

196

documented cases

17 COUNTRIES

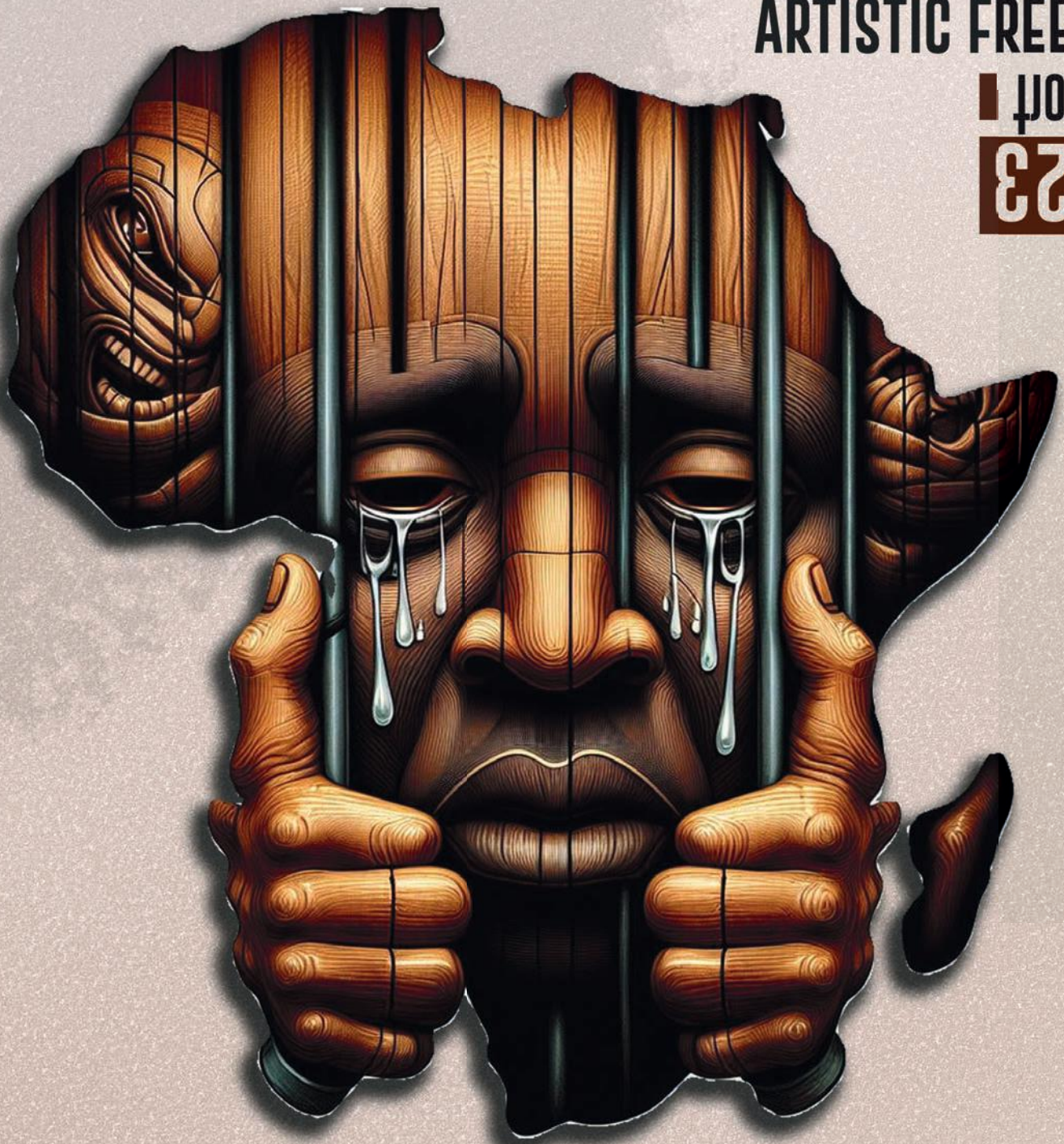
ARTSPEAK

rhimbe
trust

ARTISTIC FREEDOM

Report

2023



Theatre (Public Performance)
& Comedy: 4%,
Visual Art: 13%

Literature: 9%,
Cultural Heritage: 1%
Music: 41%

Film: 9%
Multiple Genres: 21%
Dance: 2%



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Dedicated to Freemuse

Nhimbe Trust was introduced to the UN Human Rights System, UPR mechanism and UPR engagement processes by Freemuse. Through this, Nhimbe Trust's institutional capacity was strengthened, international profile enhanced and publications have become a credible reference point for researchers, scholars and policymakers alike. This report in its entirety is attributable to human rights training extended to Nhimbe Trust by Freemuse, more specifically expertise on artistic freedom monitoring, documentation and reporting. It is testament to the sustainability of Freemuse's work and the legacy that has emerged thereof, as an indelible footprint on the African continent. For this and more, we are eternally grateful to Freemuse and look forward to ongoing cooperation into the future



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Researcher and author: Lisa Sidambe

Design: Edwin Hwera and Wiliam Sampindi

Disclaimer: The omission of references and reference to informants has been done deliberately, to ensure the continuous safety of the individuals, publications and organisations who feed into our work. Names of affected artists have also been excluded under the same rationale. On request, information on specific cases (names of artists, countries etc.) will be provided but for the purposes of this publication, the naming of artists affected will not be done.

Remarks

In the last few years, Nhimbe Trust's programming has predominantly been grounded in and inspired by the 2005 UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions, with a broad focus across the 4 goals. In the diversification of programming, a specific niche has been established in governance for culture, as it relates to research, policy and advocacy. A focus on governance and streamlining of the same has however not been at the expense of the abandonment of other areas. Emphatic reference has been placed on approaches that achieve the interconnectedness and indivisibility of governance with other fundamentals of development and human rights.

This report, which is a maiden one focusing specifically on artistic freedom, is a demonstration of work of the last couple of years, which has been supported by Africalia, Mimeta and the Swedish Arts Council. The documentation of artistic freedom cases in the Africa Region and in selected countries has been through a policy lens, in complementarity to the work done by other partners who have a focus on other areas of artistic freedom such as the relocation of artists at risk and ensuring their protection. Nhimbe Trust's priority in the next couple of years will continue to be that of creating an enabling policy environment for artists, through engaging policy makers (at the level of state parties to various regional / international blocs), civil society networks and intergovernmental entities. As a matter of priority, this engagement will strive to provide a platform for artists and culture professionals to influence policy making, affording them an opportunity to share their lived experiences. It is our hope at Nhimbe Trust that this report will play its role in speaking on behalf of artists and culture professionals - highlighting their plight, points of frustration and the celebrations that punctuate their consistent inspiration. Most importantly, we hope this report will be a useful point of reference for policy makers in the mapping of the peculiarities of artistic freedom in the region, answering the question that is often posed about why the region always records the lowest number of violations in global reports on artistic freedom. As a flagship report, focus is not necessarily on human rights analysis and legal analysis but providing a repository of information that can inform advocacy, global research and international discourse. We look forward to receiving feedback on all aspects of the report as well as hearing from you about opportunities for collaboration or gaps you may identify that our future work may need to address either in relation to your countries of operation or thematic areas of interest.

On behalf of the Nhimbe Trust Board, management and partners I would like to express my deepest and heartfelt gratitude to Ms. Lisa Sidambe the author of this report for her commitment to the cause of artistic freedom which she took up initially as a researcher in the documentation of artistic freedom cases; William Sampindi and Edwin Hwera for tireless efforts in providing technical support in respect of the design of this report and Spencer Bingu for resource management.

Nhimbe Trust Executive Director
Josh Nyapimbi



About Nhimbe Trust

Nhimbe Trust is a Zimbabwe-based non-profit non-governmental advocacy organisation working at the intersection of culture and development to foster political, social, and economic justice. Through research and advocacy that engages regional and international human rights instruments and mechanisms, the organisation advocates for the establishment, implementation and review of policies, administrative measures, constitutional provisions, and legislative frameworks that implicitly or explicitly have a bearing on the exercise and enjoyment of cultural rights and their concomitant leverage rights.

Nhimbe Trust, through its cultural governance architecture, seeks to contribute to the discourse on cultural rights on the African continent, with particular focus on the protection and promotion of artistic freedom, as well as the rights of Cultural Rights Defenders. This framing is positioned within the dictates of Nhimbe Trust's Regional Engagement Strategy (2021) which recognises the need to systematically engage African Union (AU) and United Nations (UN) human rights mechanisms, committees and thematic groups, for the purposes of affording artists and culture professionals space and voice in advocacy and human rights realisation. This holistically contributes to holding those in power accountable to commitments made, monitoring progress and providing a sense of mutual goals and objectives.

The operational capacity and international expertise of Nhimbe Trust human resources is at the core of the organisation's efficiency and global competitiveness. The current remuneration of staff however falls short of both regional and international standards. In comparison to Global North and other Global South regional counterparts of similar expertise, experience and qualifications, Nhimbe Trust lacks in the fulfilment of adequate remuneration prescripts, for which decent work advocates. To attract, motivate and retain qualified and experienced staff which can meet operational demands defined in terms of thematic scope, geographic coverage and global visibility, human resources budgetary allocations must align to the breadth and depth of this work.



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Nhimbe Trust's Programming Pillars



Campaigns



Research / Documentation



Monitoring



Advocacy



Institutional strengthening



Capacity building / enhancement



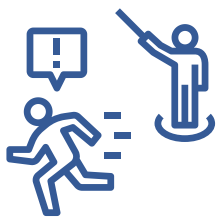
Governance for culture



Cultural participation and access to culture



Nhimbe Trust's Engagement with Artistic Freedom



Monitoring and documenting violations



Legislation mapping and review



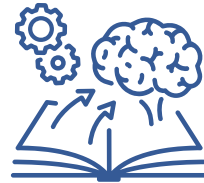
Thought leadership



Tracking court cases / litigation with implications on artistic freedom



Research study interviewees / informants



Developing training modules



Delivering trainings



UPR and QPR reporting



Election monitoring



Artists at risk case assessment



Contributing to legislation / policy formulation



Expert presentations in spaces of dialogue

Gender Lens in Nhimbe Trust's Artistic Freedom Research and Advocacy: The Approach

- *Gendered consequences of artistic freedom*
- *Gendered responses to artistic freedom*
- *Gendered dimensions of remuneration and decent work, within the scope of socio-economic rights*
- *The artistic presentation of the female, the female body and the female experience*
- *The experience of a woman as a subject of art*
- *Women's artistic expression*
- *The policing of the conduct of a woman artist or cultural professional in her private life, through imposition of standards of decency*
- *Coverage of women artistic networks of disobedience and protest*



Celebrating 10 Years of Collaborating with Freemuse



Celebrating 10 Years of Collaborating with Freemuse

2014

Partnership inception

2015

Joint Universal Periodic Review submission, reporting on the state of artistic freedom in Zimbabwe

2020

Development of a research paper on leverage rights to artistic freedom in Zimbabwe

2021

Joint Universal Periodic Review submission, reporting on the state of artistic freedom in Zimbabwe

2024

Joint Universal Periodic Review submission, reporting on the state of artistic freedom in Nigeria through a partnership comprised of Freemuse, Nhimbe Trust, PEN International and Unchained Vibes

2015

UPR workshops and interviews with Zimbabwe artists

2020

Quadrennial Periodic Reporting highlighting joint artistic freedom measures implemented in Zimbabwe

Sep 2020 - Feb 2022

Research partnership for the monitoring and documentation of artistic freedom cases in Anglophone Africa.

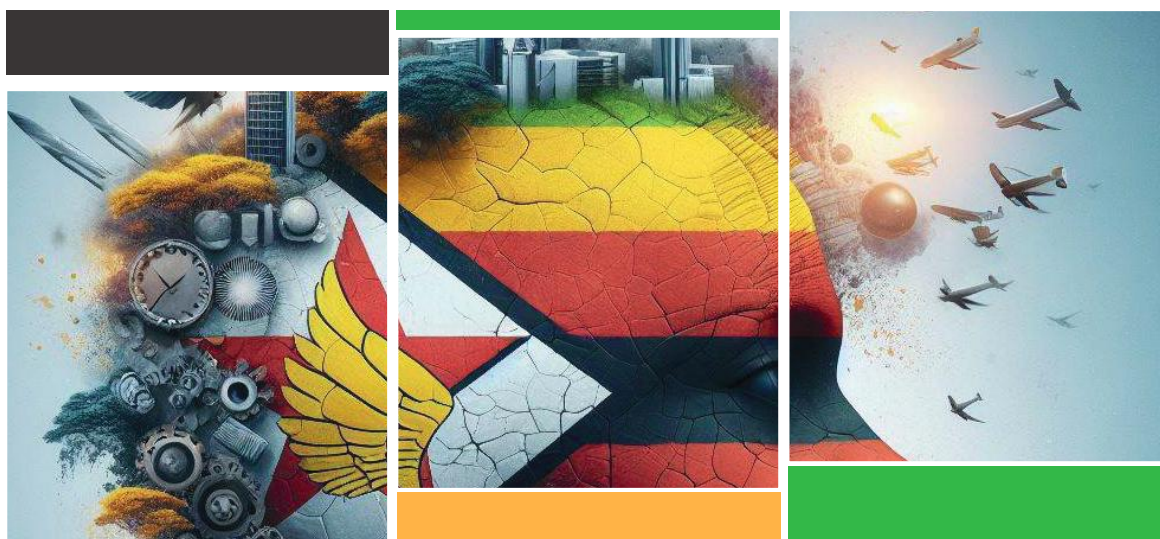
Nhimbe Trust contributing to Freemuse's 2021 and 2022 State of Artistic Freedom reports.

2024

Nhimbe Trust invited to participate in Freemuse's stakeholders meeting convened in Turkey, within the framework of Freemuse's UNESCO Aschbeg programme

Partnership Highlights within the Context Of Zimbabwe

Priority areas identified in artistic freedom mapping



1

Scope of limitations to freedom of expression:

In the absence of prescriptions that define 'prohibited forms of expressions,' specifically what counts as incitement of violence, hate speech and invasion of privacy, legislation becomes susceptible to arbitrary application.

2

Procedures of enforcing freedom of expression:

In the spirit of promoting and protecting artistic freedom, legislation should prescribe procedures to the handling of complaints of violations and the nature of measures which can be taken, specifically by the Media Commission, as redress in the event of violations.

3

Procedures relating to the issuance of broadcasting licences:

Freedom of expression is often muzzled by way of arbitrarily denying broadcasting licenses. In instances where the government has monopoly over the issuance of broadcasting rights, the Censorship and Entertainments Control Act may arbitrarily be instrumentalized to prohibit the dissemination of certain artwork which is considered offensive.

4

Procedural issues relating to mobility and the organisation of public gatherings:

Freedom of movement, assembly and association is key to the realisation of artistic freedom. Policy provisions accompanying this legislation, therefore ought to indicate, unequivocally, what procedures have to be followed for authorising public assembly, to give full effect to constitutionally guaranteed rights. Concomitantly, legislation should articulate regulations and requirements which govern the issuance of visas.

5

Provisions guiding the classification of organisations as unlawful:

Through legislative provisions, designated government authorities are empowered and mandated to declare organisations to be unlawful and such power is to be exercised in the interests of protecting national defence, public safety and public order. If the provisions contained in the law have vague provisions, post constitutional alignment, the legislation may be abused to prohibit legitimate organisations from operating. This has a direct bearing on the operations of artists and cultural professionals who form private voluntary organisations.



6

Cultural rights promotion:

This cluster of rights is a new phenomenon in the Zimbabwe constitutional framework, provided for under Section 63. Further legislative amendments or new laws must compel the government to undertake measures to promote the enjoyment of these rights. This can be achieved through amendments to already existing legislation, to cater for cultural rights broadly, or the creation of a law that is specific to cultural rights.



7

Domestication of international human rights instruments:

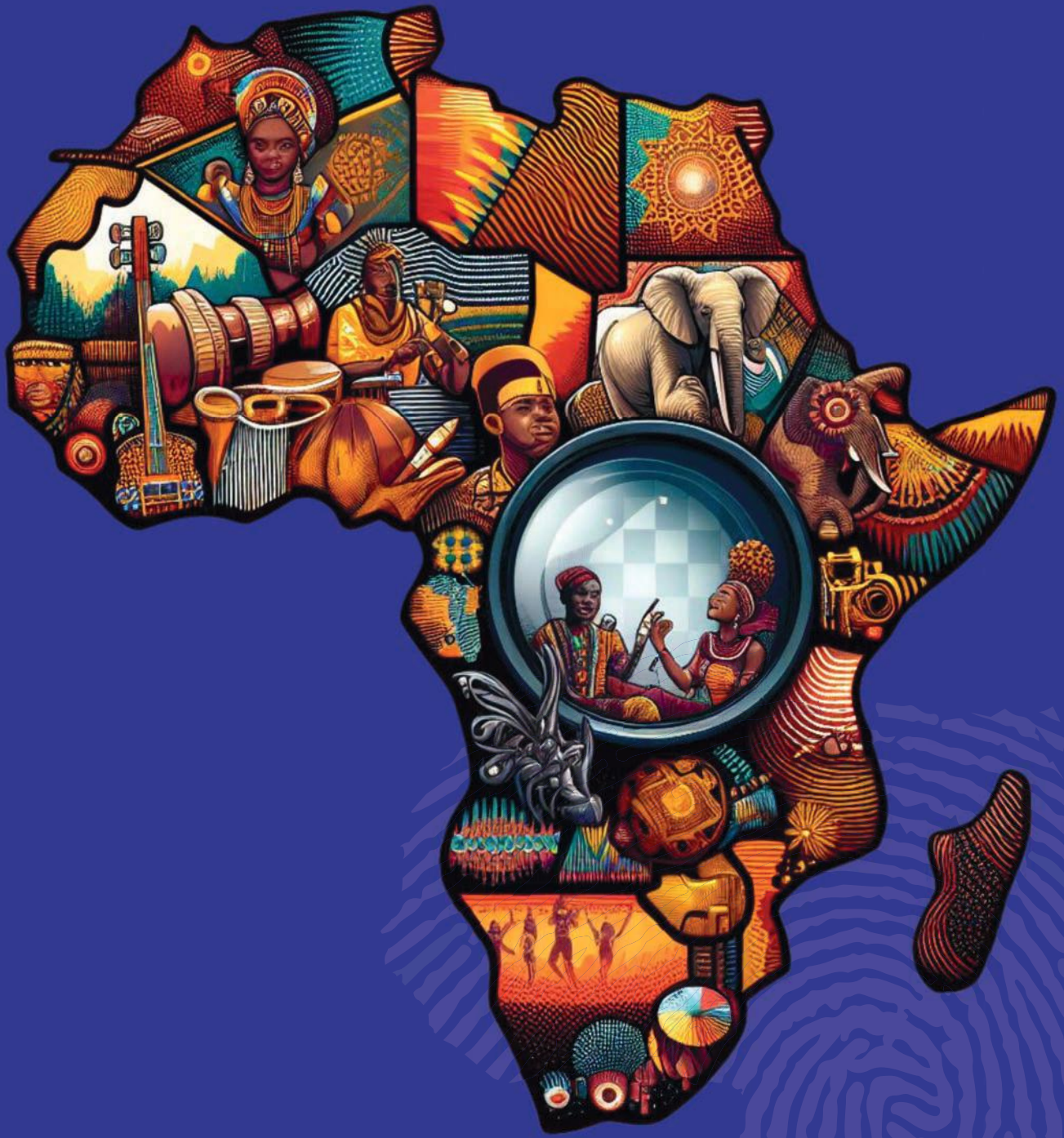
Legislation on the domestication of human rights treaties/conventions must include domestication timelines



Key recommendations made to the Government of Zimbabwe by Nhimbe Trust and Freemuse in advocacy actions

- *Ratify the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights (ICESCR), which establishes the complaint and inquiry mechanisms of the Covenant*
- *Re-align all existing legislation with the Constitution of 2013 and Zimbabwe's obligations under international human rights law*
- *Ensure the application of existing laws and criminal law frameworks to prosecute state authorities who misuse their powers to harass or intimidate artists and cultural professionals*
- *Develop a national strategy and action plan to uphold the safety of artists and cultural professionals*
- *Monitor violations to artistic freedom by both state and non-state actors, with follow-ups made on complaints and police reports that are filed to assure conclusive investigations*
- *Ensure restrictions to artistic freedom are exclusively by courts of law*
- *Abolish the Censorship Act and any censorship bodies or systems*
- *Replace the Censorship Board and other bodies censoring or regulating artistic expressions with a classification board mandated to issue age recommendations to protect children.*
- *Improve efforts to issue licences to community radio stations including through the easing of licencing fees*
- *Repeal or significantly reform the Criminal Law (Codification and Reform) Act and laws regulating public assembly*
- *Take measures, including training of national and local police, to ensure laws are not abused by law enforcers to limit artistic freedom of expression in violation of the 2013 constitution and Zimbabwe's international obligations*

Nhimbe Trust's Lens of Mapping the Region



Nhimbe Trust's Lens of Mapping the Region



Nhimbe Trust's Comprehensive Programme on Artistic Freedom (COPAF) is anchored on and guided by the 2005 UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions. The programme recognises artistic freedom's unique stature as a conglomeration of rights and fundamental freedoms that include

- > The right to create without censorship or intimidation
- > The right to have artistic work supported, distributed and remunerated
- > The right to freedom of movement
- > The right to freedom of association
- > The right to protection of social and economic rights
- > The right to participate in cultural life



As a matter of practice, artistic freedom postures itself as a synthesis of civil, political, socio-economic, cultural and collective rights. It essentially is an amalgamation of all regimes of human rights and also an instrument through which other regimes of human rights may be realised.

As human circumstances, democratisation patterns and technological advancements evolve internationally, regionally and nationally, so does the shape and form of threats to artistic freedom. Taking stock of and keeping up with these changes therefore becomes an imperative in artistic freedom research and practice, particularly in the mapping of new / increased vulnerabilities, and the identification of protection gaps. Legal, social and political institutions are therefore taken to task in the development of laws, governance systems, institutions, policies and measures that can effectively champion the rights of artists, culture professionals and general citizenry's access to and participation in cultural right. This is precisely the rationale of Nhimbe Trust's positionality in artistic freedom programming.





