

A DISSERTATION SUBMITTED IN PARTIAL FULFILMENT OF AN LL.M
MASTERS IN HUMAN RIGHTS AND DEMOCRATISATION IN AFRICA



RESEARCH TOPIC:

**THE PATRIOTIC ACT AND ITS FAR-REACHING CONSEQUENCES ON
FREEDOM OF EXPRESSION IN THE DIGITAL SPACE IN ZIMBABWE.**

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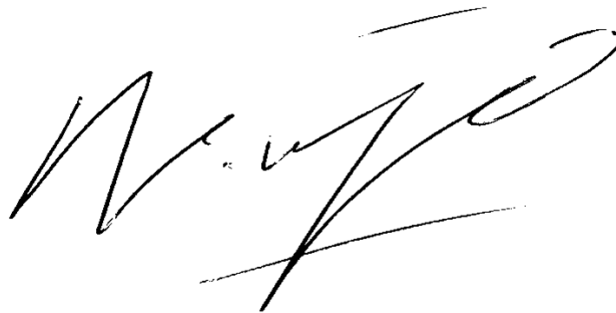
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DEDICATION

To my beloved family,

Your unwavering support, encouragement, and love have been the foundation upon which I built this work. Through every challenge and moment of doubt, you stood by my side, lifting me up and reminding me of my strength. Your patience and understanding have been a constant source of comfort throughout this demanding journey.

This dissertation is as much yours as it is mine, for without your emotional support, this accomplishment would not have been possible. Thank you for believing in me and for being my greatest inspiration.

With all my love and gratitude,

Ntandoyenkosi Moyo

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LIST OF ABBREVIATIONS AND ACRONYMS

African Charter	-	African Charter on Human and Peoples' Rights
African Commission	-	African Commission on Human and Peoples' Rights
AIPPA	-	Protection of Privacy Act
CC	-	Constitutional Court
CCC	-	Citizens Coalition for Change
CLCR	-	Criminal Law Codification and Reform Act
The Declaration	-	Declaration of Principles of Freedom of Expression and Access to Information in Africa
IAC	-	Interception of Communication Act
ICJ	-	International Court of Justice
ICCPR	-	International Covenant on Civil and Political Rights
IR	-	Information Regulator
JSC	-	Judicial Service Commission
LOMA	-	Law-and-Order Maintenance Act
MDC	-	Movement for Democratic Change
Malabo Convention	-	African Union Convention on Cyber Security and Personal Data Protection
OSA	-	Official Secrets Act
POPIA	-	Protection of Personal Information Act
RICA Bill	-	Regulation of Interception of Communications and Provision of Communication-Related Information Act
RICA Case	-	AmaBhungane Centre for Investigative Journalism and Others v Minister of Justice and Correctional
RICA Act	-	Regulation of Interception of Communications and Provision of Communication-Related Information Act



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TRC

-

Truth Reconciliation Commission

UDHR

-

Universal Declaration of Human Rights

UN

-

United Nations

UNHRC

-

United Nations Human Rights Council

WGEID

-

Working Group on Enforced and Involuntary
Disappearances

X

-

Formerly known as Twitter

ZANU-PF

-

Zimbabwe African National Union-Patriotic Front

ZLHR

-

Zimbabwe Lawyers for Human Rights

ZMMT

-

Zimbabwe Mass Media Trust

ABSTRACT

This thesis critically examines the systematic repression of freedom of expression and the right to privacy in Zimbabwe's digital space. Through an analysis of repressive legislative frameworks such as the Criminal Law and Codification and Reform Act, the Interception of Communications Act, and the recently enacted Patriotic Act, it argues that the Zimbabwean government has actively cultivated an environment of civic repression that undermines democratic principles. These laws through their vague and broad provisions have facilitated widespread state targeted surveillance, restricted free expression by introducing excessive criminal sanctions, and led to the persecution of human rights defenders, political activists, and journalists such as Hopewell Chin'ono and Job Sikhala. The government's encroachment on digital rights is further compounded by a lack of judicial independence, evidenced by constitutional amendments that centralise the power over judicial appointments and tenure of office with the President and the judiciary's inability to counter these laws effectively. Additionally, there has been a disturbing pattern of enforced disappearances and abductions of political activists and human rights defenders, contributing to a pervasive climate of fear and intimidation that negatively impacts the said rights.

