions when these arise, maintain the rule of law and protect artistic freedoms. The police should not charge artists and cultural institutions for the costs of their protection.

#### **4.6 Gender Equality**

Section (13) of the Constitution states that all agencies and institutions of government at every level must endeavor to facilitate rapid and equitable development and in particular must take measures to protect and enhance the right of the people, particularly women to equal opportunities in development. The above right is amplified in section 80 of the Constitution which provides as follows:

“80 Rights of Women

- (1) Every woman has full and equal dignity of the person with men and **this includes equal opportunities in... economic and social activities;** (emphasis was added).

In line with section 80(1) of the Constitution, it is proposed that a clause be inserted which clearly provides that the Board of the Council shall be composed of an equal representation between the two genders, subject of course to proper screening of candidates based on capability and experience.

This provision is imperative since section 80(3) of the Constitution provides that any law or practice that does not comply with section 80(1) is void to the extent of its consistency.

#### **4.7 Preservation of Culture**

Section (16) of the Constitution talks about culture. It states that all state institutions and agencies of government at every level must promote and preserve cultural values and practices which enhance the dignity, well-being and equality of Zimbabweans.

#### **4.8 Children in the arts**

Section (19) of the Constitution speaks on children. It states that the state must adopt policies and measures to ensure that in matters relating to children, the best interest of the children concerned are paramount.

---

<sup>1</sup> <http://artsfreedom.org/?p=5311>

#### **4.9 Arts Venues**

Section 32 The State must take all practical measures to encourage sporting and recreational activities, including the provision of sporting and recreational facilities for all people. Dilapidated venues and community halls should be renovated because they also serve as arts venues in communities.

## **5 Gaps in the National Arts Council of Zimbabwe Act**

### **5.1 Preamble**

The preamble to the National Arts Council of Zimbabwe Act (Chapter 25:07) provides as follows:

**“AN ACT to provide 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; and to provide for matters incidental to or connected with the foregoing.”**

The purpose of a preamble is to set out in broad terms the purpose of an enactment. The enactment must embrace broad principles in the constitution which relate to its purpose. It is thus proposed that the preamble captures that the Act also promotes arts practice and knowledge for marginalised persons and groups in Zimbabwe.

### **5.2 Section 5 of the Act – Constitution of the Board**

Section 5 of the Act provides for the composition of the Board for the National Arts Council of Zimbabwe; however it does not mention the rights of women as spelt in the constitution.

### **5.3 Section 15 Functions of the National Arts Council**

As the main piece of legislation for the arts, the National Arts Council Act states that the Council’s function shall be to foster, develop and improve the knowledge, understanding and practice of arts in Zimbabwe by encouraging the teaching and practice of the arts and their presentation, performance, execution and exhibition to the public.

This leaves a gap on other responsibilities that the National Arts Council should shoulder to facilitate for the development of the arts in Zimbabwe. These responsibilities include conducting research.

### **5.4 Good Governance Issues**

Section 5 of the Act only provides for who appoints Board members of the Council without stating the minimum qualifications and the criteria for selecting Board Members. On the qualification of Board Members the Act should clearly provide for the appointment of representatives of the arts field to the Council Board and refrain from nominating or appointing Board Members on the basis of their political or corporate affiliation. This opens floodgates for corruption and poor governance structures on the board.

### **5.5 Section 6 – Terms of Office of the members of the Board**

Section 6(2) only provides that an elected member of the Board “shall hold office for a period of three years”. However section 6(3) provides without qualification that a Board member “going out of office in accordance with this section shall be eligible for reappointment or re-election, as the case may be, to the Board”. It is imperative that the reappointment or election should only be for one or two more terms only. However more reappointments could be considered with appropriate checks and balances, say on merit through external recommendation.

### **5.6 Section 8(2) – vacation of office by member**

Section 8(2) of the Act requires that a member may vacate office at any time **upon the Minister satisfying himself** that the member is either mentally disturbed or has conducted himself in a manner prejudicial to the Council’s interests.

This provision has potential for corruption which the Constitution in section 9(1) enjoins the government and its agencies to adopt measures, legislative or otherwise to eradicate all forms of corruption and abuse of power by those holding public offices. It is difficult to see how the Minister is “satisfied” that the requirements to vacate office are met. It could be easy for a mentally disturbed person, but difficult for misconduct.