Nhimbe's specific interest in patterns of artistic freedom on the African continent builds on two decades of expertise acquired through active participation in Pan African governance for culture, as well as project design and implementation aligned to key human rights instruments, more specifically those that promote arts, culture, heritage and the rights of cultural rights defenders. Regional focus and specialisation within the context of selected African countries has the benefit of:

- a)** Increasing the global visibility of the state of artistic freedom on the African continent or specific African countries, with evidence-based research and advocacy as a conduit.
- b)** Accounting for why recorded artistic freedom violations on the continent are predominantly lower than those of other regions despite the continent's proven record of authoritarian governance, repressive laws and poor human rights protection.
- c)** Identifying capacity gaps in the mobilisation of continent-based cultural rights defenders.
- d)** Assessing and evaluating State commitment to the implementation of regional human rights instruments and the fulfilment of obligations arising from these.
- e)** Identifying, documenting and amplifying idiosyncratic conditions that are unique to the continent or specific countries, specifically those that are grounded in cultural or 'African identity' arguments in the justification of human rights violations or human rights limitations.
- f)** Using regionally generated data / research to build the capacity of regionally based cultural rights defenders, with regionally based experts as trainers.
- g)** Enhancing local and regional ownership of artistic freedom discourse.
- h)** Highlighting the impact of colonial legacies on post-colonial rights realisation, more specifically within the ambit of inherited laws, systems of regulation and governance structures.



Nexus Between GOAL 1 (Governance for Culture) and GOAL 4 (Human Rights and Fundamental Freedoms) of the UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions

While monitoring of violations and protection of artists at risk is essential as guided by the artistic freedom pillar of Goal 4, completeness is achieved in the interlinkage of Goal 1 and 4. What governance for culture (goal 1) achieves is the positioning of artistic freedom as a discourse of note in cultural policy / legislation making and design. It is through the rationale and context of discourse, networking, awareness raising, advocacy, campaigning and capacity building that data gathering and artists' protection finds meaning. In essence, governance makes research tangible, and vice versa. It is also through governance that solutions to identified problematics are proffered and crystallised. Where there is unwillingness or incapacity for crystallisation on the part of government or government functionaries, systems of governance still adequately grant advocacy, lobbying and campaigning – space and voice. This achieves the representation of the plight of the repressed and the posturing of recommendations on what ought to be changed / reformed in advocacy of the realisation, protection, promotion and enjoyment of human rights. Further, it is through Goal 1 that there is engagement with human rights mechanisms and international / human rights bodies for the presentation of reports evaluating the extent to which States fulfil their artistic freedom obligations as prescribed by human rights instruments.



Mapping the Region: Types of Laws Applied in the Regulation of Artists, Artistic Practice and Artistic Content.



Censorship /classification laws



Broadcasting laws /
codes of ethics



Criminal laws



Immigration laws



Public assembly laws



National security laws
(including terrorism laws)



Disaster management laws



Cybersecurity laws



Sexual identity laws



Drug control laws



Research Spotlight

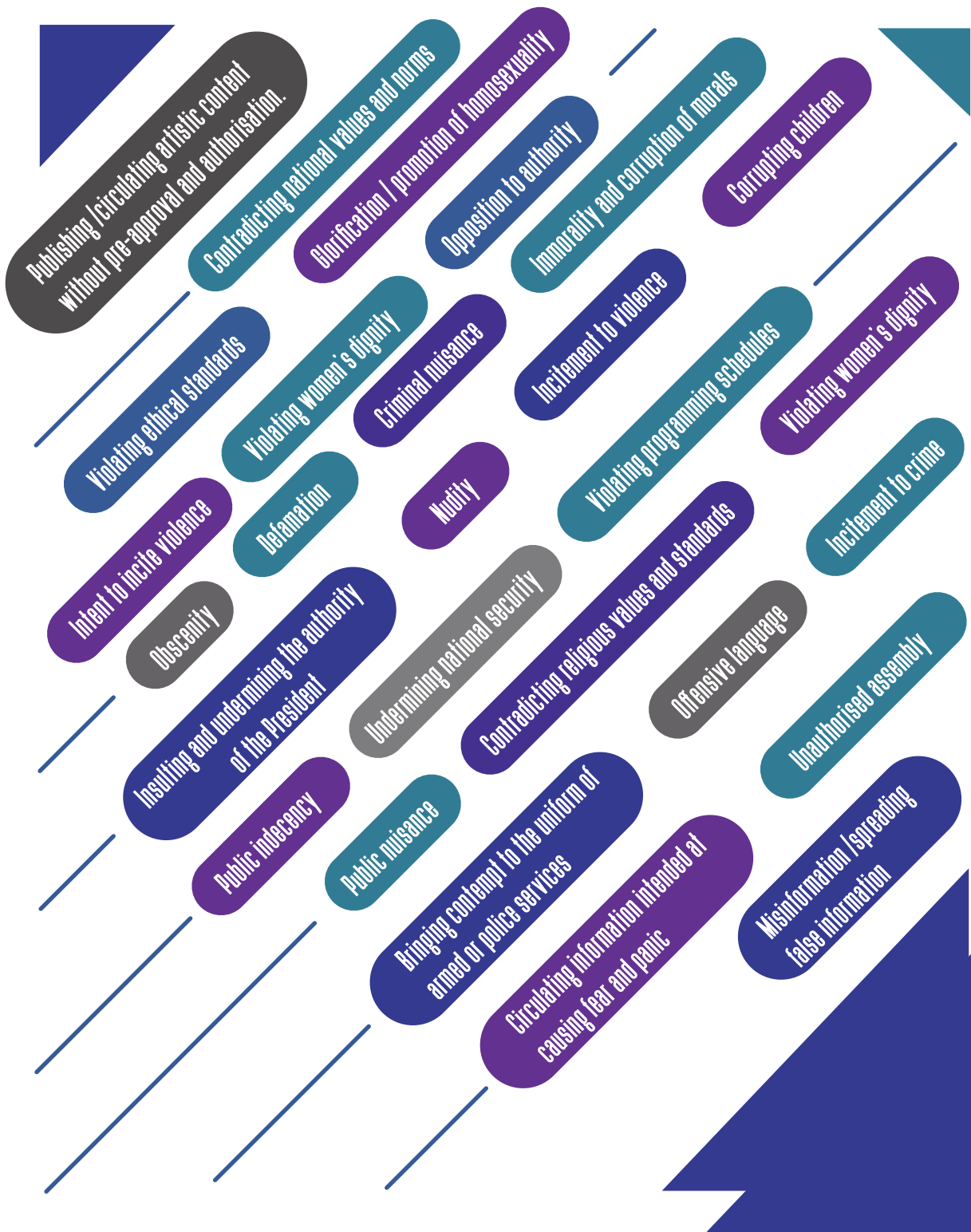
The Penal Code (or its equivalent in criminal law) was applied in at least 9 countries, making up 35% of the artistic freedom cases documented by Nhimbe Trust between January 2022 - December 2023



Case Spotlight

At least 3 musicians were prosecuted in Tanzania under the country's Cybercrime Act of 2014, on charges of using the lyrical content of their songs to spread false information against the government

Justifications Predominantly Applied in Restricting Artistic Freedom, In Reference to Regulatory Frameworks





Research Spotlight

Indecency as it relates to what is morally acceptable, as a matter of law, national identity and societal standards (including religion) applied to 52% of the artistic freedom cases documented by Nhimbe Trust between January 2022 - December 2023



Artists' Socio-Economic Rights



Zimbabwe: Artistic Freedom as a Matter of Socio-Economic Rights

"The advancement of artistic freedom is essential to protect and promote the diversity of cultural expressions. Without freedom or the social and economic conditions necessary to survive while creating, artists cannot produce meaningful works of art." UNESCO Reshaping Cultural Policies 2022.

Nhimbe Trust programming has predominantly prioritised artistic freedom as a matter of expression, without spotlighting the socio-economic rights of artists and cultural professionals. In addressing this gap, Nhimbe Trust piloted an initiative on decent work which had broader considerations of:

- (a)** The practicalities of asserting decent work agendas in highly informalised creative economies that are characterised by non-standard forms of employment
- (b)** The mutable and subjective meanings artists and cultural professionals attach to decent work and decent employment when they are exposed to environments where there are weak legal and social protections, and where there is limited-to-complete-disregard of aligning human rights to labour standards
- (c)** What the concept and practice of cultural and creative industries means within the context of labour and workers' rights within this industry framework
- (d)** Efforts advanced by cultural and creative sectors to implement and monitor the implementation of SDG 8

As part of the decent work initiative on artists' socio-economic rights, Nhimbe Trust provided workshop facilitation expertise to Chenhaka Trust, under Chenhaka's project *Performing Arts Business and Digital Distribution*, funded by the Sound Connects Fund. The project was aimed at increasing artists' efficiency and business competitiveness. The following profile cards represent workshop participants' income profile.

Zimbabwe: Artistic Freedom as a Matter of Socio-Economic Rights



Age: 37

Gender: Female

Experience in years: Not provided

What does work mean to you: Meaningful. It puts food on the table

Least amount received as payment: T-shirts

Maximum amount received as payment: US\$100 per show (approximately 92 euros)

Age: 25

Gender: Not provided

Experience in years: 9

What does work mean to you: It is an important instrument that I use to push social, economic and political change, and understanding the rural Matabeleland North

Least amount received as payment: US\$20

Maximum amount received as payment: US\$250 (approximately 230 euros)



Age: 31

Gender: Female

Experience in years: 1 year

What does work mean to you: My work means a lot to me because it affords me an opportunity to send my children to school and feed them

Least amount received as payment: Food

Maximum amount received as payment: US\$40 (approximately 37 euros)



Age: 27

Gender: Female

Experience in years: Not stated

What does work mean to you: My work means a lot to me that is why I was inspired. I went to a festival competition when I was 6 months pregnant. I am so proud of my work because others at my age did not get a chance to have work like me

Least amount received as payment: Food hamper

Maximum amount received as payment: US\$200 (approximately 184 euros)

Age: 26

Gender: Not stated

Experience in years: 3 years

What does work mean to you: It means life / world

Least amount received as payment: US\$5

Maximum amount received as payment: US\$150 (approximately 138 euros)



Age: 35

Gender: Male

Experience in years: Not stated

What does work mean to you: The work reflects my personality that I have inside, to be a role model and change everyone's life

Least amount received as payment: Getting nothing at all

Maximum amount received as payment: US\$500 (approximately 460 euros)




Zimbabwe: Artistic Freedom as a Matter of Socio-Economic Rights




Age: 22
Gender: Female
Experience in years: 2 years
What does work mean to you: It means everything to me
Least amount received as payment: US\$5
Maximum amount received as payment: US\$150 (approximately 138 euros)




Age: 26
Gender: Female
Experience in years: 11 years
What does work mean to you:
Least amount received as payment: US\$5
Maximum amount received as payment: US\$300 (approximately 276 euros)



Age: 30
Gender: Male
Experience in years: 14 years
What does work mean to you: Not stated
Least amount received as payment: Meat
Maximum amount received as payment: US\$700 (approximately 92 euros)



Age: 50
Gender: Male
Experience in years: 13 years
What does work mean to you: I consider it a gateway to success. I take it seriously. I was confined to a classroom making peanuts. I wanted to explore the world and make money for my children. I want to be an inspiration to the next generation.
Least amount received as payment: US\$5
Maximum amount received as payment: US\$500 (approximately 460 euros)



Age: 50
Gender: Female
Experience in years: 36 years
What does work mean to you: Business
Least amount received as payment: US\$50
Maximum amount received as payment: US\$5 000 (approximately 4 600 euros)



Age: 41
Gender: Female
Experience in years: 13 years
What does work mean to you: Its entertainment and a part time job
Least amount received as payment: US\$200
Maximum amount received as payment: US\$2 500 (approximately 2 300 euros)



Zimbabwe: Artistic Freedom as a Matter of Socio-Economic Rights



Age: 28

Gender: Male

Experience in years: 9 years

What does work mean to you: To me it is not only work but a lifestyle. I don't do it because I was told to but because I want to

Least amount received as payment: US\$5

Maximum amount received as payment: US\$20 (approximately 18 euros)



Age: 35

Gender: Female

Experience in years: 4 years

What does work mean to you: It means a lot to me

Least amount received as payment: Not stated

Maximum amount received as payment: US\$250 (approximately 230 euros)



Age: 39

Gender: Female

Experience in years: 22 years

What does work mean to you: It is my bread and butter. Source of livelihood

Least amount received as payment: Food hamper and US\$1

Maximum amount received as payment: US\$300 (approximately 276 euros)



Age: 37

Gender: Female

Experience in years: 20 years

What does work mean to you: It means life

Least amount received as payment: US\$2

Maximum amount received as payment: US\$300 (approximately 276 euros)



Age: 31

Gender: Female

Experience in years: 10 years

What does work mean to you: Educating and making a living

Least amount received as payment: Meat

Maximum amount received as payment: US\$1 000 (approximately 920 euros)



Age: 18

Gender: Female

Experience in years: Not stated

What does work mean to you: Source of income

Least amount received as payment: US\$5

Maximum amount received as payment: US\$200 (approximately 184 euros)



Zimbabwe: Artistic Freedom as a Matter of Socio-Economic Rights

Age: 28

Gender: Female

Experience in years: 10 years

What does work mean to you: My work is everything to me. Whenever I am at work I feel happy because I love what I do

Least amount received as payment: US\$10

Maximum amount received as payment: US\$300 (approximately 276 euros)



Age: 26

Gender: Female

Experience in years: 5 years

What does work mean to you: I take my work seriously and I love it like my own baby because that is where my income comes from

Least amount received as payment: US\$25

Maximum amount received as payment: US\$150 (approximately 138 euros)



Age: 22

Gender: Female

Experience in years: 17 years

What does work mean to you: I started from when I was a toddler and I love my work

Least amount received as payment: No payment

Maximum amount received as payment: US\$200 (approximately 184 euros)



Age: 31

Gender: Female

Experience in years: 15 years

What does work mean to you: It means everything to me because I do it with all my heart. I love it

Least amount received as payment: A meal with beef stew and a drink

Maximum amount received as payment: US\$231 (approximately 212 euros)



Age: 72 years

Gender: Female

Experience in years: 32 years

What does work mean to you: I am proud of my work. It reminds of traditional cultures of my ancestors and it give children knowledge about their roots

Least amount received as payment: Not stated

Maximum amount received as payment: US\$150 (approximately 138 euros)



Age: 19

Gender: Female

Experience in years: 3 years

What does work mean to you: My work is my source of income where I can show out the real me to the world, what really makes me happy, what I enjoy today

Least amount received as payment: US\$20

Maximum amount received as payment: US\$200 (approximately 184 euros)



Zimbabwe: Artistic Freedom as a Matter of Socio-Economic Rights



Age: 20
Gender: Female
Experience in years: 8 years
What does work mean to you: It means getting an income that will help me reach my needs as a girl child, rather than engaging in wrong deeds. Its also a way of expressing myself
Least amount received as payment: US\$5
Maximum amount received as payment: US\$100 (approximately 92 euros)



Age: 35
Gender: Male
Experience in years: 15 years
What does work mean to you: A lot. Money, happiness and inspiration to future generations
Least amount received as payment: Exposure
Maximum amount received as payment: US\$500 (approximately 460 euros)

Age: 24
Gender: Female
Experience in years: Not stated
What does work mean to you: It means generating income to pay school fees
Least amount received as payment: Food as lunch
Maximum amount received as payment: US\$200 (approximately 184 euros)



Age: 23
Gender: Female
Experience in years: 1 year
What does work mean to you: My work means a lot to me because I love what I do and it makes me remember my historical background
Least amount received as payment: T-shirts and a meal
Maximum amount received as payment: US\$100 (approximately 92 euros)



Age: 43
Gender: Female
Experience in years: 25 years
What does work mean to you: Not stated
Least amount received as payment: US\$3
Maximum amount received as payment: US\$270 (approximately 248 euros)



Age: 22
Gender: Female
Experience in years: 2 years
What does work mean to you: It means a lot to me because it reminds me of my grandparents who set the foundation for me
Least amount received as payment: US\$10
Maximum amount received as payment: US\$250 (approximately 230 euros)



Zimbabwe: Artistic Freedom as a Matter of Socio-Economic Rights

Age: 24

Gender: Male

Experience in years: 8 years

What does work mean to you: My job is my world to me. I saw the gift I had and when I learnt that I could make a living out of it I followed my passion

Least amount received as payment: Sachet of soup

Maximum amount received as payment: US\$200 (approximately 184 euros)



Age: 26

Gender: Female

Experience in years: 8 years

What does work mean to you: My work is my source of income. At the same time I am passionate about it

Least amount received as payment: No payment

Maximum amount received as payment: US\$150 (approximately 138 euros)



Age: 18

Gender: Male

Experience in years: Not stated

What does work mean to you: It means more than work to me because it has taken me to places I never thought to reach

Least amount received as payment: US\$5

Maximum amount received as payment: US\$100 (approximately 92 euros)



Artists Speak: "This Is What People Think My Work Is..."



Something reserved for people with an ancestral calling

For the uneducated

Not a permanent job

Does not have a pay slip

Prostitution

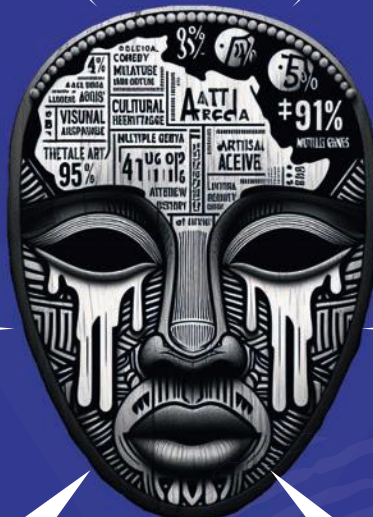
Exposure to prostitution

For the poor who have no other means of making an income

Something done by people who have ill-disciplined and immoral

A hobby

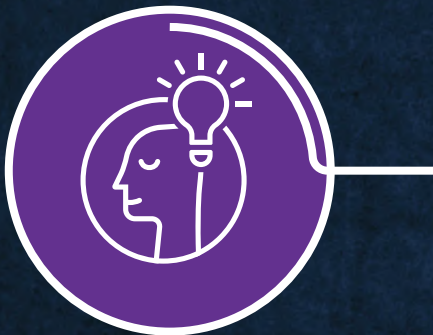
An easy craft that does not require any training, certification and qualifications





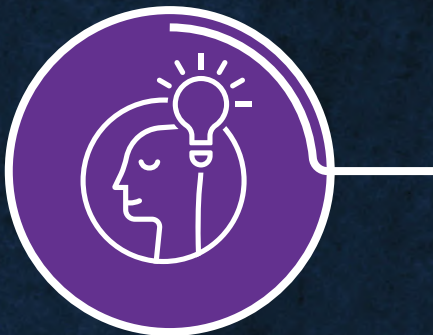
Did you know?

Public perception that artists are uneducated and not workers in the strictest sense impacts their remuneration, their recognition as workers and the assertion of their rights.



Did you know?

The perception that female artists are prostitutes and women of loose moral has a direct bearing on their treatment in the workplace, their remuneration and their social understanding. The way they are regarded compromises their security and safety, increasing their susceptibility to abuse, harassment and sexual violation.



Did you know?

In the performing arts sector, most artists are remunerated as and when there is a 'gig' secured. Absence from work translates to non-remuneration. Consequently, women perform while pregnant and return to work immediately after giving birth to secure the much-needed income. Paid maternity leave is yet to be a reality for most performing artists.



Did you know?

Some artists who perform in restaurants and entertainment clubs get meals and alcohol as payment.

Did you know?

Night clubs and other night events /festivals are some of the biggest and most consistent employers in the performing arts sector. In the absence of contractual obligations that address safety and security in relation to transportation, the vulnerabilities of female artists are heightened in their use of public transportation at night. Public transportation in this context mostly takes the form of privately owned vehicles that are not registered and approved for passenger transportation, and are pirated by their owners during the night to evade the scrutiny of law enforcement officers.



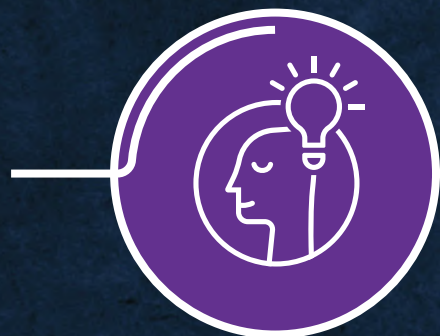
Did you know?

Inconsistent remuneration may make artists ineligible for medical aid and funeral policies. Lapses in policy contributions have consequences of policy termination, ineligibility for some benefits, and penalties. These punitive measures for payment inconsistencies make policies undesirable, undermining social security and artists' welfare.



Did you know?

Some artists prefer verbal contracting because they consider written contracts to be administratively cumbersome vis-à-vis the amount on offer as remuneration.



Innovative Approaches Taken by Artists as Individuals and Collectives, to Address Challenges Encountered



Challenge: *Safety and security of artists*

Solution:

Appointment of gender officers from the team / group, tasked with advising on gendered safety standards



Challenge: *Inconsistent income*

Solution:

Investing performance fees in small businesses (mainly poultry, public transportation, grocery supply) for the generation of income whose profits are shared equally among the group



Challenge: *Welfare and social security*

Solution:

Creating or joining small groupings / cooperatives that contribute towards specific causes. Popular groupings are burial societies (specific to covering funeral costs), money clubs with rotational pay-outs and food clubs involving monthly contributions that are used to purchase groceries that are then shared among members at the end of the year.