In contrast, the South African jurisdiction provides a comparative perspective where progressive legislation, such as the Protection of Personal Information Act (POPIA) and the Regulation of Interception of Communications and Provision of Communication-Related Information Act (RICA Bill), coupled with a robust, independent judiciary, upholds freedom of expression and the right to privacy in the digital sphere. This thesis underscores how South Africa's legislative and judicial frameworks protect these fundamental rights and serve as a model for safeguarding digital freedoms. Ultimately, this study proffers recommendations for the urgent need for Zimbabwe to adopt similar reforms that align with international human rights standards to promote an open and secure digital environment.

GLOSSARY OF TERMS

Surveillance and monitoring – Surveillance and monitoring of the digital space refer to the collection, analysis, and oversight of information and communications within digital environments, often using technology to track, observe, and record online activities. This can involve various tools and methods designed to keep watch over digital activities, whether for security, regulatory, or commercial purposes.

Unlawful interference with one's right to privacy - Unlawful interference with one's right to privacy in the digital space typically involves unauthorised actions that infringe upon an individual's ability to control their personal information online. This includes government or corporate monitoring of individuals' online activities without consent or legal justification or judicial safeguards and review, disclosing an individual's personal information to third parties (such as advertisers, law enforcement, or employers) without their consent, or Intercepting emails, messages, or other digital communications using repressive legislations that don't align to international Human Rights Standards.

International human rights standards on surveillance and monitoring of social media – These are guiding principles that aim to protect individuals' rights to privacy, freedom of expression, and access to information. The main components include the Prohibition of Arbitrary Surveillance, surveillance measures should be necessary and proportionate to prevent excessive or blanket monitoring that infringes on privacy without justification. Surveillance practices should be subject to independent oversight to ensure they comply with human rights standards. This includes judicial oversight, transparency, and the ability for individuals to seek remedies if their rights are violated.

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CHAPTER ONE

1.1. Introduction

The precepts of the fundamental human right to freely express one's views, opinions, and thoughts are not only anchored in its singular importance, but it is a facilitative right that enables the enjoyment of other rights such as freedom of assembly, and association, political participation, human dignity, education, and other rights.¹ This therefore means that when freedom of expression is disproportionately, severely, and unjustly restricted, there is a domino effect that results in the violation of many other rights.² This first Chapter will shape the framework of this entire research titled 'The Patriotic Act and its Far-Reaching Consequences on Freedom of Expression in the Digital Space in Zimbabwe'. The chapter will address the background of the study, problem statement, research questions, Literature review, methodology, delimitation of the study, and the chapter synopsis.

1.2. Background of Study

Zimbabwe gained its independence in 1980 after a prolonged and arduous liberation conflict with the British colonial power. Since 1980 the country has been under the political leadership of the Zimbabwe African National Union-Patriotic Front (ZANU-PF).³ Unfortunately, post-independence laws that severely repress the right to freedom of expression have existed throughout the colonial continuum.⁴ For example, the Law-and-Order Maintenance Act (LOMA) and the Official Secrets Act (OSA) were inherited from the pre-independence era.⁵ Post-colonial structures such as the Zimbabwe Mass Media Trust (ZMMT) in 1981 were set up by ZANU-PF to administer,

¹ General Comment 25 UNHR Committee UN Doc CCPR/C/21/Rev.1/Add.7 (1996); *Abrams v United States* 250 US 616 (1919); R Clayton *Privacy and Freedom of Expression* Sixth Edition (2010) 233.

² General Comment 34 UNHR Committee UN Doc CCPR/C/GC/34 (2011). See *Article 19 v Eritrea* (2007) AHRLR 73 (ACHPR 2007); *Lohé Issa Konaté v Burkina Faso*, Application 4/2013, ACTHPR (2014); *Amnesty International and Others v Sudan* (2000) AHRLR 297 (ACHPR 1999), *Jawara v The Gambia* (2000) AHRLR 107 (ACHPR 2000), *Interights and Others v Mauritania* (2004) AHRLR 87 (ACHPR 2004).