### **5.7 Section 10 – Proceedings of the Board**

Section 194 (1) as read with Section 9(1) of the Constitution provide that the state must adopt and implement policies and legislation to develop efficiency. This is not reflected in the provisions of section 10(4) of the Act providing for proceedings of the National Arts Council Board.

Section 10 (4) provides that there must be at least nine (9) members of the Board (four of which representing Provincial Arts Councils) in order to constitute a quorum. This provision appears good in promoting broad based participation of most of the Board members in meetings; however it results in anarchy in the conduct of the Council’s business.

It is proposed that a quorum be expressed as a minimum percentage of the total membership, say 65% of total membership rather than a number as this results in inefficiency: should most of the members wish to sabotage meetings or are absent repeatedly, the business of the Council would not be deliberated for a long time.

In the same vein, section 10(4) of the Act attempts to ensure that a minimum of 4 representatives from Provincial Arts Councils are always present at any Board meeting to constitute a quorum. It is our view that this provision is inconsistent with the constitution's tone of promoting efficiency in governance. It would mean that where less than 4 members from the Provincial Arts Councils are present, say for more than three times, the meetings will be aborted to the detriment of the Council's day to day business.

### **5.8 Section 11 – Board Committees**

Section 11(1) of the Act provides that the Board may establish one or more committees. Board Committees should be compulsory and not optional so as to promote good governance. A national arts council is a big organisation which may not operate without Board Committees to accomplish certain governance tasks. This promotes efficiency; accountability and effectiveness on the part of the Board (see Section 9(1) as read with principles set out in section 194(1) of the Constitution).

In line with the above, we propose that the word shall be substituted for may so that Committees become compulsory.

### **5.9 Section 15 – Functions of the National Arts Council**

**Section 298(1)(b)(iii) requires that government agencies takes measures to prioritise marginalised groups and areas in development.**

Although the functions of the National Arts Council are not directly related to constitutional provisions; however the Act must specifically mention that the Council must promote marginalised groups in the performance, presentation, execution or exhibition of arts in Zimbabwe. This must be mentioned specifically in the Act so that rights of previously disadvantaged groups, e.g. artists living with disabilities, women artists or marginalised arts organisations are put at the forefront in line with the spirit of the constitution (**see for example section 298(1)(b)(iii) – prioritizing marginalised groups in allocation of public funds**).

The current objects of the National Arts Council of Zimbabwe as stipulated under Section 15(1) of the Act are too broad and ambiguous. It is proposed that the functions of the National Arts Council of Zimbabwe should be clear and specific in line with the Constitution's requirement that government agencies must be efficient and accountable (**see section 9(1) of the Constitution**). This ensures that the functions are simplified, and focus on the development of the arts. Further, it then streamlines the Act with the objects of like-minded organisations in other jurisdictions (National Arts Councils of

Zambia, South Africa and Singapore) which are comprehensive and clearly stipulate the roles of these institutions. Among the critical deliverables or functions of the council should include the following areas: research, advocacy, capacity building, organising events and enhancing the marketing, celebration, showcasing of artistic products, Cultural infrastructure (spaces and venues), creating an enabling operational environment.

### **5.10 Sections 16 -25**

Not much can be said on alignment with the constitution. All that may be said may relate to standard provisions which may be appropriate to add in any Arts Council Act in general.

### **Section 22 of the Act – Registration of Arts Organisations**

Section 56(3) of the Constitution provides that:

“Every person has a right not to be treated in an unfairly discriminatory manner on such grounds as... economic or social status...”

Subsection (4) provides further that a person is treated in a discriminatory manner for the purpose of subsection (3) if-

“(a) they are subjected directly or indirectly to a condition, restriction or disability to which other people are not subjected to; or

(b) other people are accorded directly or indirectly a privilege or advantage which they are not accorded.

Section 22 of the Act contains provisions which could be potentially discriminatory in violation of section 56(3) of the Constitution.

### **5.11 Section 22 provides as follows:**

**“22 Registration of Arts organizations a condition for financial assistance etc.**

No arts organization shall—

- (a) receive financial assistance from the National Arts Council; or
- (b) participate in the activities of the National Arts Council;

unless it is registered with the National Arts Council in terms of section twenty - three.”