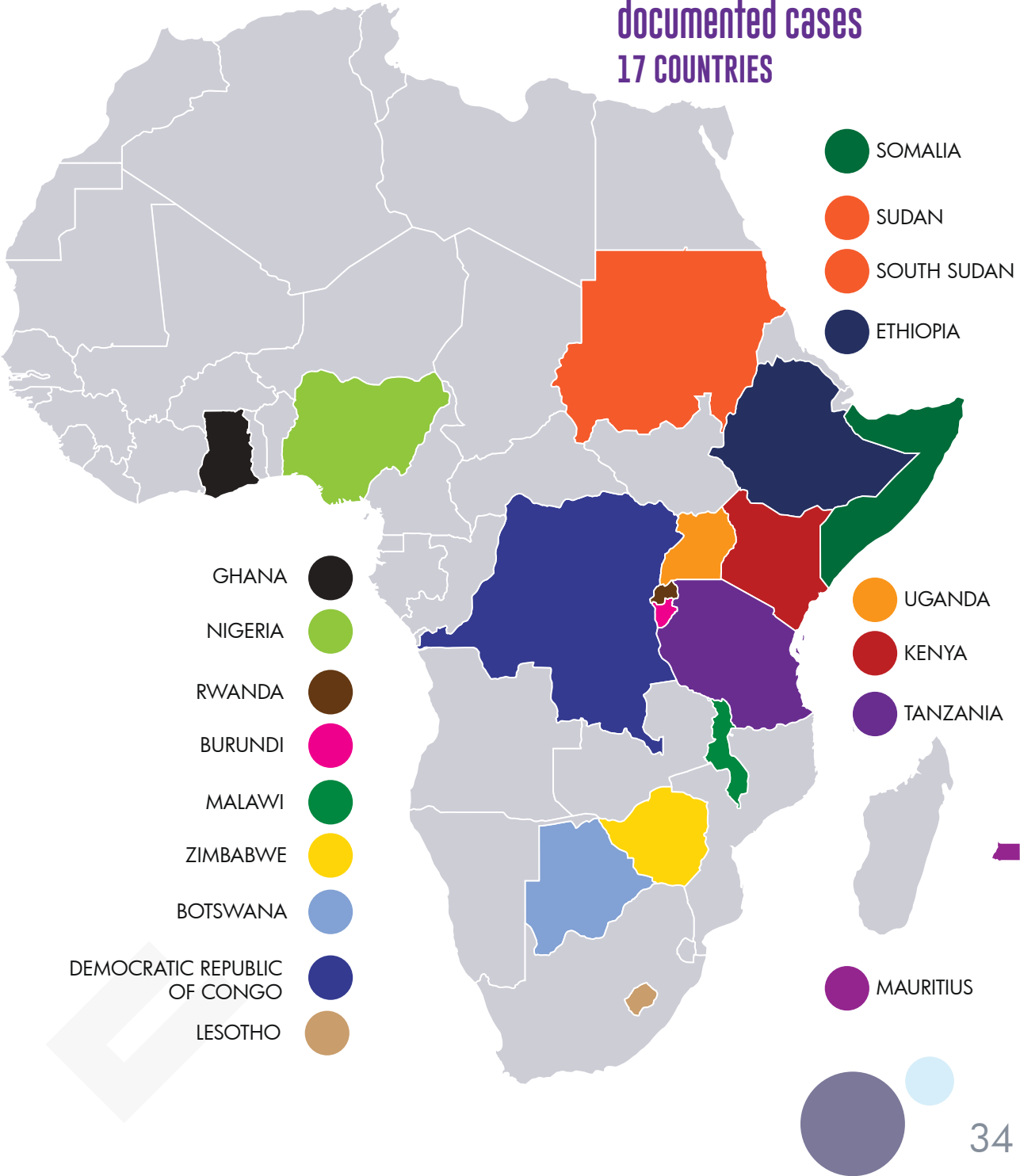
Challenge: *Inadequate remuneration*

Solution:

Creation of rate cards that are shared with clients, for the standardisation of remuneration

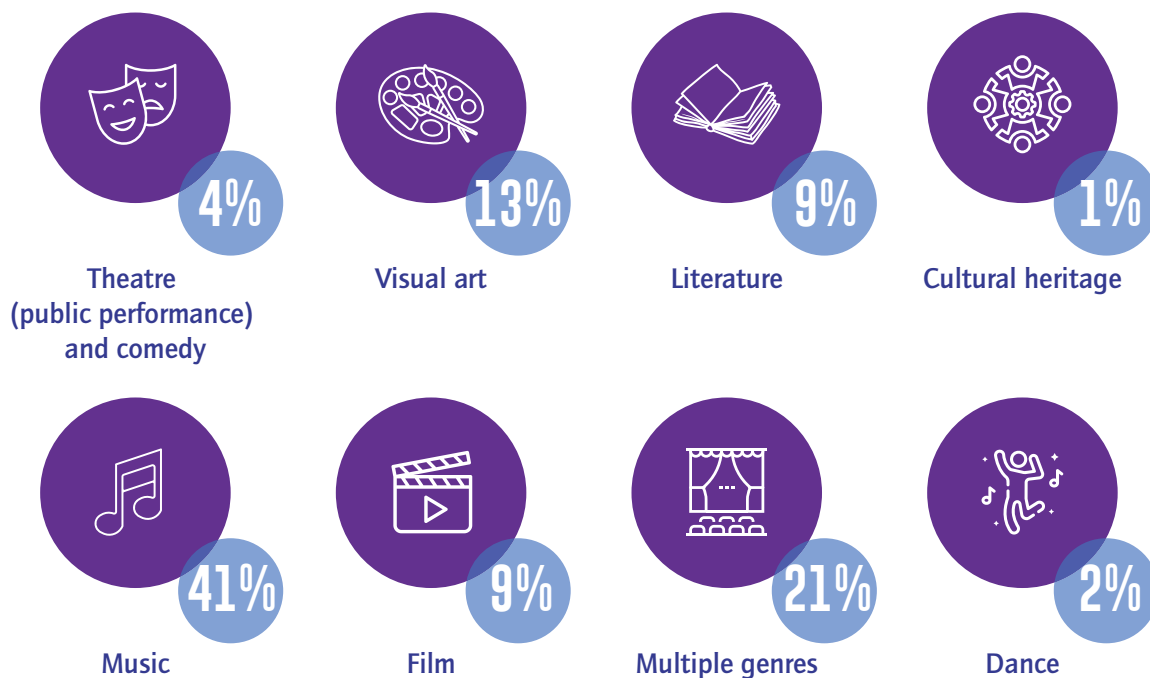
Presentation of Documented Artistic Freedom Cases: January 2022 – December 2023

196
documented cases
17 COUNTRIES



Genres

196
documented cases
17 COUNTRIES



Violations Recorded

Government: **85%**

Unknown: **2%**

Private individuals / groupings: **5%**

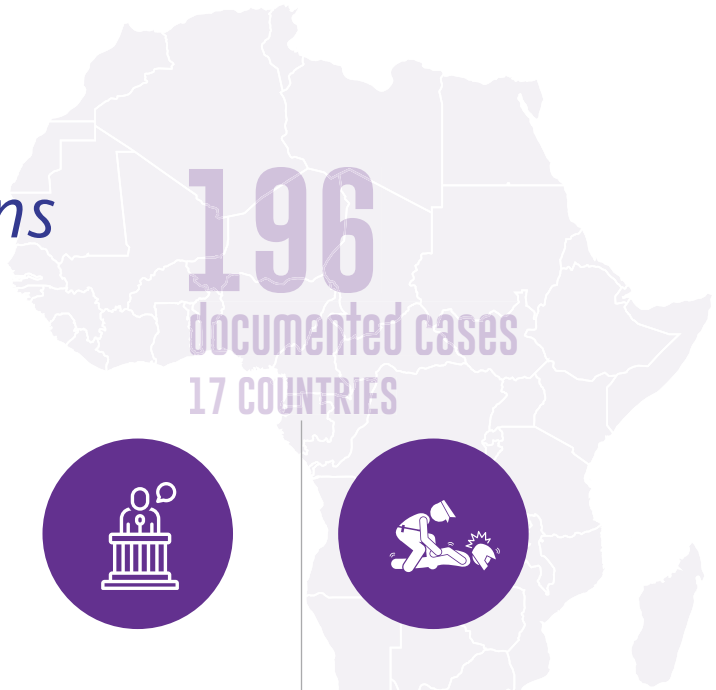
Political groupings: **2%**

Religious groupings: **4%**

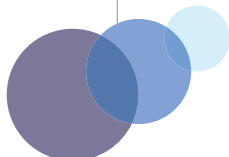
Private entities under pressure: **1%**

Criminal gangs: **1%**

Nature of Violations



 <p>Physical attacks</p>	 <p>Detention</p>	 <p>Detention combined with prosecution</p>	 <p>Death while in detention</p>
 <p>Prosecution</p>	 <p>Blanket ban</p>	 <p>Censorship</p>	 <p>Travel ban</p>
 <p>Threats</p>	 <p>Confiscated / destroyed artworks</p>	 <p>Abductions</p>	 <p>Fines / sanctions</p>
	 <p>Persecution</p>	 <p>Prison sentence with an option of settling a fine</p>	



Nature Of Non-Violations



Attempted censorship



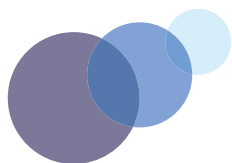
New legislation /
measures



Positive court
decisions



Self-censorship



Patterns of Detention

1

artist died while in detention

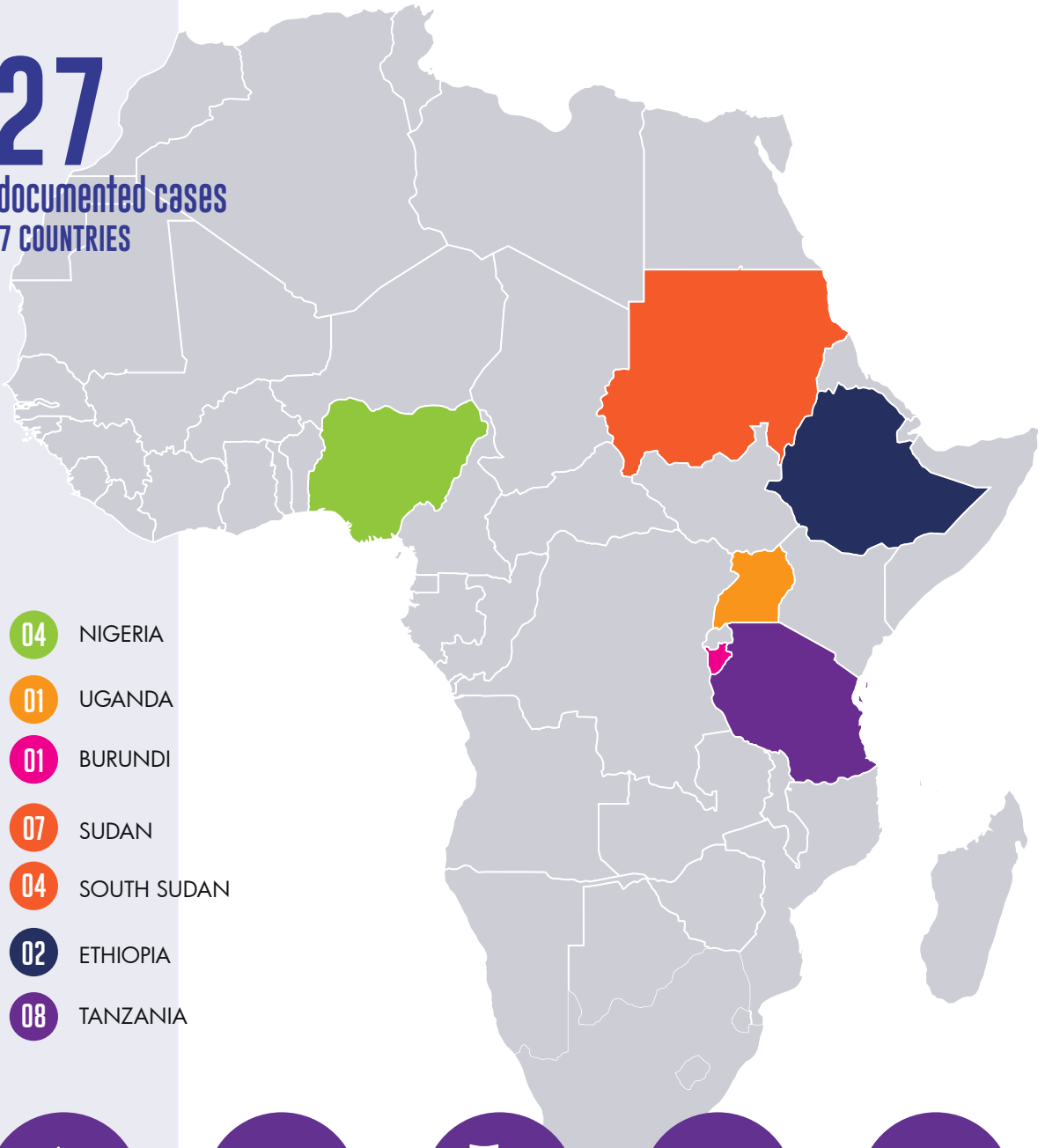
3

cases had the direct involvement of specialised state security and intelligence units

1

case involved detention by the army

27
documented cases
7 COUNTRIES



- 04** NIGERIA
- 01** UGANDA
- 01** BURUNDI
- 07** SUDAN
- 04** SOUTH SUDAN
- 02** ETHIOPIA
- 08** TANZANIA



Visual art

7 detention cases



Theatre
(festival performance)

1 detention case



Comedy

2 detention cases



Music

15 detention cases



Multiple genres

1 detention case

In relation to music

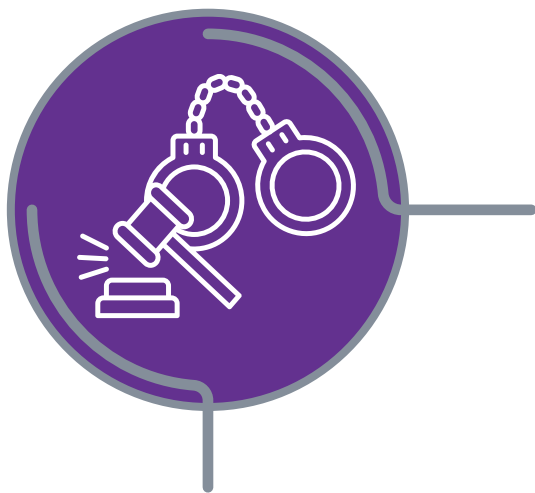


27
documented cases
7 COUNTRIES



Reasons for detention in the 27 documented cases

- 1** *Artistic commentary on ongoing conflicts*
- 2** *Indecency as it applies to religious standards*
- 3** *Indecency as it applies to morally acceptable language*
- 4** *Politically conscious artistic expression / political commentary*
- 5** *Failure to consult the police for artistic expression authorisation*
- 6** *Defaming state officials*
- 7** *Suspected gangsterism*
- 8** *Wearing uniforms resembling those of existing law enforcement agencies, in artistic creations*



Case Spotlight

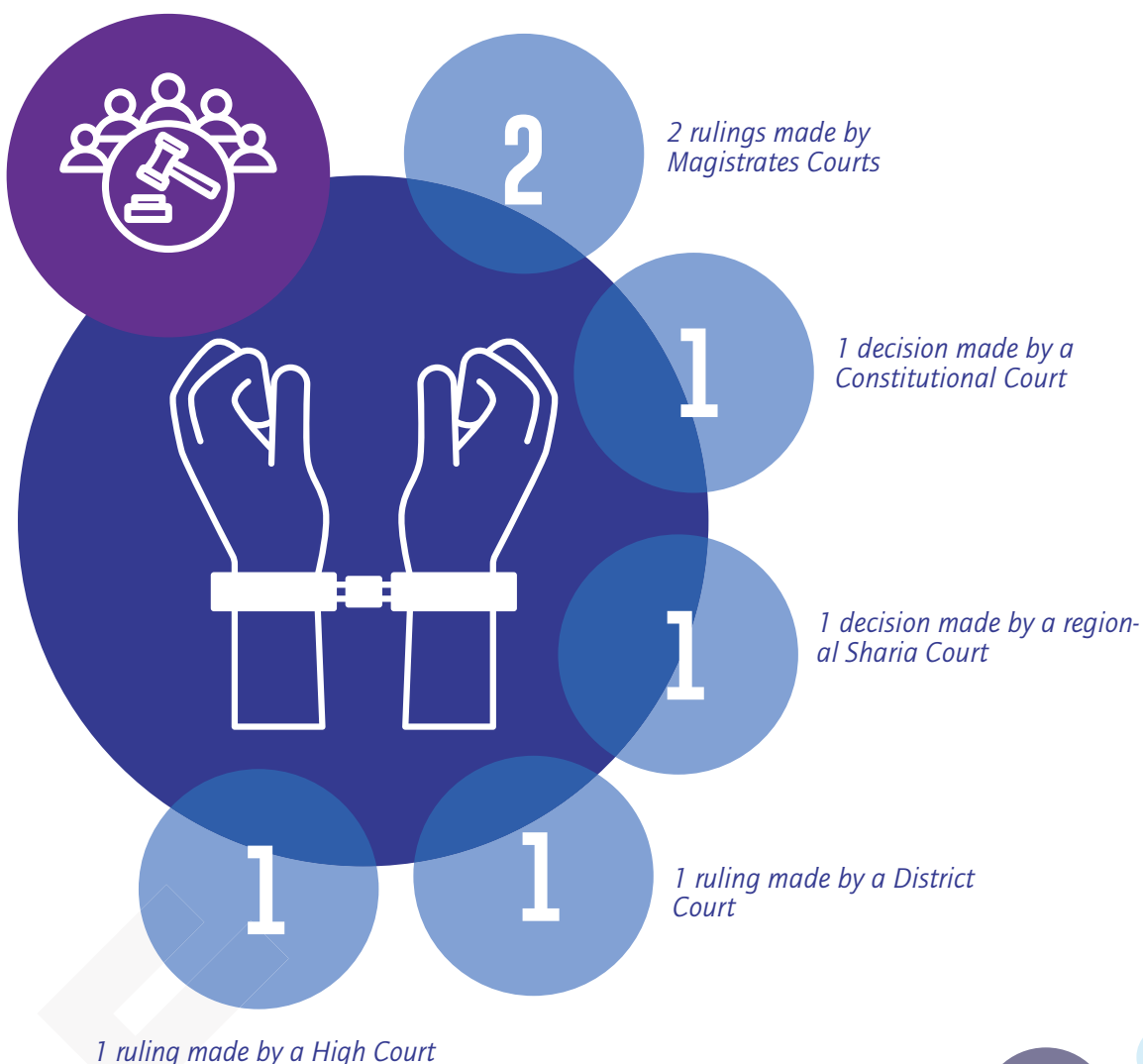
6 visual artists were detained for memorialising individuals who had died challenging military rule. They had painted the faces of the deceased on city walls. An art gallery exhibition portraying the detention experiences of these artists was then raided by the police, with those in attendance detained. The art was confiscated, and some destroyed.

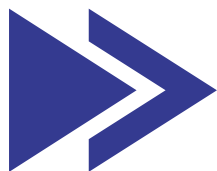
27

documented cases
7 COUNTRIES

Court Decisions in Cases Involving Artists or Their Artistic Content

6 documented cases
3 COUNTRIES





Spotlight Case



Upper Sharia Court, Nigeria: Order to arrest and investigate 10 TikTok skit-makers who were accused of indecency and the corruption of youth through 'immoral behaviour and dancing' exhibited in skits



Spotlight Case

Magistrates Court, Zimbabwe: Guilty verdict for a novelist charged with incitement of violence in an anti-corruption protest march



Spotlight Case

High Court, Zimbabwe: Acquittal of a novelist on charges of incitement of violence, a reversal of a Magistrates Court judgment which had a guilty verdict



Spotlight Case

Magistrates Court, Nigeria: Guilty verdict for 2 comedians who were charged with defamation for a skit which called a political leader corrupt



Spotlight Case

Constitutional Court, Zimbabwe: Rejection of a court challenge seeking to reverse a decision made by a censorship body to ban a film



Spotlight Case

District Court, Tanzania: Guilty verdict for a musician charged with spreading false information about the country's President in a song



Illustration of Punishments given to Artists, for Artistic Content



PUNISHMENT	(ALLEGED) OFFENCES
Psychiatric evaluation of state of mind	Exhibiting 'immoral behaviour,' in TikTok skits, contrary to Muslim standards of decency
Warrant of arrest for an international artist	Exhibition of 'indecent' dances in previous performances done in the country, contrary to the country's 'ethics'
Classification as a wanted person	Failure to submit artistic content for approval, prior to dissemination
Fined 1 806 euros, 362 euros and 1 084 euros	Violating the dignity of women in a song portraying a rape scenario
Banned from engaging in artistic activities for periods ranging between 3 and 6 months (decision later reversed)	Violating the dignity of women in a song portraying a rape scenario
Travel ban for an international artist, under immigration laws	Flaunting 'nudity' while performing
Banned from a movie production	Failure to secure male spouse's permission prior to being in the production, in conformity to regional 'Muslim' standards
Suspension from engaging in artistic activities	Publishing content without prior authorisation
Prison sentence of 6 years, with an option of settling a fine of 3 612 euros in place of imprisonment	Spreading 'false information' about the country's President in a song decrying the socio-economic status of the country
Police order to register with a censorship body Fine for more than 100 videos already posted online without authorisation	Publishing artistic content without prior-authorisation

Everyone's Right to Access Cultural Life under the Spotlight

Cultural rights form part of the international and the African human rights law. They are protected in the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights. They are also protected in the African Charter on Human and Peoples' Rights. Amongst many other entitlements and protections, they guarantee individuals and communities the right to take part in and to advance cultural life of their choice in accordance with international human rights norms and standards.

Additionally, although artists are predominantly the subject of focus in artistic freedom research and discourse due to their unique positionality as creators, distributors and consumers of art, it should be recalled that artistic freedom also entails the right of everyone to enjoy cultural life. At the core of this right is the freedom to imagine, create, distribute and access art without undue interference.


"The right of everyone to take part in cultural life is closely linked to the enjoyment of other rights recognized in the international human rights instruments. Consequently, States parties have a duty to implement their obligations under article 15, paragraph 1 (a), together with their obligations under other provisions of the Covenant and international instruments, in order to promote and protect the entire range of human rights guaranteed under international law... while account must be taken of national and regional particularities and various historical, cultural and religious backgrounds, it is the duty of States, regardless of their political, economic or cultural systems, to promote and protect all human rights and fundamental freedoms." UN Human Rights Council. ¹

In the period covered by this report, new measures were introduced, existing laws enforced and policies re-introduced by various stakeholders (predominantly state functionaries) to regulate cultural life and access to cultural life. A variety of reasons were cited for these actions. The cases under spotlight outline artistic freedom and cultural rights regulations that had a direct bearing on ordinary citizens who are non-artists, impacting their access to cultural life.