³ N Ngwenya 'Compliance through Decoration: Access to Information in Zimbabwe' in O Shyllon (ed) *Model Law on Access to Information for Africa and other regional instruments: Soft law and human rights in Africa* (2018) 14.

⁴ As above.

⁵ L Moyo and others 'Freedom of the Press, the Zimbabwean Situation Up to 2009' (2014) 5 *Mediterranean Journal of Social Sciences* 1543-1552.

censor, and control all mass media platforms in the country,⁶ and to control and manage the two main daily newspapers in Bulawayo and Harare, *The Herald* and *The Chronicle*.⁷ In the late 90s and early 2000s, the growing discontent with the ruling party and the emergence of strong political activists and opposition factions led to the Movement for Democratic Change (MDC).⁸ To deafen dissenting voices in the political arena and the public in general, more retrogressive laws were adopted to muzzle dissent, such as The Criminal Law and Codification Act particularly Section 31 and the Maintenance of Peace and Order Act.⁹ The Former punishes any ‘false statements that are prejudicial to the state’ and the latter is a mere reincarnation of the LOMA act, reinforcing the illegality of statements disturbing peace and limiting demonstrations, dissent, and public gatherings.¹⁰

On 14 July 2023, current President Emmerson Mnangagwa, against the backdrop of insistent criticism both nationally and internationally, signed the Criminal Law (Codification and Reform) Amendment Act, 2023 ‘The Patriotic Act’ into relegating the right to freedom of expression and privacy in oblivion.¹¹ The Act criminalised any messages shared in person or virtually, that may be deemed subverting or upsetting to the Government or unpatriotic.¹² The Act treats dissent or criticism of the government online in the same bracket as treason and imposes 20-year custodial sentences, loss of citizenship, and in the extreme, the death penalty.¹³ It satisfies the requirements of Section 6 of the Interceptions and Communications Act (IAC), legally justifying unmetered and arbitrary surveillance and monitoring of all messages shared online.¹⁴ This suppresses any criticism or dissent of the ruling party

⁶ As above.

⁷ J Mpofu & S Chimhenga ‘The impact of Zimbabwean Media Laws on the work of Journalists and Media organisations’ (2013) 2 *Journal of Research & Method in Education* 84.

⁸ Ngwenya (n 3).

⁹ P Kaseke ‘POSA, is that you? – Part 1’ *Newsday* (Harare) 30 April 2019 <https://www.newsday.co.zw/2019/04/posa-is-that-you-part-1/> (accessed 05 May 2024).

¹⁰ Zimbabwe Human Rights NGO Forum ‘An Analysis of the Maintenance of Peace and Order Bill’ 5 July 2019 <http://www.hrforumzim.org/publications/an-analysis-of-the-maintenance-of-peace-and-order-bill-2019/> (accessed 04 May 2024).

¹¹ Amnesty International ‘Zimbabwe: Parliament’s passing of ‘Patriotic Bill’ is a grave assault on the human rights’ 09 June 2023 <https://www.amnesty.org/en/latest/news/2023/06/zimbabwe-parliaments-passing-of-patriotic-bill-is-a-grave-assault-on-the-human-rights/> (accessed 06 August 2023).

¹² The Patriotic Act Section 22A (2)(a).

¹³ As above; E Muchena ‘Revisiting the Media Lawscape: A Context-Based Reappraisal of the New Media Laws in Zimbabwe’ (2013) 17 *Journal of Humanities and Social Science* 68.