The provisions in Section 22 of the Act are discriminatory and counter to the clear provisions of section 56(3) of the Constitution in the sense that it shuts out individual players in the arts industry by recognising arts organisations only as opposed to individuals.

Besides the angle mentioned above, section 22 also discriminates against those arts organisations which may not afford to affiliate with the National Arts Council particularly those marginalised organisations or those upcoming organisations.

In terms of Section 56(5) of the Constitution, an act of discriminatory is unfair as mentioned in section 56(3) “unless it is established that the discrimination is fair, reasonable and justifiable in a democratic society based on openness, justice, human dignity, equality and freedom, and such discriminatory measures must be taken to redress circumstances of genuine need, no such measure is to be regarded as unfair as indicated in section 56(3) of the Constitution.

Clearly section 22 of the Act will fall foul of the provisions of section 56(3) of the Constitution as such it ought to be scrap away need to register arts organisations as well as provide for recognition of individual artists who have been discriminated all along. It is thus proposed that the role of registering arts organisations and promoters must fall away.

## **6. NEED FOR CONSTITUTIONAL ALIGNMENT OF STATUTORY INSTRUMENT 87 OF 2006 - NATIONAL ARTS COUNCIL OF ZIMBABWE (GENERAL) REGULATIONS, 2006 (CAP. 25:07), AS READ WITH ITS AMENDMENT (SI 166 OF 2009)**

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 processes. The Amendment (SI 166 of 2009) mainly updated 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.

### **6.1 Areas of concern**

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

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

**Section 56(3) of the Constitution enjoins all government agencies to put measures in place to eliminate any form of unjustified discrimination. Section 3(3) of SI 87/2006**

deals with matters related to application for registration of arts organisations. Sub-Section 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 could 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 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 could be registered is a form of pre-censorship. Organisations will be forced to seek legal recognition through avenues over which the state has absolute control. That process could be used to screen organizations 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*

*Section 9(1) as read with section 194(1) of the Constitution advocates for good governance in government institutions so as to promote efficiency accountability and effectiveness in management.*

The provisions of section 4(1) as read with section 14(1) of SI 87/2006 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 basis for perceiving that applicant will not 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 basis 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.

*Further, in line with the above, Section 4(2) (b) as read with 14(2) (b) – public interest grounds empowers District Arts Councils 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 to determine what is and is not in 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 participate in the promotion of arts in Zimbabwe. The provision must be wither repealed or amended to include the criteria to determine ‘public interest’ and ‘fit and suitable’ organisations.*

Illegality of National Arts Council Regulations S I 87/2006 as amended by S I 166/2009. (Hereinafter called 'The regulations'). Nhimbe Trust finds aspects of the regulations both unconstitutional and unlawful as follows:

## **6.2 Illegality of SI 87 of 2006**

- 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 license fees for illicit licences.

### **6.3 Unconstitutionality of SI 87 of 2006**

- Section 3(3) (iv)'s insistence providing on 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 organisation to be formed by a constitution without having to necessarily register as a PVO or a trust or a company or other form.
- The wide and sweeping discretionary powers given to the Board in Part II in deciding on applications for registration violates the right to administrative justice that i.e. action that is reasonable and fair in terms of section 68(1) of the Constitution. Giving a license to an organisation on the basis that the Board 'is satisfied' that 'it will comply' with the regulations and 'in all other respects ...is fit and suitable' and allowing it to decline an application if it considers it 'would not be in the (undefined) public interest ' together with the sweeping powers to cancel and amend licences, and issuing them only for a year is arbitrary and in clear violation of the Constitutionally guaranteed right to just administrative action as said.
- Section 12's exclusion of unregistered arts organisations from the national culture policy consultations 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.