¹ See para 17-18 of General comment No. 21, Right of everyone to take part in cultural life (art. 15, para. 1a of the Covenant on Economic, Social and Cultural Rights), available at <https://www.refworld.org/docid/4ed35bae2.html>

Rwanda: Concert attendant arrested for wearing a translucent dress and charged with public indecency

On 7 August 2022, Rwanda National Police arrested concert attendant Liliane Mugabekazi and charged her under Article 143 of Rwanda Penal Code for public indecency, on grounds of a translucent dress she had won on 30 July 2022 at a Kigali concert by French musician Tayc. She reportedly was detained for 12 days and released on bail on 19 August 2022 following an in-camera bail hearing held at Kigali Kicukiro Primary Court. Prosecutors reportedly argued that this was a “serious crime.”



Ghana: Night entertainment events banned for alleged contribution to a decline in education standards

On 2 January 2022, the Office of the Paramount Chief in Tatale Traditional Area, Northern Ghana, banned the hosting of night entertainment events known as ‘night jamz’, alleging that the deterioration of education standards in the district was attributable to youth participation in these events, to the detriment of their studies. A written communique on the ban further announced that entertainment events would be permitted in the district from 6am to 6pm, with event organisers required to seek permission from the police service and the Office of the Paramount Chief, a political representative of traditional leadership.

Nigeria: Singing of Igbo songs banned at Holy Trinity Parish on claims that God does not recognise Igbo language

Between January 2022 and early February 2022, Reverend Father James Anelu of Holy Trinity Catholic Church in Ikorodu, Lagos State, banned the singing of Igbo songs in his parish, arguing that this would contain the dominance of the Igbo ethnic group and that God only recognises the dominant language of the geographic space within which a church is situated.

Nigeria: Traditional festival banned as means of curbing criminality

On 11 April 2022, Kano State Police banned Tashe, a traditional celebratory showcase which is performed by community members through theatre, song and dance every 10 days within the fasting month of Ramadan. In a statement, Kano State Police Command Spokesperson SP Abdullahi Haruna Kiyawa stated that the ban was on grounds of preventing criminal activities as Tashe gatherings were being exploited by criminals for thuggery, handset snatching and drug abuse.

Uganda: Performing artists banned from schools to secure child protection

On 1 August 2022, Uganda’s Ministry of Education and Sports banned the hosting of performing artists in schools, arguing that schools invite musicians who exhibit nudity and erotic dances under the pretext of extra-curricular activities. In a circular on behalf of the Permanent Secretary, Dr. Jane Egau Okou stated that the decision had been prompted by a 11 July 2022 viral video which pointed to the hosting of “unacceptable and offensive functions” in schools and was an execution of the ministry’s duty of being the “custodian of the values and behaviour of the children of Uganda while at school.”

Uganda: Festival ban by Parliament on grounds of contradicting national values reversed by Prime Minister

On 6 September 2022, the Parliament of Uganda banned Nyenge Nyenge music festival, citing that it promotes immorality, homosexuality and drug usage, contrary to Ugandan laws, culture and norms. The festival, which has been running since 2015 to promote electronic music by African artists, had been scheduled for 15-18 September 2022 in Jinja District, at the banks of the Nile. On 7 September 2022, however, Prime Minister Robinah Nabbanja announced that the ban had been reversed pursuant to inter-ministerial dialogue about the economic benefits of the festival, particularly within the context of post-COVID-19 recovery and the branding of Uganda as a tourism destination. The lifting of the ban was concomitant to several conditions which were also announced by Minister of Information Chris Baryomunsi on 12 September 2022. These conditions included the prohibition of minors, sex orgies, nudity, contraband and narcotic drugs, as well as a ban on vulgar language, expressions, songs and gestures. Penalties for lack of compliance were listed as sanctions, prosecution and / the immediate shut down of the festival, with the monitoring of compliance set to take the form of granting government officials and selected security personnel immediate access to the festival, when such a request or demand is made. Although these conditions were prescribed, event organisers as well as frequent attendants of the festival reportedly argued that these prohibited activities had never been a characteristic feature of the festival since its inception.

Nigeria: Public entertainment events banned to guarantee safety, peace and property protection

On 23 December 2022, Lagos' Itire Ikate Local Development Council Development Area banned carnivals, street jamz and public processions on grounds of curtailing criminality and fulfilling government's constitutional mandate of guaranteeing public safety, public peace and protection of property. Dr. Ahmed Apatira the council's Executive chairman stated that the decision had been consequent to the executive, legislative and management teams' review of the state of violence and property destruction that had previously characterised public events hosted during the festive holiday. He expressed that there was a concern that public events had become a haven of criminals and cultists.

Kenya: Ceremonies of bereavement banned on claims that they lead to early pregnancy and child abuse

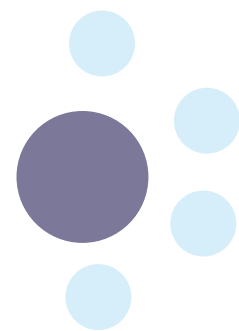
On 22 October 2023, Kilifi County Security Committee banned disco matangas in the county, arguing that they are attributable to increases in early pregnancies and children's sexual abuse. Chiefs and law enforcers were tasked with ensuring compliance. Disco matangas are ceremonies of bereavement that are characterised by music and dance, and are hosted on nights leading up to the burial of a deceased person.



Censorship Trends: Film and Music

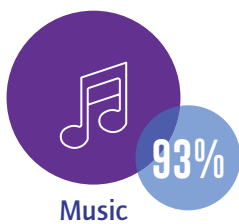
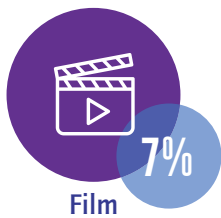
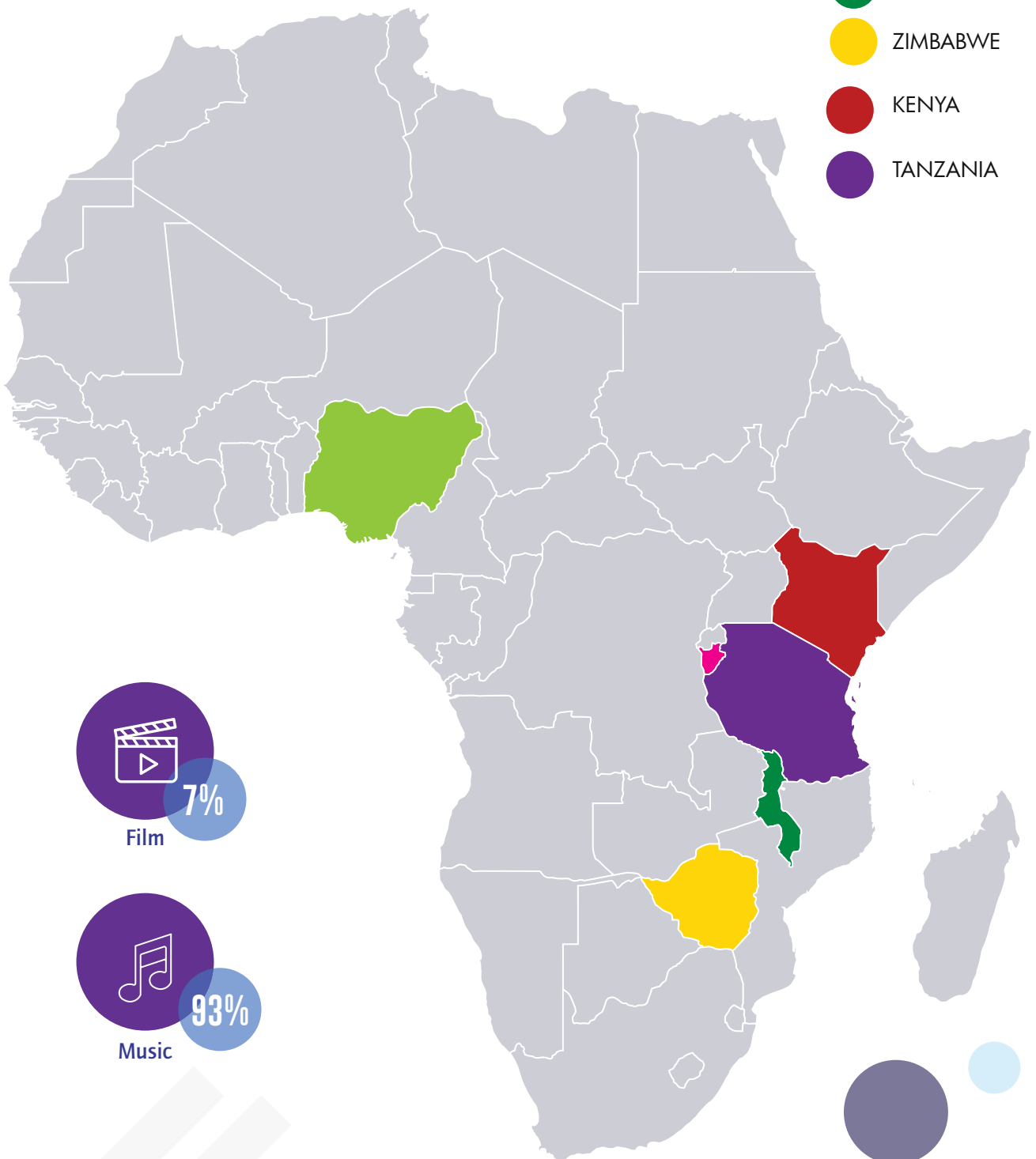
Protected under artistic freedom is the right to create without censorship. This however does not disqualify limitations to this right. Nhimbe Trust advocates for limitations that are exclusively done by courts of law and in conformity to the scope of limitations permitted by international law. State-sponsored censorship bodies and censorship functions executed by other state functionaries (including broadcasting regulators) are a characteristic feature of artistic freedom limitations in the region. Nhimbe Trust advocates for and supports advocacy efforts on:

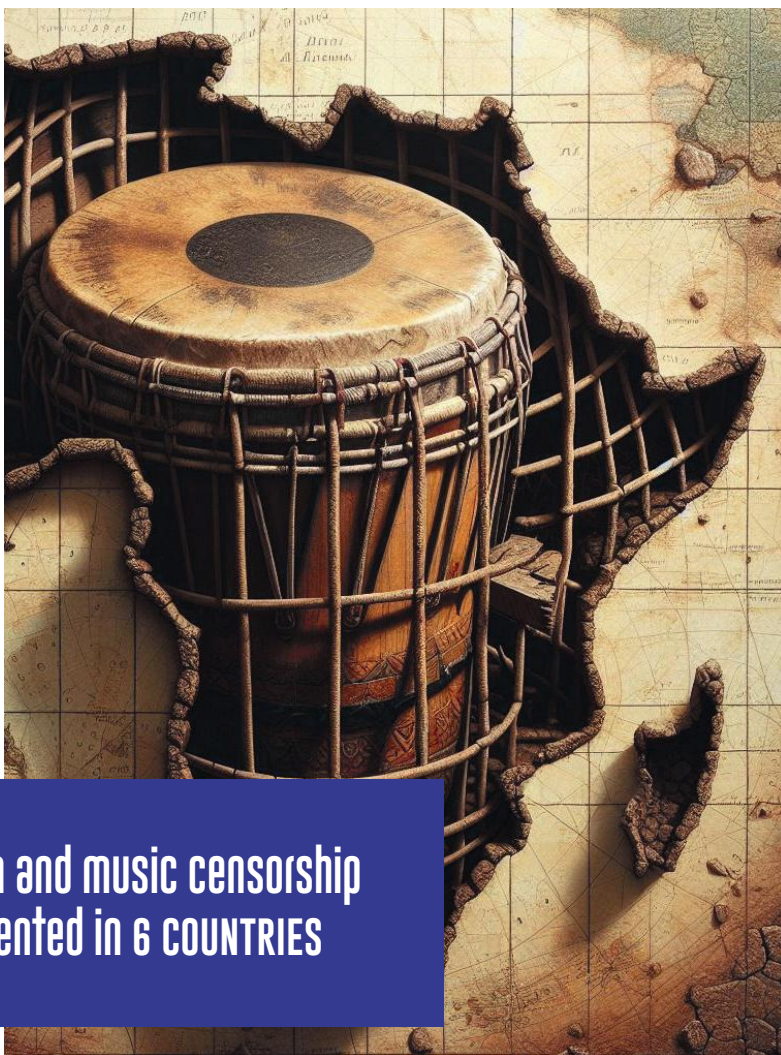
- a) the disbandment of censorship bodies
- b) the repealing of censorship laws or measures that may be enforced to unduly limit free artistic expression
- c) the impermissibility of arbitrarily introducing and implementing measures / policies that unduly restrict artistic freedom
- d) investigating and prosecuting law enforcement agents implicated in violating artistic rights and artists' rights



44 cases of film and music censorship were documented in 6 countries

- NIGERIA
- BURUNDI
- MALAWI
- ZIMBABWE
- KENYA
- TANZANIA





44 cases of film and music censorship were documented in 6 COUNTRIES



Censorship by censorship / classification bodies:

8 cases

Censorship involving cooperation between a censorship body and a drug enforcement agency:

1 case

Censorship by media / broadcasting regulatory bodies:

33 cases

Censorship by an agency regulating arts and culture activities:

1 case

Censorship by an unnamed government authority:

1 case

State-Sponsored Artistic Freedom Restrictions (Across Genres)



141 documented cases
16 COUNTRIES



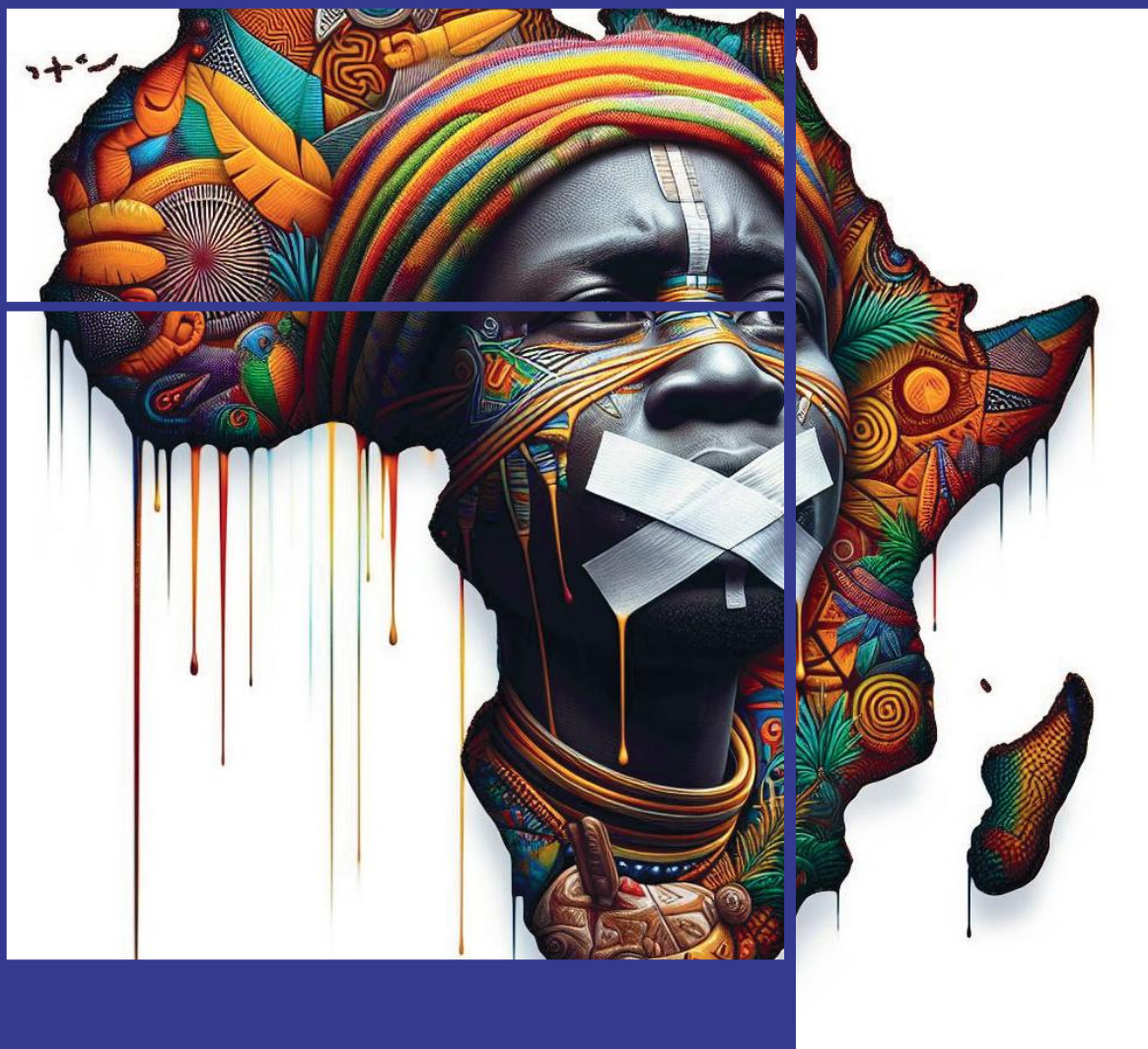
Restrictions involving censorship bodies: **12%**
 Restrictions involving the police: **35%**
 Restrictions involving decisions made by Parliament: **1%**
 Restrictions involving decisions taken directly by ministries: **15%**
 Restrictions involving unnamed government authorities: **3%**
 Restrictions involving local government: **2%**
 Restrictions involving specialised security units, including the army: **2%**
 Restrictions involving media / broadcasting regulatory bodies: **30%**



Case Spotlight

A case of artistic authenticity vs. public order maintenance

An artist was arrested by the police at a festival, following a public performance in which he had fictionally created a stabbing wound with a panga that seemed to have penetrated his entire body from the stomach. He was detained and released on charges of misrepresenting himself and engaging in risky behaviour, in the absence of informing the police for their prior approval. In his performance, the artist had sought to engage festival attendants on how wounds are created in films and further ascertain how police and medical personnel would react to an injury at the festival. On his release, the artist argued that prior engagement with the police for authorisation and awareness would have defeated the aim and intended outcome of his performance.



Digital Trends

The increased use of and reliance on digital platforms for information dissemination and information access has been attendant to the regulation of expressions posted online. The digital policing of artists and their content has been through cyber laws, censorship laws and other regulatory means, as legitimated by existing laws or the scope of operational functions of regulatory authorities. Although human rights law permits restrictions to free expression, there increasingly is growing concern that the regulation of online platforms by governments and government functionaries does not conform to legitimate restriction and is consistently instrumentalised to silence dissent and monitor the online activities of government critics. Within the context of artistic practice, digital regulation is disproportionately enforced to crackdown on politically conscious artists and artistic creations, as well as content deemed immoral and contrary to 'national values.'



38

cases involving digital space regulation documented in 5 countries



Tanzania



South Sudan



Ethiopia



Nigeria



Kenya

of the **38** documented cases

64% related to artistic content posted on YouTube

34% related to artistic content posted on TikTok

2% related to artistic content posted on Amazon Prime and Instagram



29
cases

Music



3
cases

Film



1
case

Multiple genres



5
cases

Comedy



For artistic content posted online and deemed problematic:



Imprisonment with an option of paying a fine: 1 case



Detention: 5 cases, with 4 prosecuted



Censorship: 9 cases



Prosecution: 3 cases



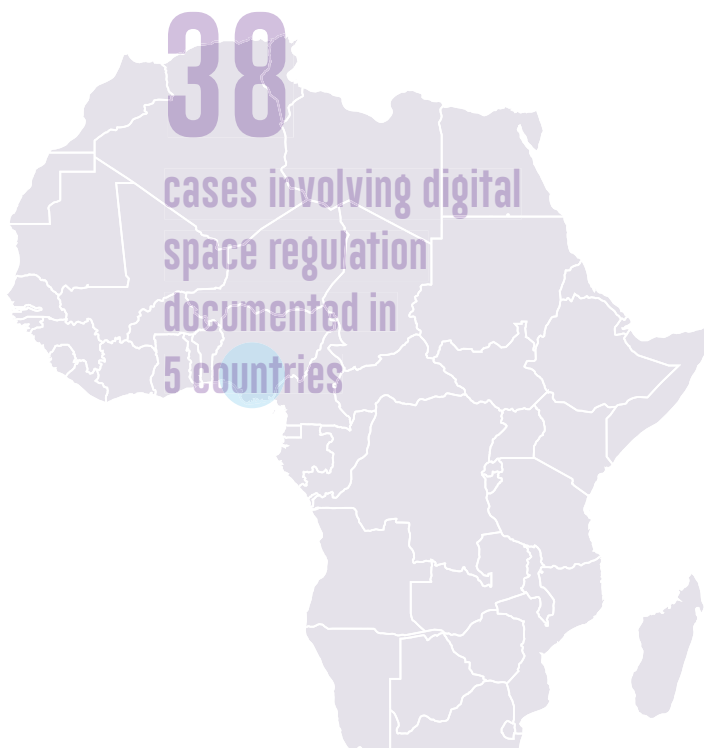
Physical attacks: 1 case

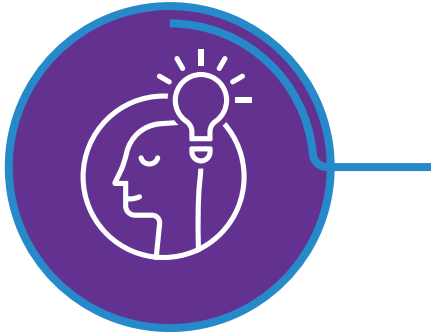


Fines / sanctions: 5 cases



Persecution: 14 cases



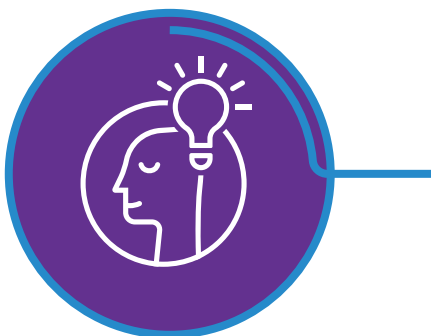


Did you know?

There are at least 2 draft laws on digital regulation under consideration in at least 2 countries (Lesotho and Nigeria)

Lesotho: A Computer Crime and Cybersecurity Bill grants the state authority to monitor cyberspace for the detection of crimes and imposition of penalties. It also establishes a National Cybersecurity Advisory Council which among other functions, provides technical expertise to law enforcement agencies on cyber specific crimes.