¹⁴ Interception of Communications Act (Chapter 11:20): Amnesty International (n 11).

and punishes any information shared online that jeopardizes the national interests of the state and or any content that may be deemed ‘unpatriotic.’¹⁵

Furthermore, the judiciary has often been seen as complicit in suppressing freedom of expression, for instance, even though the High Court in April 2021, had invalidated Section 31(a)(iii) of the Criminal Law Codification and Reform Act (CLCR) which criminalises the ‘publishing or communicating falsehoods prejudicial to the state’, Fadzai Mahere, an outspoken critic of the government, human rights defender, and the Citizens Coalition for Change (CCC) opposition party spokesperson in April 2023, was not only tried under the non-existent law but was convicted and sentenced for violating it.¹⁶ Additionally, the court's deference to the executive and lack of credibility has been demonstrated in Job Sikhala’s trial and continued detention for over 500 days, a travesty of justice that shows a growing crackdown on any dissent.¹⁷ Job Sikhala a prominent political activist was charged and arrested for posting a video criticising the government for the death of Moreblessing Ali, a CCC activist.¹⁸

The courts in July 2020 refused to drop charges against prominent author Tsitsi Dangaremba and filmmaker Julie Barnes after they were arrested and charged with incitement to commit public violence because they had discussed the harsh economic conditions on social media as part of the #ZimbabweanLivesMatter movement. The two ladies were handed a six-month suspended sentence for exercising their constitutional right to protest peacefully.¹⁹ On the other hand, the court in very few instances has acquitted and ruled against the government.²⁰ However such rulings

¹⁵ As above.

¹⁶ Fact Check Zimbabwe ‘Mahere convicted on a law that was declared invalid’ (Harare) <https://factcheckzw.org/mahere-convicted-on-a-law-that-has-been-declared-invalid/> (accessed 16 August 2024).

¹⁷ Amnesty International ‘Zimbabwe: Continued detention of former opposition MP Job Sikhala a travesty of justice’ 29 November 2023 <https://www.amnesty.org/en/latest/news/2023/11/zimbabwe-continued-detention-of-former-opposition-mp-job-sikhala-a-travesty-of-justice/> (accessed 24 August 2024).

¹⁸ As above.

¹⁹ Amnesty International ‘Zimbabwe: Conviction of author Tsitsi Dangaremba and Barnes for protesting economic hardships a travesty of justice’ 30 September 2022 <https://www.amnesty.org/en/latest/news/2022/09/zimbabwe-conviction-of-author-tsitsi-dangaremba/> (accessed 24 August 2024).

²⁰ The News Hawks (@NewsHawksLive) ‘#JournalistFreeAtLast!’ Twitter, 12 May 2023, <https://twitter.com/NewsHawksLive/status/1657065489497980934?s=20>. (accessed 24 August 2024).

have come after prolonged detentions, allegations of torture, and threats of violence, resulting in the self-censorship of journalists and political activists out of fear for their lives and safety.²¹

1.3. Problem Statement

The fulcrum of the problem with the Patriotic Act is twofold. Firstly, one of the legal principles of the rule of law is that law must be certain and clear, the public must not be left in a state of daze and confusion on what exactly the law proscribes and what specific conduct violates the precepts of a particular legislation.²² The Patriotic Act is littered with vague and broad legal provisions that can be arbitrarily interpreted and this has the negative import of weaponising the law and targeting specific individuals.²³ After a thorough reading of the legislation it begs the question, what exactly constitutes ‘unpatriotic behavior’, or ‘upsetting and subverting’?²⁴ Almost anything can be considered upsetting for example a discussion of the rigging of an election or criticism of the government online would categorically violate the Patriotic Act.²⁵ Considering the government’s history of targeted dissent in Zimbabwe with brute lethal force²⁶ or custodial sentences leveled against political activists²⁷ and extrajudicial killings and disappearances of journalists,²⁸ armed with this new law, the crackdown via prosecutions and arrests will become more widespread and brutal.²⁹

²¹ H Chin’ono (@daddyhope) ‘I won’t be reporting on this story for my safety’ Twitter, 29 March 2023, <https://twitter.com/daddyhope/status/1640949145312669696?s=20>. (accessed 24 August 2024).

²² *Vallejo v Wheeler* (1774) 1 Cowp 153, *Golden Straight Corporation v Nippon YKK (The Golden Victory)* (2007) UKHL 12, para 1, *R (Nadarajah and Abdi) v Secretary of State for the Home Department* (2005) EWCA Civ 1363.

²³ *Winters v New York* 33 U.S 507 (1948).

²⁴ The Patriotic Act Sec 22A.

²⁵ Amnesty International (n 11).