## **7 Recommendations**

7.1 It is proposed that the functions of the National Arts Council of Zimbabwe should be clear and specific in line with the Constitution's requirement that government agencies must be efficient and accountable (see section 9(1) of the Constitution). This ensures that the functions are simplified, and focus on the development of the arts. Further, it then streamlines the Act with the objects of like-minded organisations in other jurisdictions (National Arts Councils of Zambia, South Africa and Singapore) which are comprehensive and clearly stipulate the roles of these institutions. Among the critical deliverables or functions of the council should include the following areas: research, advocacy, capacity building, organising events and enhancing the marketing, celebration, showcasing of artistic products, Cultural infrastructure (spaces and venues), creating an enabling operational environment. The NACZ Act should also make a provision to the

functions of the Council that the Council shall promote and protect and defend freedom of artistic expression as the Constitution already provides for the provision in Section 61

7.2 On the qualification of Board Members the Act should clearly provide for the appointment of representatives of the arts field to the Council Board and refrain from nominating or appointing Board Members on the basis of their political or corporate affiliation. The Act must have a provision that promotes the rights of previously disadvantaged groups for example the disabled people by ensuring that they have representation in the Board and equal opportunities.

7.3 The Act should provide for a clear criteria which is to be followed by the Minister in appointing Board of the Council shall be composed of an equal representation between the two genders, subject of course to proper screening of candidates based on capability and experience. **The Act should state that or enjoin the Minister to set minimum qualifications required for appointees to the Board of the National Arts Council of Zimbabwe. Section 194(2) of the Constitution also emphasis that “appointments to offices in all tiers of government, including government institutions and agencies and government controlled entities and other public enterprises, must be made primarily on the basis of merit” (Emphasis was added).**

7.4 In order to comply with section 9(1) of the constitution, it is proposed that the Act provides in subsection (2) that **“the Minister in consultation with the existing Board, may require a member to vacate his office”**; alternatively, **the Minister may act upon recommendation of the majority of the Board.** Whilst Section 197 of the Constitution gives some latitude to an Act to specify terms of office for an office bearer of a government controlled institution, Section 6 must specify the number of terms that a Board member may retain a position so as to comply with the Constitution’s good governance principles in Section 9 thereof.

7.5 The Act must specify the number of terms that a Board Member may be eligible for and the length of each term.

7.6 The Act should make provision for children in the arts by stating that it will foster development and enhance opportunities for children interested in arts.

7.7 Clearly section 22 of the Act will fall foul of the provisions of section 56(3) of the Constitution as such it ought to be scrap away need to register arts organisations as well as provide for recognition of individual artists who have been discriminated all along. It is thus proposed that the role of registering arts organisations and promoters must fall away.

7.8 The Act must provide for checks and balances on the powers of the Minister so that he does not act corruptly or abusive of his power in applying the other side of this provision to get rid of those Board members who are not supportive of his management styles, for instance.

7.9 A national arts council is a big organisation which may not operate without Board Committees to accomplish certain governance tasks. This promotes efficiency; accountability and effectiveness on the part of the Board (see Section 9(1) as read with principles set out in section 194(1) of the Constitution). In line with the above, we propose that the word **shall** be substituted for **may** so that Committees become compulsory.

7.10 It also has to be noted that though the Act stipulates that there shall be arts council structures at district levels, this situation was discontinued when it became evident that financial resources to ensure that the district councils remain functional were hard to come by. However the Act was not amended to accommodate the absence of district and provincial boards or committees. This paper therefore recommends that for in order to improve effectiveness of the National Arts Council of Zimbabwe these district structures should be abolished.

#### **7. 11 Insertion of Provision on Meeting Notices**

The constitution's provisions on good governance require government agencies to promote efficiency and accountability in the management of government or quasi-government institutions (see Section 194(1) as read with Section 9(1) of the Constitution. In particular section 9(1) provides that:

**“the state must adopt and implement policies and legislation to develop efficiency, competence, accountability, transparency...in all institutions and agencies of government at every level and in every public institution...” (Emphasis is added)**

To cater for the interests of all the organisations represented on the Board, it is proposed that a **subsection be inserted in the Act providing for how and when meeting notices are sent and served to ensure that all Board members are duly informed to attend meetings.**

#### **9. References**

National Arts Act, No 23 of 1984 Zambia

No. 56 of 1997: National Arts Council Act. 1997 (South Africa)

National Arts Council Act (CHAPTER 193A) (Singapore)

National Arts Council of Zimbabwe Act Chapter 25:07

Constitution of Zimbabwe Amendment No. 20

Belgrade Recommendation on the Rights and Status of Artists (1980)