Nigeria: A bill repealing and amending the National Broadcasting Act CAP L11 of 2004 seeks to extend the mandate of the National Broadcasting Commission to digital streaming regulation and social media oversight, permitting government to censor social media content and mandate social media users to register with government.



Did you know?

Uganda: On 14 October 2022, President Yoweri Museveni signed into law the Computer Misuse (Amendment) Act 2022, an amendment of the Computer Misuse Act 2011. The law expands the scope of information technology regulation to social media and addresses data access, data sharing, child protection and hate speech. The reputational damage of individuals and identity groups is protected by the law through the criminalisation of information that ridicules, degrades, demeans, creates divisions or promotes hostility. Of concern is that in practice, provisions protecting the reputational damage of individuals are instrumentalised to mute the criticism of government and political elites, including the President's family.



Good to know

Nigeria: On 25 March 2022, the Court of the Economic Community of West African States ruled that Section 24 of Nigeria's Cybercrime Act 2015 was inconsistent with freedom of expression guarantees provided for in the African Charter on Human and People's Rights and in the International Covenant on Civil and Political Rights. The section dealt with cyberstalking, criminalising the digital publication of information that is false, aggravating, has pornographic material and amounts to cyberbullying. The government of Nigeria was ordered to amend the law in conformity to international human rights obligations and commitments



Good to know

Uganda: On 10 January 2023, a panel of five judges of Uganda's constitutional court unanimously ruled that Section 25 (offensive communication) of Uganda's Computer Misuse Act 2011 was unconstitutional and should cease to be enforced. The provision was found to be "vague and overly broad to define the actual offence committed." At least 2 Uganda artists had previously been prosecuted under this provision, for artistic works critical of government and the President.



Physical Attacks

04

documented cases
03 COUNTRIES



Zimbabwe



Tanzania



Kenya

1 musician was attacked by a private individual while performing on stage, through the hurling of an object that was suspected to be a stone

1 politically conscious musician was manhandled and marched off stage by the police while performing, with the police stating that they were conducting a drug raid

1 comedian was attacked for a joke shared in public transportation

1 comedian was attacked for mocking a known person in a skit posted on Instagram



50%

Music



50%

Comedy





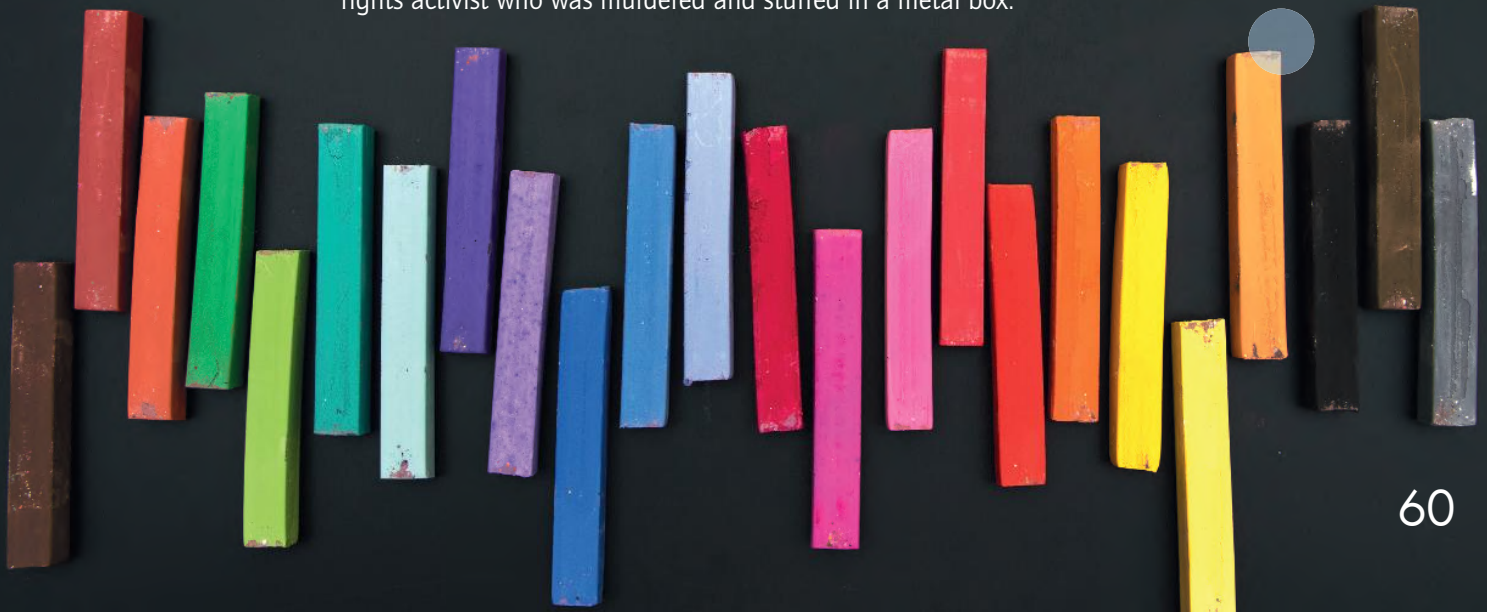
Spotlight Case

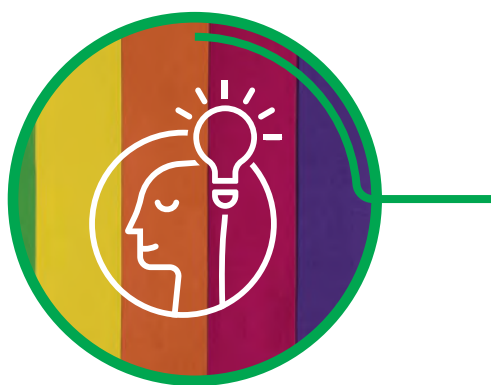
A comedian was physically attacked by three private individuals during a public performance in which he joked about a fictional strained relationship between a tenant and a landlord. A private individual who reportedly identified himself as having the same name as the fictional tenant expressed concern over the joke, with two others alleging that the comedian was responsible for influencing rental increments against tenants. The trio then proceeded to physically assault the comedian who sustained facial injuries evidenced by a swollen upper lip.



LGBTI Regulation in Kenya

In Kenya, there generally has been high intolerance of LGBTI identities and creative content. This intolerance has been rationalised as working towards the promotion, protection and preservation of Kenyan values, morals and beliefs, in accordance with constitutional, legislative, religious and moral principles. Beyond the predominant banning of gay and lesbian themed creative content, there has been the emergence of killings, harassment and assaults targeted at individuals who are LGBTI activists or are themselves openly or suspected to be of LGBTI identity. Most recent examples of gruesome killings are the murder of a lesbian woman who reportedly was attacked and raped by six unidentified males before being killed, as well as the January 2023 murder of an LGBTI rights activist who was murdered and stuffed in a metal box.





Did you know?

Same sex intimacy is criminalised under Kenya's Penal Code Section 162 (unnatural offences), Section 163 (attempt to commit unnatural offences) and Section 165 (indecent practices between males). These offences are punishable by up to 14 years imprisonment.

The Penal Code, when read with the Film Stage Plays Act CAP 222, prohibits same-sex marriages and the subsequent broadcasting, exhibition, distribution, and possession of any creative content which may 'glorify, normalise, promote or propagate' this restricted form of relationship.

1 film **was banned** by Kenya Film Classification Board for LGBTI themes

Public discussions related to LGBTI content **were banned** by parliament

The distribution and publication of LGBTI content **was banned** by parliament and Kenya Film Classification Board

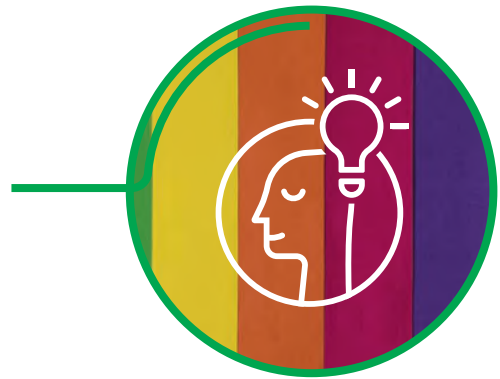
A regulatory **framework restricting** the digital accessibility of LGBTI content is being developed by Kenya Film Classification Board in collaboration with Netflix and TikTok





Did you know?

*On 14 February 2022, Kenya Film Classification Board banned an Indian drama comedy film *Badhaai Do* stating that its LGBTI thematic focus "overtly disregards the laws, constitution and the sensibilities of the people" of Kenya. Among other aspects of the film's content, KFCB pointed to scenes of shared affection between same-sex characters, the depiction of families' empathy for homosexual relationships, the showcasing of LGBTI symbolic colours and the depiction of a community campaign advocating for same-sex rights. It was expressed that the board deemed these scenes to be an "obvious and deliberate attempt by the producers to promote same-sex marriage."*



Did you know?

On 24 February 2023, Kenya's Supreme Court upheld a 2015 decision by the High Court and a 2019 decision by the Court of Appeal, in which both had ruled that a refusal by the Non-Governmental Organisations Coordination Board to register an NGO on grounds of sexual orientation had been discriminatory and in violation of a constitutionally guaranteed right to freedom of association. Hazarding that its judgement should not be conflated with a legalisation, decriminalisation or moral approval of same-sex relationships, the Supreme Court stated that the right to association as provided in Section 36(1) of Kenya's constitution is guaranteed by "virtue of common humanity;" provides no exception to sexual orientation and includes the right to form an association.



LGBTI Regulation in The Region

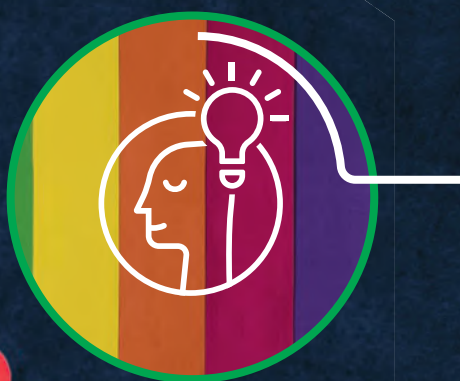
Did you know?

In a volatile environment charged with LGBTI intolerance and criminalisation, public statements made by government authorities are a subject of concern in efforts of curbing LGBTI related discrimination, hate crimes and violence. On 29 December 2023, Evariste Ndayishimiye the President of Burundi characterised homosexuality as a curse, and referred to the stoning of LGBTI persons as a possible option.

"I even think that these people, if we find them in Burundi, it is better to lead them to a stadium and stone them. And that cannot be a sin." President Evariste Ndayishimiye.

Did you know?

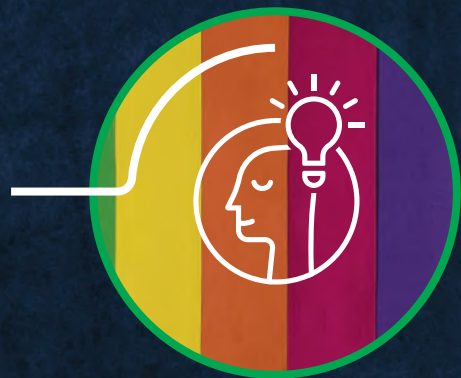
Zimbabwe's immigration Act Chapter 4:02 classifies homosexuals as prohibited persons in Section 14(f). This provision restricts the mobility of LGBTI persons, including the mobility of LGBTI persons in the exercise of their artistic freedom. This increases mobility difficulties in an environment that already is characterised by challenges of geo-politics, resource constraints and administrative bureaucracy.





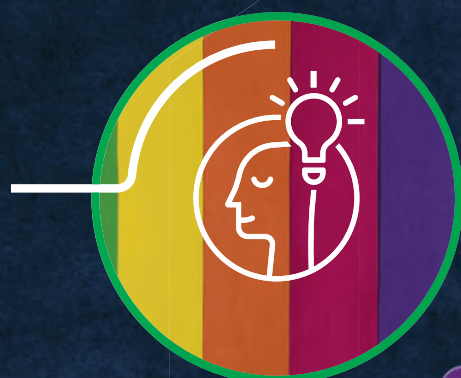
Did you know?

On 29 May 2023, President Yoweri Museveni signed Uganda's Anti-Homosexuality Act 2023 into law, a legislation that criminalises same sex sexual relations as well as the recognition or promotion of the same. Section 11(2)(b) in particular criminalises the broadcasting or distribution by any means, including through the internet, of materials promoting or encouraging homosexuality or homosexual offences. In conformity to this law, Multichoice Africa announced it would cease the airing of LGBTI themed content through its DSTV programming in Uganda, a decision necessitated by its adherence to domestic laws and regulations, by which it is governed.



Good to know

On 4 October 2023, the Supreme Court of Mauritius ruled that Article 250 of the Penal Code on the criminalisation of same sex relations was unconstitutional, discriminatory and was colonial Britain's imposition which did not reflect Mauritian values.





Broadcasting Regulation: Nigeria Case Illustration

There is an inextricable linkage between artistic freedom and broadcasting. Artistic content (predominantly film, dance and music) disseminated by broadcasters is subjected to broadcasting ethics and codes, as defined by broadcasting commissions or corporations. Broadcasting regulation, as informed by documented cases, assumes a two-pronged approach:

- a) The direct policing of artists and artistic content by broadcasting regulators. The execution of this role is sometimes done through cooperation partnerships with arts councils, censorship bodies and the police
- b) The policing of broadcasters for the identification of any artistic content which is aired contrary to broadcasting schedules, broadcasting standards and codes of ethics

As technological advancements have emerged and evolved, so has the multiplication of digital platforms from where artistic content can be distributed, without sole reliance on analogue broadcasting. The concentration of artistic content in digital platforms has attracted the policing obligations of broadcasting regulators, with three notable patterns emerging:

- 1) The repealing and amending of existing broadcasting laws, for the inclusion of provisions that permit the regulation of digital platforms
- 2) The reinterpretation of provisions of existing laws, to demonstrate that they already provide for digital media oversight
- 3) The introduction of new laws / measures that are specific to digital media





Spotlight Case

Intersection of digital media distribution and broadcasting oversight

On 6 September 2022, a song was banned by the Nigeria's National Broadcasting Commission on grounds that its music video which had been released on digital streaming platforms contained 'direct alcohol consumption' and its lyrics were 'laced with unwholesome words and the portrayal of drunkenness as a way of life.' Both the lyrical and visual contents of the song were deemed by the commission to be in violation of the National Broadcasting Code. The commission expressed that the airplay of the song by broadcasters in the country was indicative of their failure to have listened to the lyrics prior to airing, in abdication of the duty to broadcast responsibly.



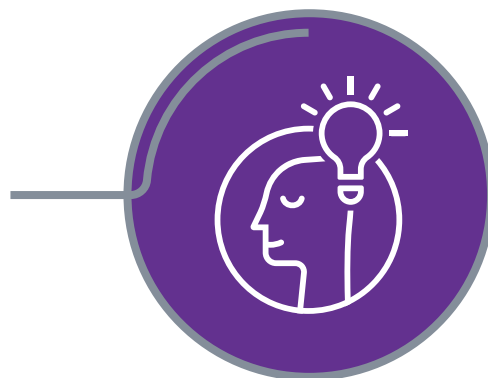
The failure of broadcasters to comply with broadcasting laws, codes and ethics is punished through sanctions and fines. The constitutionality and permissibility of punitive sanctions has recently been under the spotlight in Nigeria, through a court challenge. Additionally, the permissibility of Nigeria's broadcasting code under international human rights law has also been under scrutiny in courts. Although these legal challenges have been adjudicated with due consideration of their specific merits which are situated in broadcasting, the legal principles legitimating the function and operational mandate of the National Broadcasting Commission extend to artistic freedom and its regulation in Nigeria.

Good to know

Intersection of digital media distribution and broadcasting oversight

Media Rights Agenda challenged the imposition of fines on 45 broadcasters who had been found guilty of ethical misconduct by the National Broadcasting Commission, for their coverage of the 2019 general election which had included 'comments undermining national security.' In setting aside the fines on 10 May 2023, Judge James Omotosho of the Federal High Court in Abuja ruled that:

- **the** commission had illegally empowered itself with criminal investigation powers that are the exclusive function of law enforcers
- **the** commission had unduly encroached into the constitutional functions of the judiciary, in the imposition of sanctions.
- **the** commission's act of fining broadcasters without affording them an appeal or response had undermined the sacrosanct right to a fair trial, which also includes the right to make submissions in response to charges laid or allegations made



Good to know

On 23 October 2023, the Court of the Economic Community of West African States presided by Justice Dupe Atoki ruled that Nigeria's National Broadcasting Code which mandates the Commission to impose sanctions on broadcasters violates both constitutional and international law guarantees of free expression. In the judgment, the court further stated that the code reflected a failure by the Federal Republic of Nigeria to align domestic laws with international law, commitments and practice, as guided by African Charter of Human and People's Rights.





Thematic Exploration



Regional and International Normative Standards on Artistic Freedom Limitations

Several jurisdictions in Africa² have constitutionalized the right to freedom of expression and they are States Parties³ to the African Charter on Human and Peoples' Rights (the African Charter) and the International Covenant on Civil and Political Rights (ICCPR). Normative standards developed while interpreting freedom of expression as recognised in these two international treaties form the conceptual and legal framework which defines the scope and limitations of freedom of expression.



Freedom of expression is recognised as a human right which is guaranteed for everyone under regional and international human rights law. Under the African Charter, freedom of expression is guaranteed in article 9, which states that "Every individual shall have the right to express and disseminate his opinions within the law." This provision of the African Charter has been interpreted by the African Commission on Human and Peoples Rights (African Commission) as follows:

"Freedom of opinion, including the right to form and change all forms of opinion at any time and for whatever reason, is a fundamental and inalienable human right indispensable for the exercise of freedom of expression. States shall not interfere with anyone's freedom of opinion."⁴

Similarly, freedom of expression is guaranteed under the ICCPR in article 19(2) which states that:

"Everyone shall have the right to freedom of expression; [and] this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice."

Thus, freedom of expression is recognised as a key element of artistic freedom. This is precisely because it gives artists the legal guarantee to produce and disseminate their artistic creations without being subjected to arbitrary restrictions or reprisals. The guarantee and protection of freedom of expression enables artists to unleash their artistic creativity to the fullest of their potential. However, freedom of expression is not an absolute right. Its exercise is subject to limitations. Article 19 (3) of the ICCPR states that:

"The exercise of the rights provided for in paragraph 2 of this article [freedom of expression] carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary: (a) For respect of the rights or reputations of others; (b) For the protection of national security or of public order, or of public health or morals."



² At least 35 countries recognise freedom of expression as a constitutional right

³ See ratification table at <https://achpr.au.int/en/states> and https://tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/Treaty.aspx?Treaty=CCPR&Lang=en

⁴ Principle 2 of the Declaration of Principles of Freedom of Expression and Access to Information in Africa, 10 November 2019



Permissible restrictions to human rights as guided by regional and international law

All restrictions against freedom of expression must comply with certain normative standards. In its interpretation of article 9 of the African Charter, the African Commission has stated that:

“States may only limit the exercise of the rights to freedom of expression and access to information, if the limitation: (a) is prescribed by law; (b) serves a legitimate aim; and (c) is a necessary and proportionate means to achieve the stated aim in a democratic society.”⁵

Similar normative standards are outlined under the ICCPR.⁶ In essence, limitations must comply with the principles of legality, necessity and proportionality.

In order to comply with the **principle of legality**, restrictions against freedom of expression must be provided for through a law that is publicly accessible, which clearly sets out the circumstances under which restrictions or penalties may be imposed, and the procedures to be followed when imposing those restrictions or penalties.⁷

In order to comply with the principle of necessity, restrictions against free expression may be imposed only if they are necessary. Therefore, before any penalties can be imposed, evidence must be tendered to demonstrate the existence of a direct and immediate connection between the decision to impose the said penalties and the need to protect a specific right.⁸

Even where penalties have been proven to be necessary, they must be **proportionate to addressing the harm** that has been caused.⁹ In light of the recognition of freedom of expression as a human right, a balance must be struck between this right and others. This must be done in a way that affords maximum protection to all rights under consideration, with the rights limited as minimally as possible. This is the purpose of proportionality, to strike a balance between competing rights.

In order to comply with the principle of proportionality, the nature (scope, degree or extent) of penalties imposed must not be excessive to limit freedom of expression beyond what is absolutely required (necessary) to protect competing rights.¹⁰ In addition, penalties may not be imposed in a way that is discriminatory on any of the listed grounds in international human rights law,¹¹ or grounds that are analogous to those listed therein. Laws authorizing the imposition of penalties must be subject to judicial review,¹² where their consistency with the normative standards discussed above can be evaluated through impartial adjudication.



⁵ Principle 9(1) of the Declaration of Principles on Freedom of Expression in Africa.

⁶ See Communication No. 1553/2007, *Korneenko et al. v. Belarus*; United Nations Human Rights Committee General Comment 34 (Article 19: Freedoms of opinion and expression), CCPR/C/GC/34, 12 September 2011 at paras 24, 25 and 26.

⁷ See Communication No. 1553/2007, *Korneenko et al. v. Belarus*; United Nations Human Rights Committee General Comment 34 (Article 19: Freedoms of opinion and expression), CCPR/C/GC/34, 12 September 2011 at paras 24, 25 and 26; *Amnesty International Togo and Others v. The Togolese Republic* ECW/C CJ/JUD/09/20; Principle 9 (1) and (2) of the African Commission on Human and Peoples' Rights Declaration of Principles of Freedom of Expression and Access to Information in Africa, 10 November 2019.

⁸ See United Nations Human Rights Committee General Comment 34 (Article 19: Freedoms of opinion and expression), CCPR/C/GC/34, 12 September 2011 at para 35. Also see Principle 9(4) of the African Commission on Human and Peoples' Rights Declaration of Principles of Freedom of Expression and Access to Information in Africa, 10 November 2019.

⁹ See United Nations Human Rights Committee General Comment 34 (Article 19: Freedoms of opinion and expression), CCPR/C/GC/34, 12 September 2011 at Para 21; Principle 9(4) and (b) and 38(2) of the African Commission on Human and Peoples' Rights Declaration of Principles of Freedom of Expression and Access to Information in Africa, 10 November 2019; *Amnesty International Togo and Others v. The Togolese Republic* ECW/C CJ/JUD/09/20.