²⁶ Amnesty International ‘Zimbabwe: One year on, no justice for those killed by soldiers in post-election demonstrations’ 1 August 2019 <https://www.amnesty.org/en/latest/press-release/2019/08/zimbabwe-one-year-on-no-justice-for-those-killed-by-soldiers-in-post-election-demonstrations/#:~:text=After%20the%20shooting%20on%201,were%20shot%20from%20the%20back>. (accessed 07 August 2024).

²⁷ US Department of State ‘2023 Country Reports on Human Rights Practices: Zimbabwe’ <https://www.state.gov/reports/2023-country-reports-on-human-rights-practices/zimbabwe> See Also, Human Rights Watch ‘Zimbabwe: Opposition Activists Wrongfully Denied Bail’ 31 July 2024 <https://www.hrw.org/news/2024/07/31/zimbabwe-opposition-activists-wrongfully-denied-bail> (accessed 07 August 2024).

²⁸ UNOHCHR ‘UN Experts concerned over reports of death threats against Journalists in Zimbabwe’ 24 August 2001 <https://www.ohchr.org/en/press-releases/2009/10/un-experts-concerned-over-reports-death-threats-against-journalists-zimbabwe> (accessed 07 August 2024).

²⁹ Amnesty International (n 11).

Secondly, this law promotes expansive surveillance and monitoring of all social media networks, arbitrarily interfering with the right to privacy.³⁰ In Zimbabwe, the ICA is the principal legislation that governs the circumstances in which the government can legally intercept any digital telecommunication.³¹ The Act defines interception as either, recording, listening to, copying, or reading of any telecommunication information in the course of its transmission.³² The Act in Section 6 states that the Minister shall issue a warrant of interception if on reasonable ground a serious offense ‘has been or is being or will probably be committed’ or if a crime referred in the third schedule or ninth schedule of the Criminal Procedure and Evidence Act is being committed i.e. treason.³³ The ICA defines a serious crime as an offense ‘attracting a sentence of maximum deprivation of liberty of at least four years or a more serious sentence’.³⁴

This intrinsically means the Patriotic Act gives unregulated authority to all surveillance and monitoring of social media because by introducing the serious crime of wilfully injuring the sovereignty and national interest of the country, the Minister under Section 6 can issue a warrant of interception. This warrant would be legally justified on two grounds, firstly, when one posts or virtually communicates any information that is considered subverting or upsetting to the government such as criticism or dissent, the individual is committing a serious crime that attracts a sentence of 10 to 20 years. Secondly, to regulate and guarantee the enforcement of the Patriotic Act, the executive arm of the government can legally scour social media constantly to identify any communication deemed unpatriotic.³⁵

Although, the right to freedom of expression and privacy is provided for in the constitution these rights through the Patriotic Act have been severely and unjustifiably repressed. Considering that in Zimbabwe there are 5.48 million internet users,

³⁰ The Conversation ‘Zimbabwe’s Patriotic Act erodes freedoms and may be a tool for repression’ (Harare) 30 July 2023 <https://theconversation.com/zimbabwes-patriotic-act-erodes-freedoms-and-may-be-a-tool-for-repression-209984> (accessed 08 August 2024).

³¹ ICA Sec 6.

³² ICA Sec 2.

³³ The Criminal Procedure and Evidence Act (Chapter 9:03) 3rd & 9th Schedule.

³⁴ ICA Sec 2.

³⁵ C Mavhunga ‘Zimbabwe Rights Group, Opposition Furious over Signed Patriotic Bill’ (Harare) *Voa News* 17 July 2023 <https://www.voanews.com/a/zimbabwe-rights-groups-opposition-furious-over-signed-patriotic-bill-/7184729.html> (accessed 08 August 2024).

and 2.05 million social media users, equating to 12.2% of the total population, a total of 13.88 million cellular smartphone connections are active in Zimbabwe, equivalent to 82.4% of the total population.³⁶ This legislation, by sheer numbers alone, is the greatest assault on freedom of expression and the right to privacy in the modern history of Zimbabwe.³⁷ As the French philosopher Montesquieu stated in 1742, ‘There is no crueller tyranny than that which is perpetuated under the shield of law and in the name of justice’.³⁸

1.4. Research Questions

The main research question is what the far-reaching consequences of the Patriotic Act on freedom of expression and the right to privacy in the digital space in Zimbabwe are.