¹⁰ Principle 38(2) of the African Commission on Human and Peoples' Rights Declaration of Principles of Freedom of Expression and Access to Information in Africa, 10 November 2019.

¹¹ See articles 2 (1) and 3, as well as 26 of the ICCPR, and article 19 of the African Charter.

¹² Article 2(3)(a) and (c) of the ICCPR and United Nations Human Rights Committee General Comment No. 31: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant, 26 May 2004.



The role of the judiciary in rights limitations

The role of the judiciary in adjudicating matters of rights limitations is indispensable. Among other cases, the judicial bodies of several African countries have given rulings that provide clarification on the conformity of domestic laws to constitutions and international law. Some rulings have also interpreted what certain rights mean and to whom they apply. Judgments of note that have had a direct implication on the exercise and enjoyment of artistic expression and under which artists have previously been prosecuted or sanctioned are:

- A 2021 ruling by Uganda's Constitutional Court repealed some sections¹³ of the country's 2014 Anti-Pornography Act on grounds that they were vague, uncertain and a violation of constitutionally guaranteed rights to freedom of expression, liberty, privacy and property. This law had discriminately affected female artists performing while adorning minimal clothing
- A 2022 ruling of the Court of the Economic Community of West African States ruled that Section 24 of Nigeria's Cybercrime Act 2015 was inconsistent with freedom of expression guarantees provided for in the African Charter on Human and People's Rights and the International Covenant on Civil and Political Rights. The section dealt with cyberstalking, criminalising the digital publication of information that is false, aggravating, has pornographic material and amounts to cyberbullying
- A 2023 ruling by Uganda's constitutional court found that Section 25 of the Computer Misuse Act 2011 which categorised offensive communication as the usage of 'electronic communication to disturb or attempt to disturb the peace, quiet or right to privacy of any person with no purpose of legitimate communication,' was unconstitutional and violated freedom of expression guarantees provided in international law. Artists critical of government and government officials had been prosecuted under this law
- A 2023 ruling by Kenya's Supreme Court held that the right to form an association as provided in Section 36(1) of Kenya's constitution is guaranteed by 'virtue of common humanity' and provides no exception to sexual orientation

Sanctioning as a punitive measure for artistic expression

In a galaxy of restrictions against artistic freedom is the use of sanctions to punish artistic expressions deemed contradictory to existing laws, social norms and professional codes of ethics. Sanctions that have particularly been problematic and have raised critical questions about the bodies that should be legally permitted to limit artistic expression are those issued by state sponsored bodies tasked with the regulation of arts, culture and media sectors. What has emerged as a pattern of note across several African countries is how these regulatory bodies are legitimised by censorship or media laws that are broad and vague. Consequently, authorities use their discretion to interpret the scope and breadth of what is legally permissible in the exercise of artistic freedom. In more extreme circumstances as evidenced in Kenya in the past, the regulatory functions of a state body then assume the ideological posture of the authority figure at its helm.

Further, continuously emerging as a trend in artistic freedom limitations is the strict and discriminate regulation of artists and artworks that are critical of government, governance and government officials. Added to this category is religious and social commentary as well as the regulation of the use of and reference to any symbols which may reasonably be associated with the state, employees of the state and religious groupings. Mechanisms utilised by regulatory bodies to identify, monitor and police artists with creative works that are classified as restricted are:

- > Mandatory registration
- > Mandatory pre-approval of artistic content before circulation
- > Criminalisation of artistic expression that has not been censored / classified / vetted prior to dissemination
- > Imposition of punitive measures for artists and artistic content deemed to violate national values and norms in their mutations, and as conceptualised or interpreted by various laws

¹³ In the judgment of the court, Section 2 (creating and defining the offence of pornography), Section 11 (establishing the Anti-Pornography Committee), Section 13 (criminalising the production, publication, broadcasting, procurement, importation and exportation of pornography) and Section 15 (entry into premises for seizure of personal property and the arrest of persons) of the Act were annulled on grounds that they were vague, uncertain and a violation of constitutionally guaranteed rights to freedom of expression, liberty, privacy and property.



In relation to sanctions in particular, the nature of sanctions that are predominantly issued against artists are:

- > Monetary fines
- > Bans from performing or circulating artistic content for a defined or indefinite period
- > Travel bans specific to performances artists may wish to have in other countries
- > Social media gags

In very rare instances are artists given the right to respond, appeal or explain the artistic intent of the expression attracting a sanction.

Limitations of challenging sanctions in the courts

Imperative to note is that artistic expression restrictions by regulatory bodies are hardly subjected to a legality test in the courts, for the ascertaining of whether they are provided in law, pursue a legitimate aim and are necessary. Even where it is established that they are supported by law, judicial processes have the vantage point of further interrogating whether the law in question; in its entirety or in some of its aspects conforms to international human rights law, standards and practice. Most artists consider judicial processes to be cumbersome, inconvenient and a compromise of personal artistic integrity. Inevitably, they accept artistic expression restrictions by state sponsored regulatory bodies without a court challenge. Concerns of funding the court challenge against low income from artistic practice may also act as a deterrent. What has emerged as an observation is that several court challenges on artistic freedom limitations on the African continent are funded by Global North donors. Regrettably, this occurrence is postured by some African governments to advance the political narrative that human rights advocacy by the 'West' is one of its many mechanisms of advancing regime change and challenging the sovereign authority of governments in power. This is especially vocalised when legal challenges are on artistic expression that has been limited on grounds of LGBTI content, indecency, localised religion, political dissent and what is deemed 'moral' from the perspective of the 'African majority.'

The legality of the imposition of sanctions in Nigeria considered

In the case of Nigeria, the Federal High Court in Abuja and the Court of the Economic Community of West African States have both considered the legality of the issuance of sanctions by the National Broadcasting Commission. In its judgment, the High Court in May 2023 made several assertions about the functions of the commission; that criminal investigation powers that are the exclusive function of law enforcers, sanctioning is the constitutional function of the judiciary, and an act of not affording sanctioned broadcasters the right to appeal or respond undermines the sacrosanct right to a fair trial, which also includes the right to make submissions in response to charges laid or allegations made.¹⁴ The ECOWAS Court on the other hand ruled in October 2023 that Nigeria's National Broadcasting Code which mandates the Commission to impose sanctions on broadcasters violates both constitutional and international law guarantees of free expression.¹⁵

¹⁴ In the judgment of the court, Section 2 (creating and defining the offence of pornography), Section 11 (establishing the Anti-Pornography Committee), Section 13 (criminalising the production, publication, broadcasting, procurement, importation and exportation of pornography) and Section 15 (entry into premises for seizure of personal property and the arrest of persons) of the Act were annulled on grounds that they were vague, uncertain and a violation of constitutionally guaranteed rights to freedom of expression, liberty, privacy and property.

¹⁵ See Media Rights Agenda's coverage of the case here <https://mediarightsagenda.org/media-rights-agenda-wins-suit-challenging-nbcs-power-to-impose-fines-on-broadcast-stations/>.

See International Centre for Investigative Reporting here <https://www.icirnigeria.org/nbc-broadcasting-codes-infringe-on-human-rights-rules-ecowas-court/>.

Emerging Challenges on the use of Civil Defamation Remedies on Artistic Freedom in Africa

1. Introduction

International human rights law and domestic constitutions of several Sub-Saharan Africa protect the right to human dignity, which includes reputation, and freedom of expression. In some cases, these two rights are in tension. In order to protect reputation, it may be necessary, in some circumstances, to limit freedom of expression. The role of defamation law is to strike a balance between these two rights.¹⁶

In a quest to strike this balance, valid concerns have been raised against the criminalisation of defamation.¹⁷ Successive United Nations Special Rapporteurs on Freedom of Opinion and Expression, the OAS Special Rapporteur for Freedom of Expression, the Special Rapporteur on Freedom of Expression and Access to Information in Africa and the OSCE Representative on Freedom of the Media have repeatedly called for criminal defamation laws to be abolished and civil ones to be favoured.¹⁸ In the context of defending artistic freedom, it has been argued¹⁹ that the threat of imprisonment, which is brought about by the criminalisation of defamation, deters artists from freely expressing themselves leading to self-censorship. Put differently, criminalising defamation creates a chilling-effect which could push artists to steer away from content that could be deemed controversial, thereby undermining their freedom of expression.²⁰ For this reason, international human rights law prohibits the imposition of criminal sanctions, including custodial sentence, for defamatory expressions. Several countries on the African continent, including Ghana, Gambia,²¹ Lesotho, South Africa and Zimbabwe, have formally decriminalised all or certain aspects of defamation law. However, criminalisation of defamation is still a persisting challenge, not only in Africa but globally. A recent survey²² found that at least 160 UNESCO Member States still have criminal defamation laws. In Africa defamation is criminalised in 39 states, while 12 States have decriminalised it.²³ Unlike criminal defamation, civil defamation involves the use of civil remedies, such as compensation, in order to protect or restore the right to dignity (reputation), when threatened or impaired through defamatory expressions. Contemporary advocacy has centred around promoting the use of civil remedies (civil defamation) to address the harm that is caused by defamatory expressions. There appears to be a perception that civil remedies do not create as much a chilling effect on freedom of expression as is done by criminal defamation law. This perception appears to be based on the incorrect assumption that the use of civil remedies will automatically strike a balance between protecting human dignity (reputation) and freedom of expression. In this paper, we look at some of the challenges which are emerging as a result of the use of civil remedies (civil defamation) to address the harm that may be caused on reputation as a result of defamatory expressions. In order to provide context to this discussion, we start by providing an analysis of the conceptual and legal framework on artistic freedom and defamation law.

¹⁶ Although it must be noted that conflicts may exist between freedom of expression and other rights.

¹⁷ This implies the use of criminal sanctions in order to hold accountable persons who defame others.

¹⁸ Ten of their joint declarations contain recommendations concerning defamation and related offences. See UNESCO "The misuse of the judicial system to attack freedom of expression: Trends, Challenges and Responses" at page 4, available at <https://unesdoc.unesco.org/ark:/48223/pf0000383832>

¹⁹ Hoolo 'Nyane 'Abolition of criminal defamation and retention of scandalum magnatum in Lesotho' African Human Rights Law Journal 2019 (19).

²⁰ See INCL report on "Threats to Artistic Freedom in Uganda", accessible at <https://www.icnl.org/post/analysis/threats-to-artistic-freedom-in-uganda>

²¹ Following the 2018 judgment of the Community Court of Justice of the Economic Community of West African States in Federation of African Journalists (FAJ) and others v. The Gambia.

²² See UNESCO's World Trends Global Report on Freedom of Expression and Media Development (2021-2022).

²³ Ibid

2. Obligations of States when developing and implementing legislation

States Parties to the ICCPR and the African Charter have an obligation to ensure that defamation restrictions are implemented in compliance with the normative standards discussed above. A crucial element of this obligation is to ensure that defamation laws are:

“(a) clear, precise, accessible and foreseeable; (b) overseen by an independent body in a manner that is not arbitrary or discriminatory; and (c) effectively safeguards against abuse including through the provision of a right of appeal to independent and impartial courts.”²⁴

“*The legal status of these bodies should be clearly defined and their institutional autonomy and independence guaranteed and protected by law.*”

Therefore, there must be a written law which regulates the implementation or application of defamation penalties. The law must provide mechanisms to protect people against abuse of the penalties and such mechanisms should include the right to appeal to an independent and impartial court. In the context of artistic freedom, the implementation of defamation laws on creative work must be overseen by an independent body and must provide the affected artists with the right of appeal to an impartial tribunal, to challenge the imposition of defamation penalties against them. This principle has been underscored by the United Nations Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression, the Organization for Security and Co-operation in Europe (OSCE) Representative on Freedom of the Media, the Organization of American States (OAS) Special Rapporteur on Freedom of Expression and the African Commission on Human and Peoples' Rights (ACHPR) Special Rapporteur on Freedom of Expression and Access to Information in Africa in their joint declaration ²⁵ which calls upon States to:

“Ensure that all public bodies, which exercise powers in print, broadcast, other media and/or telecommunications regulation, including bodies that receive complaints from the public, are independent, transparent and effectively functioning in law and in practice. They should be protected from undue interference, particularly of a political or commercial nature. The legal status of these bodies should be clearly defined and their institutional autonomy and independence guaranteed and protected by law. This should include a participatory and transparent appointment process for the governance and senior managerial structures of these bodies, the ability to employ their own qualified staff, and a clear mandate and power of regulation as well as public accountability and adequate funding.”

Although this was said in the context of the role of the media in promoting democracy, the same principle applies to artists because artists are also entitled to freedom of expression as guaranteed for journalists and, artists are also part of the broader media. In addition, as has been underscored by the United Nations Human Rights Committee ²⁶ States have an obligation to ensure that they design and implement their defamation laws in ways which does not impose criminal sanctions for defamation, and places reasonable limits on damages to be paid as compensation for defamation.

²⁴ Principle 9(2) of the Declaration of Principles of Freedom of Expression and Access to Information in Africa, 10 November 2019

²⁵ On media freedom and democracy of May 2023, available at <https://www.ohchr.org/sites/default/files/documents/issues/expression/activities/2023-JD-Media-Freedom-and-Democracy.pdf>

²⁶ General Comment 34 on Article 19 of the ICCPR of 2011.

3. *Emerging challenges regarding the implementation of civil remedies in defamation cases*

i. Absence of written laws

➤ A major challenge regarding the implementation of civil defamation laws to regulate artistic freedom is the absence of publicly accessible written laws in some jurisdictions.²⁷ Several of jurisdictions on the African continent apply common law, which was derived from the English law and was introduced as part of colonialism. Common law is largely unwritten law, although parts of it can be found in written court judgments. For example, quantifying monetary damages is case-specific and is always entirely at the discretion of the court. This affects predictability in the way the penalties, such as costs in damages are applied, and this makes artists vulnerable to arbitrary application of these penalties.

ii. Lack of independent oversight institutions

Another challenge regarding the implementation of defamation laws in the context of the creative sector is that the implementation of some of the measures that are meant to protect people against defamation by artists, is overseen by institutions which lack independence particularly from the government. In several jurisdictions in Africa, censorship boards have been established as part of the institutional mechanisms that are meant to ensure that artists respect the right of others to reputational dignity. In most cases, these bodies are constituted by government appointees. For example, in Zimbabwe the Board of Censors is appointed by the Minister.²⁸ In Nigeria,²⁹ members of the National Film Video Censors Board are appointed by the President on the recommendation of the responsible cabinet minister. In Kenya, the members of the Kenya Film Classification Board are appointed by the Minister while some of them are members of the executive branch of the government. The appointment of members of these bodies by government undermines their ability to operate independent of government control when they perform their functions, including when they make decisions on the censorship of art. It also undermines public and stakeholder confidence in their independence, which (in turn) creates a chilling effect on artistic creativity and promotes self-censorship by artists.

iii. Disproportionate measures and threat of vexatious litigation

In its recent report, UNESCO³⁰ has noted that although several countries have decriminalised defamation, freedom of expression remains under threat from the use of disproportionate civil damages (as penalties for defamation) and the threat of vexatious litigation. Quantifying monetary damages is case-specific and is always entirely at the discretion of the court. Such discretion has sometimes, resulted in the imposition of harsh defamation penalties that are disproportionate to the harm that has been caused, and which excessively undermine freedom of expression and consequently undermines artistic freedom. Cases of disproportionate penalties include the imposition or awarding of excessive damages to be paid as compensation for making defamatory expressions. For example, recently in Kenya a magistrate's court³¹ awarded damages up to USD87000 against a poet who had published statements which were found to be defamatory, making allega-

²⁷ Particularly those who were former British colonies

²⁸ Section 3 of the Censorship and Entertainments Control Act.

²⁹ See section 3(1) of the National Film Video Censorship Act No.85 of 1993.

³⁰ See "The misuse of the judicial system to attack freedom of expression: Trends, Challenges and Responses" at page 3, available at <https://unesdoc.unesco.org/ark:/48223/pf0000383832>

³¹ The case is unreported. However the details can be found here <https://www.buzzfeednews.com/article/tamerragriffin/shail-ja-patel-defamation-sexual-assault-kenya-exile>.

tions of sexual assault. Although this case does not involve the awarding of damages against an artist for artistic expressions that have been found to be defamatory, the legal principles applied in this case are also applicable to situations of artists who are found to have made defamatory artistic expressions. Therefore, the awarding of such excessive damages could create a chilling effect on the ability of artists to express themselves. As noted by UNESCO³², just like criminalizing defamation, the use of excessively burdensome (disproportionate) civil damages as compensation for defamation creates a chilling effect on freedom of expression. In that sense, therefore, excessive penalties (especially costs in damages) constrain artistic freedom.

“Ghana became the first country in Africa to decriminalize defamation

Vexatious litigation is another challenge, which remains. This involves the abuse of the civil justice system to harass and intimidate persons from expressing their opinions freely. A notable case is that of South African cartoonist, Jonathan “Zapiro”, who published a cartoon interpreted to be ridiculing former President Jacob Zuma. In 2008, the cartoonist drew and published a cartoon in which he used the metaphor of rape to express Zuma’s (alleged) abuse of South Africa’s justice system, in order for him to evade accountability for allegations of corruption. In the cartoon, Jacob Zuma was shown loosening his trousers while former Youth League of the ANC president Julius Malema, Congress of South African Trade Unions general secretary Zwelinzima Vavi, South African Communist Party general secretary Blade Nzimande and ANC secretary general Gwede Mantashe hold ‘Lady Justice’ down, saying: “Go for it, boss.”³³ Former President Zuma slapped the cartoonist with a lawsuit in which he claimed R5 million. He eventually withdrew the case, but this had already created a chilling effect on artistic freedom.

Ghana became the first country in Africa to decriminalize defamation.³⁴ However, as has been reported by the United Nations Democracy Fund,³⁵ there has been an increase in civil suits for defamation brought by powerful individuals, leading (in some cases) to the awarding of huge costs against individual journalists, in favour of corporates and powerful politicians. Similar cases have also been recorded in Malawi,³⁶ South Africa,³⁷ Botswana³⁸ Although these cases do not involve artists, the legal principles applied herein are also applicable in cases which involve artistic expressions that are deemed defamatory.

³² See “The misuse of the judicial system to attack freedom of expression: Trends, Challenges and Responses” at page 2, available at <https://unesdoc.unesco.org/ark:/48223/pf0000383832>

³³ The cartoon can be accessed at <https://theworld.org/stories/2019-05-21/south-african-cartoonist-draws-20-years-zuma-wf-scandals>.

³⁴ It did so in 2001.

³⁵ <https://pensouthafrica.co.za/wp-content/uploads/2017/11/Stifling-Dissent-Impeding-Accountability-Criminal-Defamation-Laws-in-Africa.pdf>

³⁶ See the case of Gorge Chaponda v Blantyre Print and Packaging Ltd and others Civil Cause 55/2017, available at <https://media.malawilii.org/files/judgments/mwhc/2022/30/2022-mwhc-30.pdf>. Also see <https://www.nyasatimes.com/bnl-ordered-to-pay-george-chaponda-mk50m-over-maizegate-defamatory-articles/>

³⁷ See August v Maimane (20866/2018; 20867/2018; 20868/2023; 20869/2018) [2023] ZAWCHC 254 (13 October 2023), accessible at <https://www.saflii.org/za/cases/ZAWCHC/2023/254.html>

³⁸ See Tsodilo Services (Pty) Ltd v. Tibone 2011 2 BLR 494 CA. In this case, the Court of Appeal of Botswana reduced a damages award against a newspaper from P400,000 to P250,000 (approx. 56,000 to 30,000 USD) on the basis that the lower court had not properly balanced the right to dignity with the right to freedom of expression in ordering for an amount of damages that was out of line with previous jurisprudence in Botswana and neighbouring countries. See <https://globalfreedomofexpression.columbia.edu/cases/tsodilo-services-pty-ltd-v-tibone/>

Defamation penalties are derived from common law, as discussed above. Although, monetary damages were the only available remedy under the common law of defamation, this has now changed, especially because of the recognition of freedom of expression as a right.³⁹ Other remedies should be considered which are appropriate and proportionate to addressing the harm that has been caused. For example, the responsible person can be ordered to issue a retraction, a public apology or to publish a statement which makes the necessary clarifications to restore the damaged reputation.⁴⁰ However, where defamatory expressions have caused financial harm, such harm must be quantified properly and costs in damages can be awarded but the costs must remain reasonable and proportionate to the damage caused. As was underscored in the South African case of *Van der Berg v Coopers and Lybrand Trust Ltd*,⁴¹ "care must be taken not to award large sums of [costs in] damages too readily lest doing so inhibits freedom of speech or encourages intolerance to it and thereby fosters litigation."⁴²

In *Mogale v Seima*,⁴³ the Supreme Court of Appeal of South Africa criticized the punitive use of damages as a remedy for defamation and said that "punishment and deterrence are functions of the criminal law and should not form part of the law of delict."⁴⁴ In another case of *Esselen v Argus Printing*⁴⁵ and *Lynch v Agnew*,⁴⁶ as well as the Namibian case of *Trustco Group International Ltd v Shikongo*,⁴⁷ it was underscored that when determining an award of damages, the judicial officer should not anticipate future transgressions nor seek to protect the plaintiff from any future defamation. Therefore, the punitive use of damages in civil defamation cases, to deter defamatory practices is unlawful and is contrary to international human rights law normative standards as they pertain to restrictions on freedom of expression. The use of punitive civil remedies defeats the very purpose of advocating for the de-criminalization of defamation.

As has been recommended by UNESCO,⁴⁸ remedies should be proportional, aiming to repair the damage caused by certain expressions rather than to punish those who made them. Courts should prioritize the awarding of nonpecuniary remedies, imposing financial awards only when the harm caused cannot be remedied through any other ways.

*The use of
punitive civil
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of defamation.*

³⁹ See *Le Roux and Others v Dey* (CCT 45/10) [2011] ZACC 4; 2011 (3) SA 274 (CC) ; 2011 (6) BCLR 577 (CC)

⁴⁰ See the South African case of *Ward-Jackson v. Cape Times Ltd* 1910 WLD 25, where these remedies are extensively discussed.

⁴¹ 2001 (2) SA 242 (SCA)

⁴² *Ibid* at p 499.