Other sub-questions to develop the main question will include:

1. What is the legal framework governing the right to freedom of expression and privacy in the digital space?
2. How does the Patriotic Act encourage the repression of those rights?
3. How have enforced disappearances, abductions, and torture of human rights defenders and the role the judiciary plays encouraged the repression of freedom of expression and privacy?
4. How has South Africa compared to Zimbabwe ensured the protection, promotion, and enforcement of freedom of expression and the right to privacy in the digital space?

1.5. Literature Review

Several authors have contributed to the literature on freedom of expression and the various means by which the executive has attempted to suppress and repress that right. The preponderance of literature focusing on this right has focused on censorship of journalists and media repression. For example, N. Ngwenya writes, that during a

³⁶ S Kemp ‘Digital 24: Zimbabwe’ 23 February 2024 <https://datareportal.com/reports/digital-2024-zimbabwe> (accessed 01 May 2024).

³⁷ Mavhunga (n 35).

³⁸ https://www.zinfos-moris.com/There-is-no-crueller-tyranny-than-that-which-is-perpetuated-under-the-shield-of-law-and-in-the-name-of-justice-Charles_a137.html (accessed 01 May 2023).

heightened period of political opposition between 2000 and 2008, there was a vast implementation of policies and legislations aimed at cracking down on freedom of speech and giving authoritarian practices by the ZANU-PF a veneer of legality.³⁹ Ngwenya further reiterates, that the enactment of the Access to Information and Protection of Privacy Act (AIPPA)⁴⁰ muzzled journalist freedom and limited the right to access information, expression, and other civil liberties by introducing undefined and vaguely worded limitations to those rights.⁴¹ L Moyo, echoing the same sentiments, vehemently criticizes the AIPPA as an assault on journalistic freedoms such as the right to freedom of expression and a conspicuous repression of media laws.⁴² Furthermore, renowned academic scholars such as J Mpofu and S Chimhenga have argued that the current media laws in Zimbabwe, fall short of international legal standards and encourage self-censorship under the threat of imprisonment and intimidation thereby narrowing what journalists can report.⁴³

On the other hand, A. Munoriyarwa eloquently articulates the growing concern of journalist surveillance by state authorities in Zimbabwe. He states that due to the watchful eye of the authoritarian government in Zimbabwe, journalists working in politically sensitive areas and performing the duty of watchdogs for the society, have sadly been subjected to torture, intimidation, and enforced disappearances.⁴⁴ His article builds on the findings of Munorinyarwa and Chiumbu, that the monitoring and surveillance of journalists in Zimbabwe have created the biggest threat to journalistic freedoms and is a thorn in freedom of expression in any democratic society.⁴⁵ Furthermore, the authors argue that journalists are aware of the growing practice of digital surveillance and monitoring by state organs and the increasingly dangerous climate existing for journalists in Zimbabwe.⁴⁶

³⁹ Ngwenya (n 3) 24 See Also, Human Rights Watch 'Sleight of hand: Repression of the media and the illusion of reform in Zimbabwe' 20 April 2010 <https://www.hrw.org/report/2010/04/20/sleight-hand/repression-media-and-illusion-reform-zimbabwe> (accessed 08 August 2024).

⁴⁰ Access to Information and Protection of Privacy Act (Chapter 10:27).

⁴¹ Ngwenya (n 3) 158.

⁴² Moyo and others (n 5) 1543.

⁴³ Mpofu & Chimhenga (n 7) 87.

⁴⁴ A Munoriyarwa 'When watch dogs fight back: resisting state surveillance in everyday investigative reporting practices among Zimbabwean Journalists' (2021) 15 *Journal of Eastern African Studies*, Taylor & Francis Journals 421-441.

⁴⁵ A Munoriyarwa & S H Chiumbu 'Big Brother is Watching: Surveillance Regulation and its Effects on Journalistic Practices in Zimbabwe' (2019) 40 *African Journalism Studies* 26-41.

⁴⁶ As above.

Additionally, T. Chitanana and B. Mutsvairo have underscored the utility of digital activism, highlighting the seismic #ThisFlag movement during former president Mugabe's regime.⁴⁷ They argue successfully that online posts and digital lobbying, although still new in Zimbabwe, have become one of, the greatest empowering tools political activists and journalists have at their disposal to challenge authoritarian regimes and advance political change.⁴⁸ This research seeks to collaborate and complement the well-thought-out ideals of the various learned authors cited above. It expounds the narrative and trajectory of digital activism in Zimbabwe, focusing on civilians, journalists, and political activists with the main aim of repressing freedom of expression through the vastly vague broad provisions, violating the right to privacy via broad surveillance and monitoring of social media accounts, and the draconian extreme penalties of the Patriotic Act.

1.6. Methodology

This study undertakes a desktop approach. It uses both primary and secondary legal sources to advance its main objective. The research will reference literature and online sources, such as websites, case law, books, newspaper articles, and international, regional, and municipal legislative instruments.

1.7. Delimitation of Study

This study gives a comprehensive overview of the scope and nature of the digital space in Zimbabwe as it pertains to free expression and the right to privacy. This study comparatively assesses, against the South African Jurisdiction, how the laws, lack of judicial independence, and the perpetration of enforced disappearances and abductions have created a negative impact of stifling and cracking down on freedom of expression and provided a base for unmetered surveillance and monitoring of the digital space. This study will not address physical protests or the crackdown on conventional methods of expressing dissent such as riots and marches, however, it focuses on the digital aspect of the right.

⁴⁷ T Chitanana 'From Kubatana to #ThisFlag: Trajectories of digital activism in Zimbabwe' (2020) 17 *Journal of Information Technology and Politics* 130–145. <https://doi.org/10.1080/19331681.2019.1710644>.

⁴⁸ As above.

1.8. Chapter Synopsis

Chapter one

This is an introductory chapter that comprises the introduction, a brief historical background to the study, the problem statement, research questions, literature review, research methodology, delimitations of the study, and the synopsis of the chapters.

Chapter two

This chapter examines the legal nature and content of the civic right to freedom of expression in the digital space and the right to privacy by focusing on the International, regional, and municipal legal framework.

Chapter three

This chapter discusses the Zimbabwean context, it will review the extent to which the laws encourage surveillance and repression of freedom of expression, discuss the role of the Zimbabwean judiciary in the protection or repression of freedom of expression, and give contextual examples of such repression.

Chapter four

This chapter shall focus on a comparative African jurisdiction, South Africa, and include a comparative discussion within the context of protection, promotion, and enforcement of freedom of expression and the right to privacy within the digital space.

Chapter five

This chapter provides conclusions of the study as well as recommendations.

CHAPTER TWO

2.1. Introduction

Since adopting the Universal Declaration of Human Rights (Universal Declaration) by the United Nations (UN) in 1948 the right to freedom of expression has been protected and regulated at various levels of law: international, regional, and municipal.⁴⁹ The normative content of the right has developed in the 21st century to include the internet and the digital space as a medium of expression.⁵⁰ The undeniable utility of the internet has amplified free speech, It has shaken authoritarian regimes and ignited revolutions, for example in Egypt,⁵¹ Tunisia,⁵² Ethiopia,⁵³ and Sudan.⁵⁴ This positive effect of the internet in the context of freedom of expression has attracted repressive legislation by despotic and authoritarian rulers in Africa, with the intent of muzzling dissent and eliminating political challenges.⁵⁵ The main objective of this chapter is to examine the legal frameworks that provide of the right to freedom of expression in the digital space and to discuss the international law standards when it comes to protecting the right to privacy. To comment on the four requirements that limitation measures must meet in order be justified in any democratic society and to show how Zimbabwe falls short of them,⁵⁶ And to provide a thorough analysis of the Patriotic Act.

2.2. International Legal Framework

The conceptualisation of human rights in international law is rooted in the Universal Declaration of 1948.⁵⁷ Although a soft law instrument, its principles and

⁴⁹ See General Comment 34; E Barendt *Freedom of Speech* (2007) 1821; J Magee *Freedom of expression* (2002) 13.