⁴³ 2008 (5) SA 637 (SCA)

⁴⁴ *Ibid* page 501

⁴⁵ *Esselen v Argus Printing* 1992 (3) SA 764 (T)

⁴⁶ *Lynch v Agnew* 1929 TPD 974

⁴⁷ [2010] NASC 6

⁴⁸ See "The misuse of the judicial system to attack freedom of expression: Trends, Challenges and Responses" at page 15, available at <https://unesdoc.unesco.org/ark:/48223/pf0000383832>

Artistic Freedom Election Monitoring





Introduction

Democracy is not just about the electoral process in isolation of other imperatives that are a core constituent element of the value chain of democratization. In essence, a deliberation on the architecture of democracy should take into account the existence and recognition of human rights, as expressed in legal and policy frameworks, and also have an extended consideration of the nature of the environment within which human rights and fundamental freedoms, as they relate to inclusion and public participation, are to be protected, promoted and defended. Deliberations that are predicated on the question of the 'nature of the environment,' draw attention to not only the rights that are guaranteed by international instruments and legal frameworks but the degree to which these rights are promoted, protected and defended in practice.

As a matter of governance priority therefore, and within the ambit of asserting democratic values and norms, a conceptualisation of free, fair and credible elections, however varied, cannot be insulated from an analysis and assessment of the state of human rights and fundamental freedoms. The African Union, as rationalized as a regional governance body, places emphatic reference on the interconnectedness of democracy, democratic participation, rule of law and human rights. The African governance architecture affirms both the African Charter on Human and People's Rights and the African Charter on Elections, Governance and Elections, by expressly validating 'popular participation and citizen engagement' as imperatives in the attainment of democracy, governance and respect for human and people's rights. The fulcrum of this positioning is the recognition that the exercise and realisation of human and people's rights is essential in the consolidation of democratic institutions and culture, especially within the context of granting credence to good governance and rule of law.

The process and practice of situating democratic processes, such as elections, within the framework of 'sustained efforts of promoting and protecting human rights' is partly attributable to the emergence of initiatives and measures that have attached premium to election observation and monitoring, for the purposes of comprehensively and contextually conducting legal framework analysis, capturing legislation implementation, documenting rights abuses and violations, and mapping strategic interventions that can be operationalised or instrumentalised to 'correct or prevent' occurrences that undermine the advancement of human rights. Notably election observers and monitors have a propensity to document and monitor general patterns of human rights abuses and violations prior to, during and post an election. In this general scope and approach, there are limited efforts, if any, to capture and document human rights abuses and



Notably election observers and monitors have a propensity to document and monitor general patterns of human rights abuses and violations...

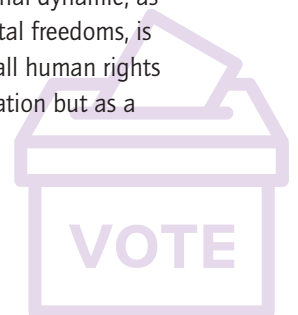


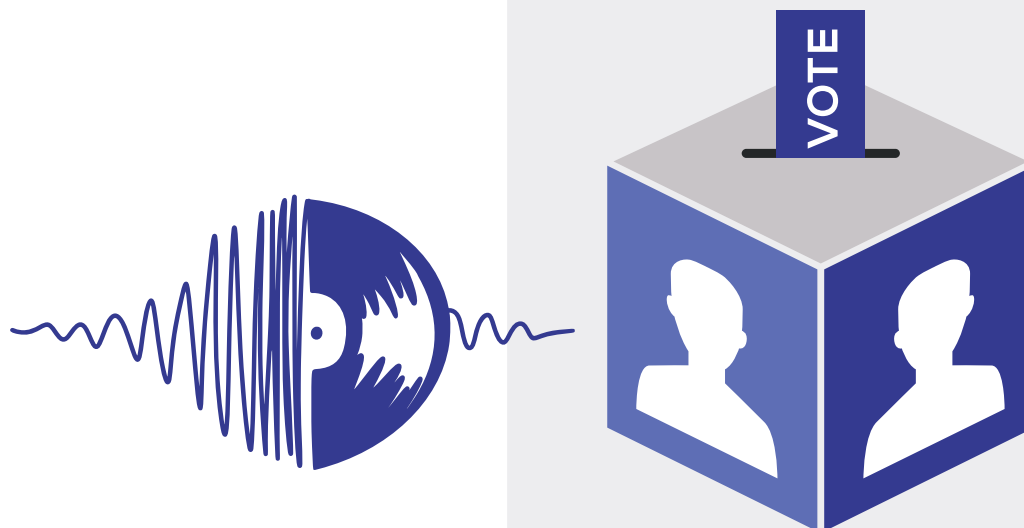
violations with an express and deliberate mention of cultural rights, artistic freedom and creativity. This should however, not be construed to be indicative of the absence of violations and abuses that specifically relate to this cluster of rights and freedoms. Notably, artistic freedom, as conceptualised by UNESCO, is a conglomeration of human rights such as the right to freedom of movement, the right to participate in cultural life and the right to create without censorship or intimidation. By extension, the UN Human Rights Office of the High Commissioner, in capturing rights that are pre-requisites in the certification of the efficacy of an election, recognizes freedoms of expression and opinion, peaceful assembly, association and non-discrimination. These essentially are representative, not exhaustively, of leverage rights to the realisation of artistic freedom.

An emergent question in this regard, is why then there should be the explicit prioritisation of artistic freedom and creativity, within the practice of election monitoring and observation, when these freedoms already are accounted for under leverage rights of concern. It is this research's submission that freedom of artistic expression and creativity, although projected as an amalgamation of specific human rights, by virtue of coalescing all regimes of human rights, has idiosyncrasies that can only emerge as an imperative outside of the shadow of leverage rights. These nuances specifically relate to matters of cultural rights conceptualisation and practice, cultural policy formulation and implementation, and the domestication or localisation of international instruments that expressly recognise culture, cultural expressions and artistic expressions, in their mutations and diversity, as conduits of citizen participation and engagement. Secondly, the masking of artistic freedom under a conglomeration of other rights is antithetical to sustained efforts that are aimed at developing normative and empirical evidence that makes a deterministic consideration of the role of creative agency in the consolidation and the solidification of democratic processes. Thirdly and most significantly, the failure to isolate artistic freedom abuses and violations within the context of electoral processes, a branch of democratization, undermines the catalytic generation of qualitative and quantitative analysis that can reliably grant indication to how artistic freedom is realised individually, in relation to other rights and transversally within the scope of all regimes of human rights. This relational dynamic, as it relates to the value chain of human rights and fundamental freedoms, is key in the extraction of evidence-based knowledge on how all human rights and freedoms are indivisible not just by manner of proclamation but as a matter of practice.



...freedom of artistic expression and creativity, although projected as an amalgamation of specific human rights, by virtue of coalescing all regimes of human rights....





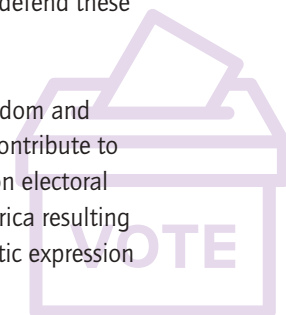
A case for Artistic Freedom within the Ambit of Electoral Processes

Artistic freedom, creativity and expression are fundamentals of a functioning democracy. They reflect on the nature and degree of a society's recognition and prioritisation of every citizen's right to participate in public and private affairs. In election periods, however, there is collapsed tolerance of fundamental freedoms and rights. Broadly, this occurrence emerges as a consequence of the peculiarities of political competition that depress tolerance of criticism, suffocating divergence and diversity of critical opinion.

Within the framework of international law and human rights standards, a practice of suffocation warrants a violation that is inconsistent with universal values and norms. Artistic and cultural creativity, and the freedom to express this creativity without fear or censorship is a universal human right and a crucial element in the functioning of participatory democracy and a free and open society. In Africa, political, religious, social-economic and cultural values may impose constraints on these freedoms, more so in the run up to a national election where building capacity for independent critical thinking and the development of transformational ideas through culture is more likely than not considered a threat to political status quo.

Constitutionally mandated elections and limited public office terms offer African countries the opportunity to consolidate and institutionalize the democratic process and strengthen governance systems but all too often, these elections are characterised by election-related violence, repression, and curtailments to democratic space and human rights, as a manifestation of structural, cultural, ethnic, religious, economic and governance factors. These occurrences provide substantive justification as to why most countries on the continent are classified as fragile. Within the logic of fragility, the limited reliability and credibility to achieve stability and deliver on the promises of fundamental freedoms, undermines the global constitutive order of democratisation and its concomitant guarantees of human rights broadly and artistic freedom more specifically. This places a demand on creative civil society to formulate more strategic and innovative interventions that comprehensively map artistic freedom violations, for the purposes of curating mechanisms that strengthen, promote, protect and defend these fundamental freedoms in environments of extreme uncertainties, such as an election.

Within the backdrop of this understanding and conceptualisation of the nexus between artistic freedom and democratic processes, Nhimbe Trust's AFEM project, launched in 2020, has consistently sought to contribute to actions aimed at strengthening human rights approaches to artistic freedom, with a specific focus on electoral processes. The overall objective of the project is to alleviate threats to participatory democracy in Africa resulting from the imposition, during elections, of restrictions and constraints on the right to freedom of artistic expression and creativity.



Role of Artists in Electoral Processes, as Informed by Election Monitoring in Zambia (2021), Kenya (2022) and Zimbabwe (2023)



Facilitating civic and voter education, as commissioned by various stakeholders



Performing at political rallies



Voter mobilisation



Election candidates



Endorsing election candidates



Endorsing political parties



Campaigning for election candidates



Facilitating / convening election-based discussions on their physical and digital platforms



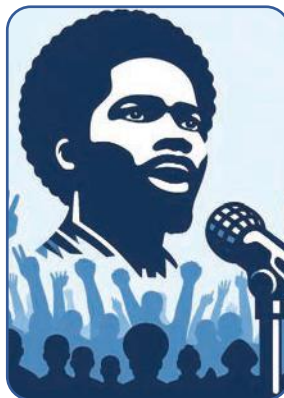
Artistic Genres most used within the Context of Electoral Processes



*Visual art (murals
and paintings)*



Music



Poetry



Comedy



Challenges Encountered by Artists during Electoral Processes



Weak / inaccessible mechanisms of artistic freedom protection



Confiscation, destruction or censorship of politically conscious art



Restrictions to public assembly, for the showcasing of artistic content that is suspected to be anti-government



Use of their artistic content (mostly songs) in political campaigns, without their consent



Threats and harassment for confirmed / perceived political allegiance



Laws on cybersecurity, public assembly and censorship disproportionately applied to target artists suspected or confirmed to have allegiances to opposition parties



Perception that artists are uneducated negatively impacts their political standing as election candidates, with some communities expressing lack of confidence in their capacities to be policy makers



'Politics of the stomach.' Incentives (mostly financial) of aligning with well-funded political parties deemed by artists to outweigh the implications of artistic integrity



Self-censorship



Coercion to perform at political rallies



Case Spotlight

On 25 April 2022, the Censorship and Entertainments Control Unit of the Ministry of Home Affairs and Cultural Heritage banned a political documentary film, *President*, citing that it contains scenes that violate Section 10(2) of Zimbabwe's Censorship and Entertainments Control Act which prohibits the exhibition / broadcasting of content that is 'contrary to public order.' The censorship unit stated that within the context of the 2023 general elections, the film in its entirety had the 'potential to incite violence.' The documentary film chronicles the 2018 presidential campaign race of opposition leader, Nelson Chamisa, spotlighting alleged occurrences of election fraud, violence, rigging and intimidation.



Case Spotlight

In November 2022, Zimbabwe Republic Police denied Election Resource Centre (ERC) permission to host a music concert intended at promoting student voter registration in Bulawayo city, on grounds that the police deemed the concert to be "too political." ERC reportedly applied for permission on 7 and 11 November 2022 respectively, and on both occasions the request was denied

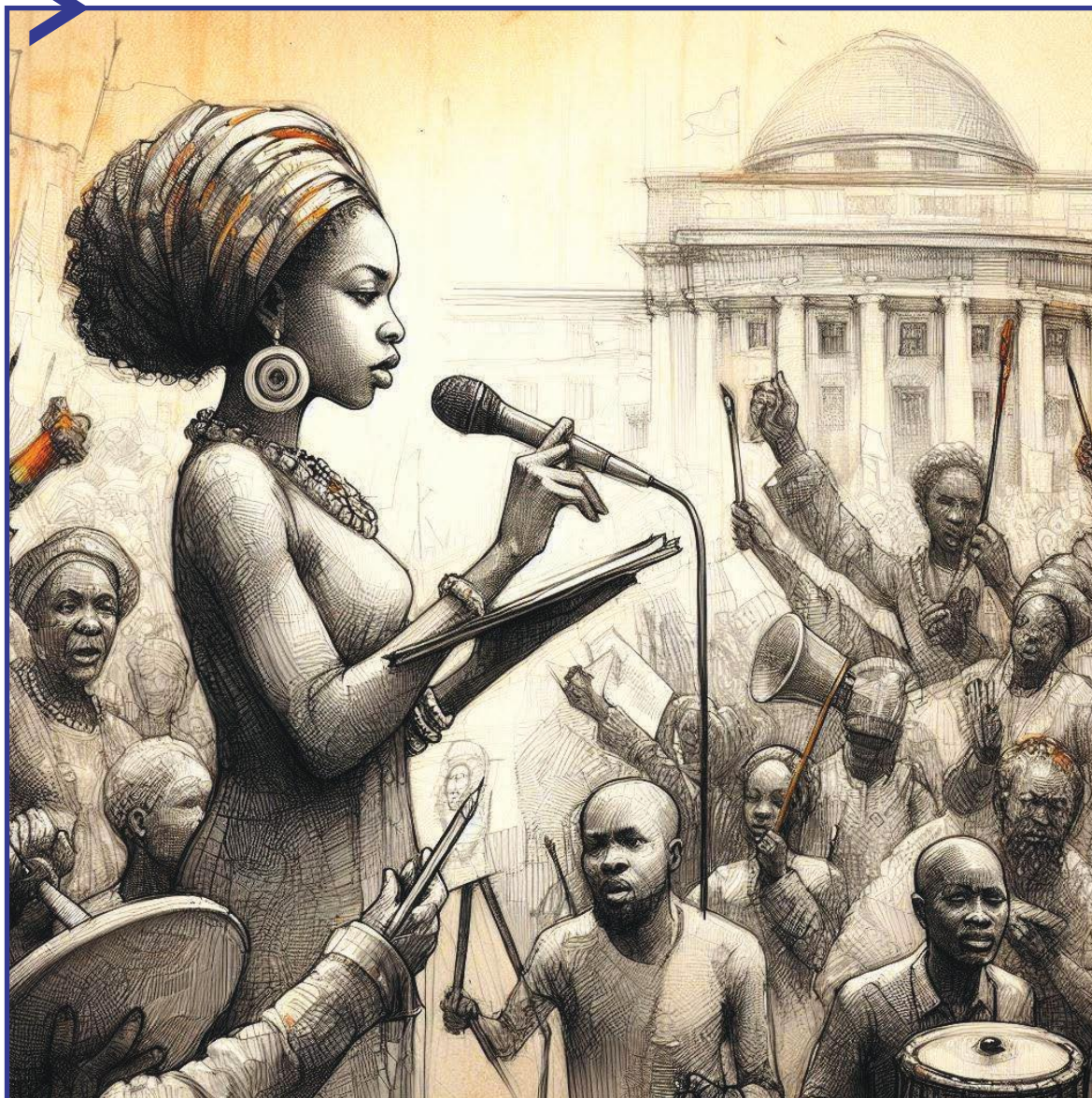




Did you know?

On 29 July 2023, Abbah El-Mustapha the newly appointed director of Kano State Film and Video Censors Board revoked licences of all film and music practitioners in Kano State, citing industry sanitisation and the establishment of a more effective licencing framework. The board stated that this measure would enhance adherence to State laws, policies, religious beliefs and cultural norms, while simultaneously deregistering non-compliant practitioners in an exercise Mr. El-Mustapha termed "fetching bad eggs." Industry practitioners deemed the measure to be politically motivated and intended at persecuting those who had campaigned against the State's ruling party, the New Nigeria People Party, to which Mr. El-Mustapha is a member. This assertion was underscored by allegations that in the aftermath of the February 2023 general elections some members of the public suspected to be members of the ruling party had looted and destroyed the professional and personal properties belonging to creative industry practitioners who had supported opposition parties.





Petitioning in Relation to Artistic Freedom in the Region





Petitioning within the domain of artistic freedom has assumed the posture of a movement, a protest, an activism that shapes the trajectory of artistic practice and the content of artistic creations. Much like artistic freedom, petitioning is protected by a universally guaranteed right to freedom of expression. As a practice, petitioning contributes to democratic culture and democratic practice, provoking dialogue and critical thought that is an essential ingredient of a functioning society. Petitioning as experienced in relation to artistic freedom in most African countries has however narrated itself away from progressive and critical engagement, to posture itself as a deliberate and obvious attempt to:

- ⊞ Censor artists
- ⊞ Advance the censorship of artistic creations
- ⊞ Normalise persecution and sanctioning as an acceptable punitive measure for artistic expression, through processes that are not adjudicated by courts of law
- ⊞ Legitimate punitive sanctions against artists, without the option of an appeal or the right to respond
- ⊞ Disregard human rights protections as guaranteed in international human rights law





As informed by artistic freedom case documentation, most calls for limitations to artistic expression in petitions have evidently been predicated on justifications of limitations that do not acknowledge human rights standards, do not refer to human rights law and do not elaborate on state obligations under international law.

They have been characterised by rationales of religion, politics, personal emotions / feelings and the ideological orientation of the petitioners.

What makes these petitions or their equivalent particularly concerning and worthy of attention is the apparent power dynamic, in most cases, between the petitioner and state functionary being petitioned, tipping the scales in favour of the petitioner. This has been evidenced by cases of censorship in which regulatory bodies have cited petitions as grounds of their decisions, in what they characterise as the fulfilment of participatory democracy. Further, the influence wielded by petitioners in relation to petitioned artists creates an environment of fear and intimidation, prompting self-censorship. This wholly contradicts the fundamentals of artistic freedom of the right to create without intimidation and the right to create without censorship.

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Profiles of Petitioners in Documented Cases



Religious groupings



Ethnic groups



*Political groupings
that are a faction of
the ruling party*



*Law enforcement /
security agents*

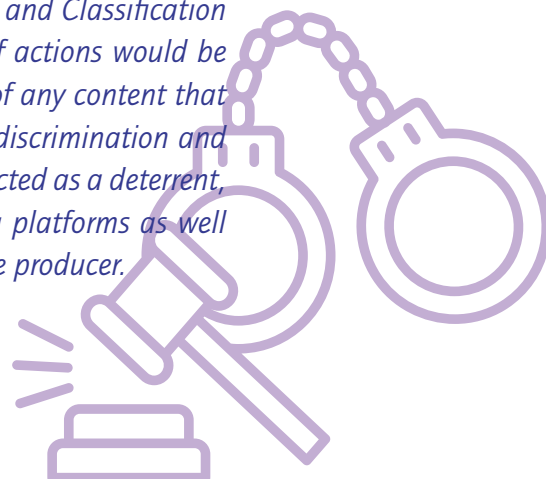
"We find this song disgusting, detestable and egregious. It is a brazen assault on Nigerian and African values. Portable's latest song has reduced human life to the level of ordinary ants that can be stamped out under human feet without qualms and without consequences. It is an open invitation to criminality. It makes a mockery of law and order. It is an open disrespect for human life." Extract from a petition by the Muslim Rights Concern for measures to sanction and investigate musician Portable (given name Habeeb Okikiola), and ban the circulation and broadcasting of his song Kuku Do Ritual. The song, which Portable released on 20 January 2023, refers to unconventional and diabolical means of wealth generation. It suggests that such means should not be shunned because death is inevitable regardless of how humans conduct their lives.



Spotlight Case

A regulatory body takes censorship action in response to a petition

On 30 January 2023, Adedayo Thomas the Executive Director of Nigeria's National Film and Video Censors Board (NFVCB) stated that a Yoruba movie, Osuwon Mi, had been banned and would be removed from streaming platforms on grounds that it had been circulated without having been submitted to the board for censorship and classification. The decision on the ban was a response to a petition submitted by Ta'awunu Human Rights Initiative on 6 December 2022 in which the organisation argued that actress Kemi Afolabi's portrayal of a flirtatious and adulterous woman in a Muslim veil was tantamount to a 'gross violation of the rights of Muslim women in veil' and served the 'furtherance of an indecent and nonchalant attitude towards the Muslim community.' In a written response to the petition, NFVCB's Director of Film Censorship and Classification Deborah Malgwi expressed that a number of actions would be taken by the board as it would not approve of any content that 'ridicules religion' and 'encourages religious discrimination and violence.' The listed actions, which were projected as a deterrent, included removing the movie from streaming platforms as well as sanctioning the lead actress and the movie producer.

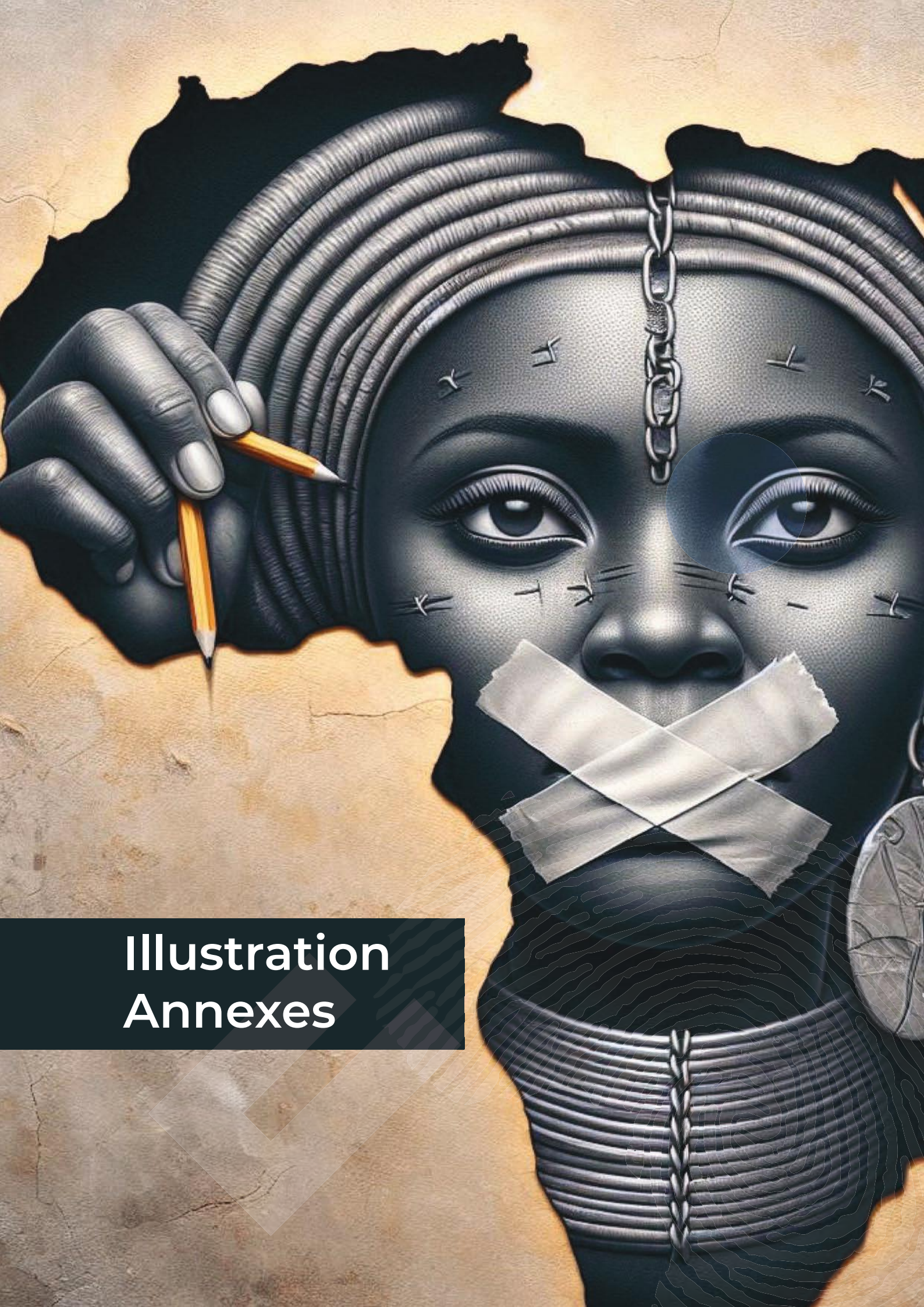




Spotlight Case

A regulatory body provides clarification on its legally permitted mandate, in response to a petition

*Following the release of the movie *Gangs of Lagos* on Amazon Prime on 7 April 2023, Isale Eko Descendants Union petitioned the National Film and Video Censors Board to withdraw the approval licence of the movie and ban it from streaming platforms, citing that the movie 'despicably and insensitively' depicts the culture of Lagos' Isale Eko community. A crime thriller centred on the life of childhood friends who grow up in the Isale Eko area of Lagos, the movie features the Eyo Masquerade, a cultural performance of dance and song indigenous to the Yoruba ethnic group. The masquerade is believed to be a living embodiment of ancestral spirits who are represented by performers who cover their entire bodies with white robes, headgear and traditional face masks. Alleging that masquerade inclusion in the movie signifies cultural exploitation, the Union argued that its community had been defamed through the association of masquerading with criminality and criminal mindedness, contrary to the masquerade's indigenous identity of celebration, sacrilege and community unity. The centering of the storyline on Isale Eko city was also deemed by the union to depict the city as a hive of gangsterism. Responding to the petition, Adedayo Thomas the CEO and Executive Director of the National Film and Video Censors Board stated that his board was not empowered by the law (National Film and Video Censors Board Act, 1993) to regulate online content, clarifying that his mandate is limited to cinema and public space exhibitions.*



**Illustration
Annexes**

YOUR REF.:
Telephone: 791180
764465/700796/792991



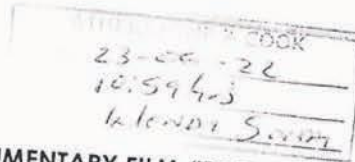
**Ministry of Home Affairs
and Cultural Heritage
Censorship and Entertainment
Control Unit
P.O. Box CY 165
Causeway
HARARE**

16 June 2022

REFERENCE:

Atherstone & Cook Legal Practitioners
Practor House
119 Chinamano Avenue
HARARE

Attention : Mr Chris Mhike



Re: APPLICATION FOR APPROVAL OF DOCUMENTARY FILM-"PRESIDENT"

Reference is made to your follow-up correspondence referenced CM/ak/F55 dated 02 June 2022 on the above subject.

Please be kindly advised that your documentary film, "**President**" was not approved in terms of section 10(2)(b) of the Censorship and Entertainments Control Act, Chapter 10:04 which states that, the board shall not approve any film or film advertisement which in its opinion "*is likely to be contrary to public order*".

Also take note that the "**Notice for Rejection**" was made to the whole documentary film. The film has the potential to incite violence as the country is now preparing to go for elections in 2023.

Yours faithfully,

O. MUGOMERI
ACTING DEPUTY DIRECTOR
CENSORSHIP AND ENTERTAINMENTS CONTROL UNIT

- cc Permanent Secretary [Ministry of Home Affairs and Cultural Heritage]
- cc Director [Legal]
- cc Acting Director [SPPME]

Min. of Home Affairs and Cultural Heritage
Deputy Director
Censorship Entertainment and Control Unit
16 JUN 2022
P.O. BOX CY 165, CAUSEWAY
ZIMBABWE



PRESS STATEMENT BY THE KENYA FILM CLASSIFICATION BOARD AG. CHIEF EXECUTIVE OFFICER MR. CHRISTOPHER WAMBUA ON THE RESTRICTED INDIAN FILM TITLED: 'BADHAAI DO' ISSUED ON MONDAY 14TH FEBRUARY, 2022 AT 10:00 AM, AT THE BOARD'S UCHUMI HOUSE OFFICES, NAIROBI.

Members of the Press

Colleagues

Good morning

The Kenya Film Classification Board (KFCB) is a regulatory agency mandated by the *Films and Stage Plays Act Cap 222* of the Laws of Kenya to regulate the creation, broadcasting, possession, distribution and exhibition of film and broadcast content.

Regulation of film and broadcast content aims at ensuring that content conforms to our Kenyan culture, values and National aspirations, as well as to protect children from exposure to inappropriate content.

The law further vests KFCB with the responsibility of **examining and classifying** all film content intended for **public exhibition for age-appropriateness**. In discharging this responsibility, the KFCB and content as any of the following: **GE** (General Exhibition), **PG** (Parental Guidance Recommended), **16** (Not suitable for Persons under 16), **18** (Above 18 years) and/or **Restricted/Banned**. In examining and classifying film and broadcast content, the Board is guided by classification standards and guidelines under classifiable elements, including: **Violence and Crime, Sex, Obscenity and Nudity, Occult and Horror, Drugs, Alcohol and other Harmful Substances, Religion and Community and Propaganda for War, Hate Speech and Incitement**.

Ladies and gentlemen,

In February this year, the Board received a **147-minute drama comedy film of Indian origin** titled: *Badhaai Do* to examine and classify before public exhibition in cinema theatres.

The film was examined by both our internal and external examiners while basing on the existing classifiable elements and standard guidelines as above.

The examiners then noted an obvious and intentional attempt by the producers to promote the same-sex marriage agenda as an acceptable way of life. The gay and lesbian characters in the film explicitly seek to normalize their feelings for each other and ultimately convince their families to embrace and empathise with them. Furthermore, the choice of characters equally seeks to abuse establishments such as the disciplined forces and academia, professions that epitomise sobriety and virtue, and that society holds in high regard. The multiple scenes of lesbian and gay affection depicted in the film are in complete disregard of our cultural values and beliefs.

Ladies and gentlemen,

Homosexuality remains an anathema and claims such as 'Love is Love', 'I am okay with my son being a gay', 'gay people can adopt' among others, as portrayed in the film fly in the face of our laws and values. According to Article 45 of the Constitution of Kenya (2010), marriage is defined as a union between persons of the opposite sex. Sections 162, 163 and 165 of the Penal Code criminalizes homosexual behaviour. The film in question, therefore, overtly disregards our laws, constitution and sensibilities as a people.

Moreover, the film tries to directly influence the viewer into believing that homosexuality is a normal way of life. This is clearly evident by use of symbolic colours that are associated with LGBTQ+ as displayed towards the end of the film. The film also petitions society to embrace homosexuality as a group of homosexuals stages a march to advocate their rights.

Ladies and Gentlemen,

While this film is acceptable in its country of origin, India, the Board has rated it as **RESTRICTED** in Kenya as it propagates a worldview that is in dissonance with our constitution, culture, values and norms and could easily expose vulnerable consumers to perversion. On this score, any films or broadcast content appearing to legalize, advocate, normalize or glorify the act contravenes the laws of our land. The film is, therefore, unacceptable and an affront to our culture and identity as Kenyans.

While adults may have a right to choose what they consume within the parameters of the law, children and other vulnerable segments of society are at the risk of being corrupted.

On account of the afore-cited reasons, on this 14th day of February 2022, the Board hereby pronounces the 147-minute gay-themed film titled: *Badhaai Do*, as **RESTRICTED**. For the avoidance of doubt, **RESTRICTED** in this case means that it is prohibited from exhibition, distribution, possession or broadcasting within the Republic of Kenya.

In light of the foregoing, the Board further wishes to state as follows:

1. We have noted an increase in audio-visual content that seeks to promote and normalise gay themes and ideologies contrary to our national laws, beliefs and norms. In this regard, the Board will not allow such content to be either broadcast or exhibited in Kenya.
2. Any attempt to exhibit, distribute, broadcast or possess the **RESTRICTED** film or any other **RESTRICTED** films within the Republic of Kenya shall be met with the full force of the law. On this account, we appeal to registered Cinema Operators across the country to ensure that the said film does **NOT** exhibit.
3. The Board remains vigilant to ensure that films exhibited in Kenya promote our cultural values, including preserving the institution of family.
4. Local and International filmmakers wishing to create audio-visual content are reminded to strictly adhere to the provisions of the *Films and Stage Plays Act* by acquiring filming licences as well as submitting their content for examination and classification for age suitability before public exhibition.
5. We call upon parents, guardians and caregivers to remain vigilant and monitor what their children are watching on TV or other broadcast channels and guide them appropriately.

Ladies and gentlemen,


On a different note but still within our mandate, the Board has noted a worrying trend where audio-visual content bordering on political incitement and hate speech is being produced, uploaded and peddled on social media platforms in blatant breach of the provisions of Article 33 and 34 of the Constitution of Kenya (2010) and KFCB's Film Classification Guidelines. In this regard, content creators are reminded to strictly adhere to the provisions of the *Films and Stage Plays Act* and other laws.

It is worth noting that, in the past one month, the Board has flagged down audio-visual content on hate speech and reported the same to relevant Government and private sector agencies for appropriate action. The Board shall remain vigilant in monitoring film and broadcast content shared on social media platforms and other broadcasting channels in line with our regulatory mandate. The Board also remains committed to working closely with other relevant Government and private sector agencies to execute its regulatory mandate, especially in the electioneering period.

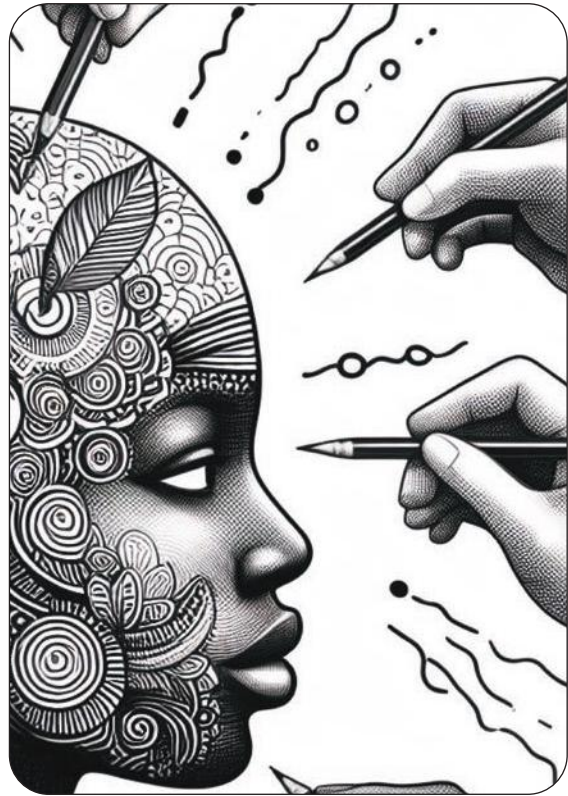
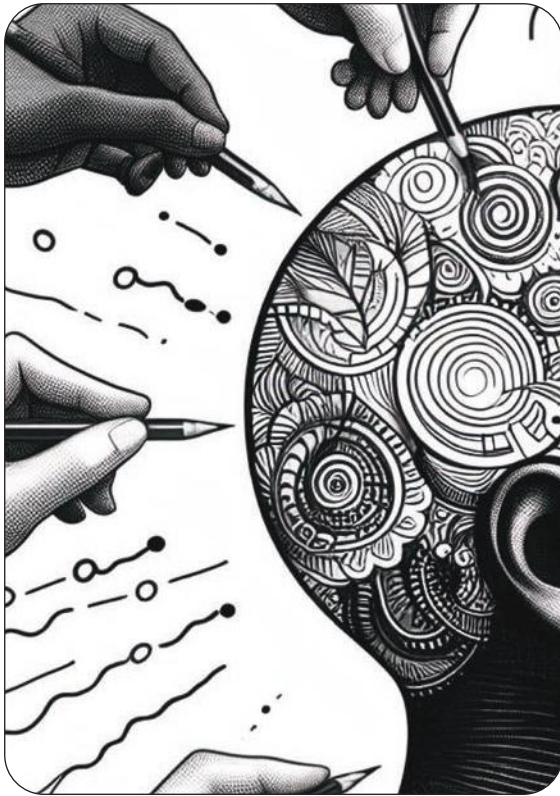
Lastly,

While recognizing and appreciating the existence of Articles 33, 34 and 35 (*Freedom of Expression, Freedom of the Media and Access to Information*), the Board urges content creators, the media and the public to be cautious of the content they upload or share on social media since freedom is not absolute. Freedom of expression must be premised on responsibility.

I thank you for your attention.



Christopher Wambua
Ag. CHIEF EXECUTIVE OFFICER

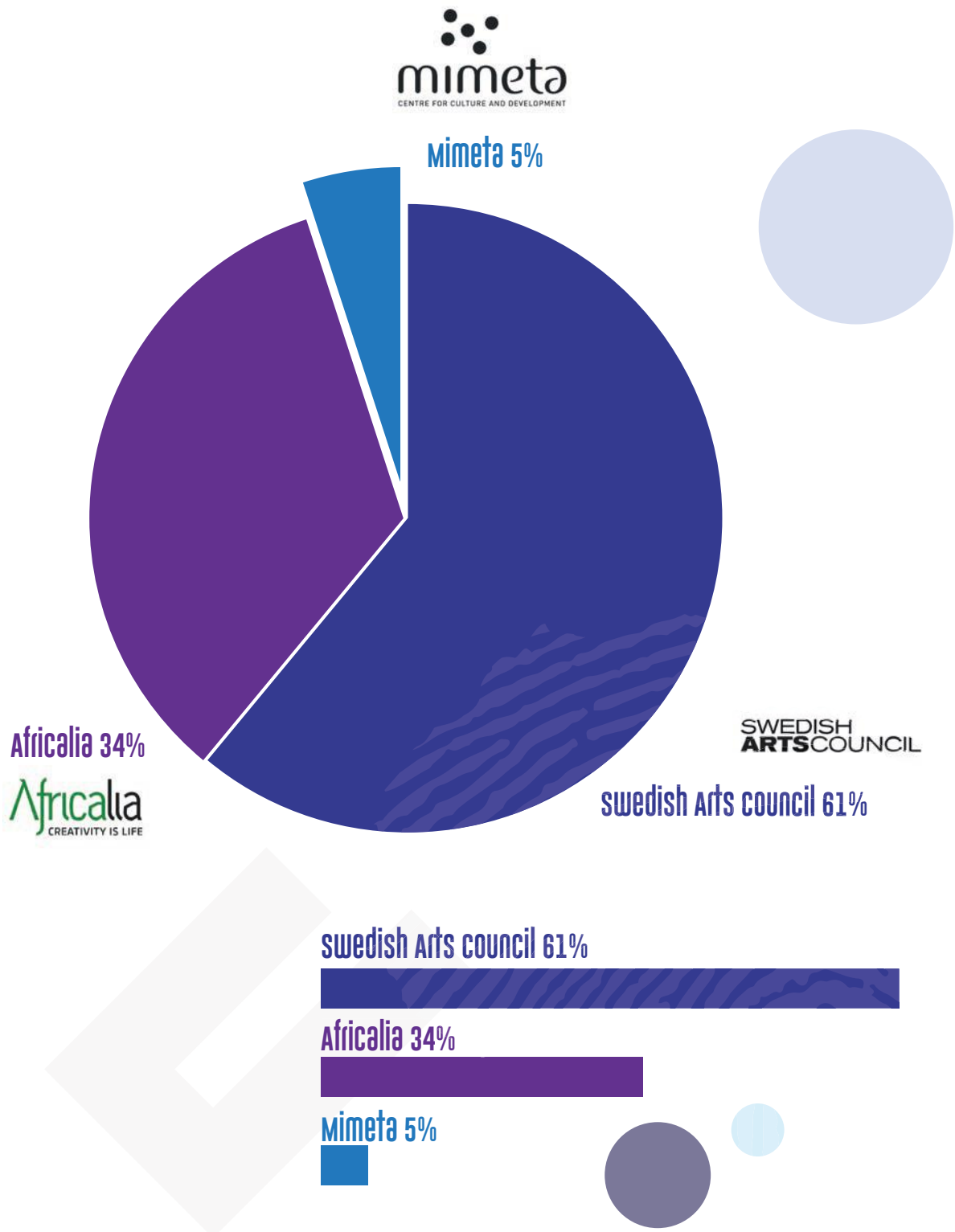


Collaborating partners

Avant Garde Lawyers
National Arts Council of Zimbabwe
Unchained Vibes Africa
Freemuse
PEN International
Artists at Risk Connection

Funding partners

Nhimbe Trust 2023-2024 Funding Outlook

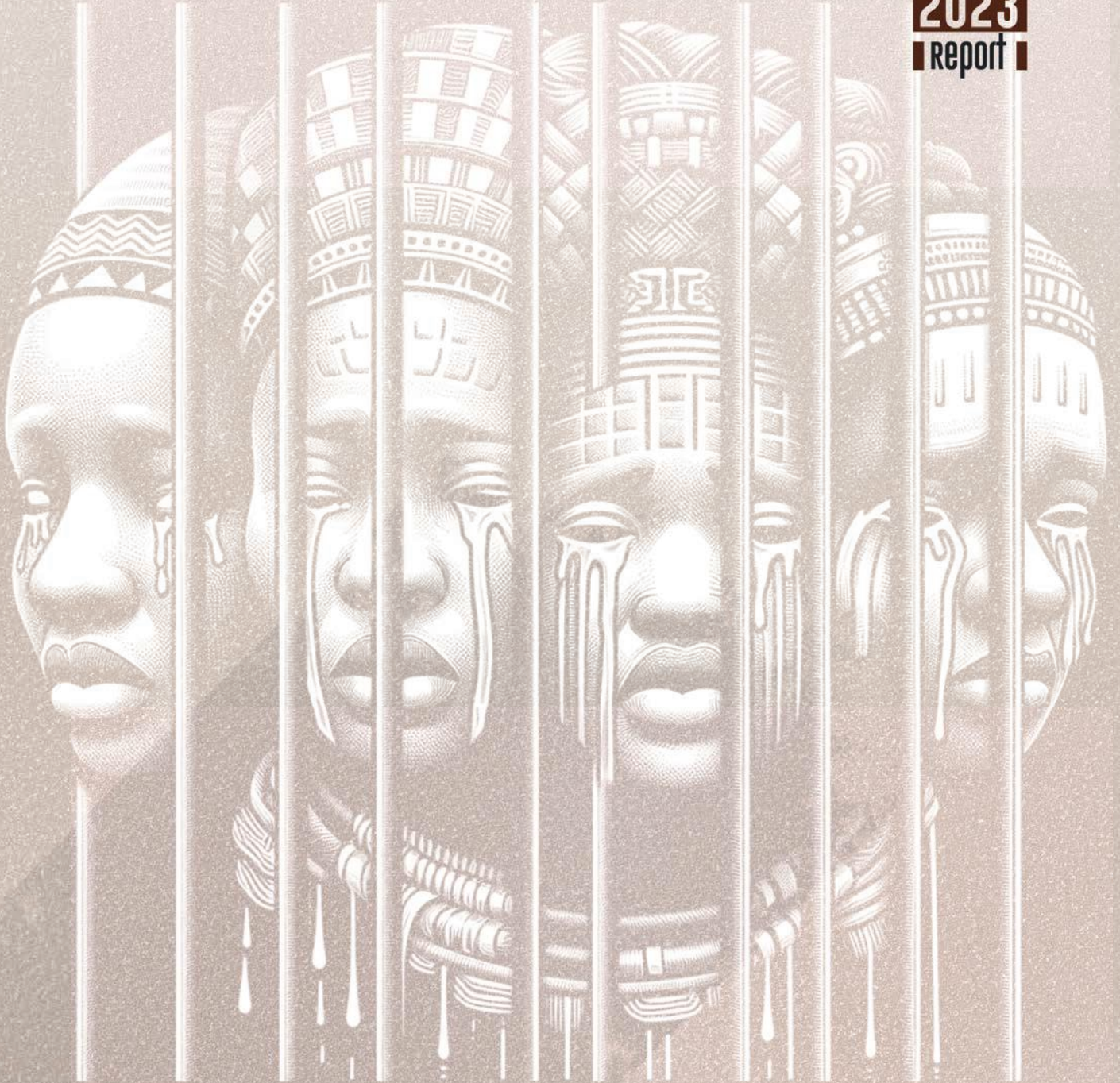


ARTSPEAK



ARTISTIC FREEDOM

2023
Report



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