⁵⁰ A Puddephatt *Freedom of expression and the internet* (2016) 17.

⁵¹ K Clarke & K Kocak 'Launching revolution: social media and the Egyptian uprising's first movers' (2018) 50 *British Journal of Political Science* 1.

⁵² A Dhillon 'Social media and revolution: The importance of the internet in Tunisia's uprising' Independent Study Project (ISP) Collection (2014) 1.

⁵³ A Bitew 'Social media and the simmering Ethiopian revolution' 3 September 2016 <https://ecadforum.com/2016/09/03/social-media-and-the-simmering-ethiopian-revolution-alem-bitew/> (accessed 11 August 2024).

⁵⁴ N Taha 'Sudan's social media deemed major player in Bashir's ouster' (Addis Ababa) *VOA News* 18 April 2019 <https://www.voanews.com/a/sudan-s-social-media-deemed-major-player-in-bashir-s-ouster-/4882059.html> (accessed 11 August 2024).

⁵⁵ R Heacock *Internet filtering in sub-Saharan Africa*, *Open Network Initiative* (2012) 6.

⁵⁶ General Comment 34 para 24.

⁵⁷ D Voorhoof 'The right to freedom of expression and information under the European human rights system: Towards a more transparent democratic society' (2014) EUI Working Paper RSCAS 2014/121.

status in legal jurisprudence have attained international customary recognition with many of its provisions being codified in many existing treaties.⁵⁸

2.2.1. *Universal Declaration of Human Rights*

Articles 19 and 12 of the Universal Declaration provide for the freedom of expression, including the freedom to hold opinions without interference and to impart ideas through any media and the right to privacy.⁵⁹ Freedom of expression is a facilitative right that anchors the realisation of other rights and promotes pluralism, access to information, and political participation.⁶⁰ It is an essential hallmark of any democratic society, and any unjustifiable infringement constitutes a violation of democracy's fulcrum.⁶¹ Though drafted before the dawn of the digital era, Article 19 has been interpreted to include the medium of the internet and any media of one's choice.⁶² In 2016 the United Nations Human Rights Council (UNHRC) passed a resolution affirming that the 'same rights people have offline must be protected online, in particular freedom of expression'.⁶³ Thus, Article 19 of the Universal Declaration extends beyond the frontiers of physical expression and its protection and fulfillment cover the digital space for example social media platforms.⁶⁴

2.2.2. *International Covenant on Civil and Political Rights*

The International Covenant on Civil and Political Rights (ICCPR) that Zimbabwe ratified on the 13th of August 1991 analogously reiterates Article 19 of UDHR. As the *pacta sunt servanda* principle provides,⁶⁵ States are bound by the treaties they are party to and must fulfill the objectives of their provisions in good faith.⁶⁶ Just like a contract, a state that signs a treaty has assumed obligations and

⁵⁸ *Benhadj v Algeria*, Communication No. 1173/2003, UNHR Committee (20 July 2007) UN Doc CCPR/C/90/D/1173/2003 (1996); *Park v Republic of Korea*, UNHR Committee (8-26 July 1996) UN Doc CCPR/C/OP/6/2005 (1999).

⁵⁹ Universal Declaration Articles 19 & 12.

⁶⁰ General Comment 25.

⁶¹ Barendt (n 49).

⁶² Cannataci and others 'Privacy, free expression and transparency and redefining their new boundaries in the Internet ecosystem' (2016) UNESCO Internet Study.

⁶³ UNHRC, 'Resolution on the promotion, protection, and enjoyment of human rights on the internet' A/HRC/32/L.20 (2016) para 1 <https://digitallibrary.un.org/record/845728?ln=en>; UN Resolution 68/167 'The right to privacy in the digital space' GA Res 68/167 UN Doc A/RES/68/167 (2014) http://www.un.org/en/ga/search/view_doc.asp?symbol=A/RES/68/167.

⁶⁴ As above.

⁶⁵ Black's Law Dictionary 8th Ed (2004) Latin for 'agreements must be kept'.

⁶⁶ H Wehberg 'Pacta Sunt Servanda' (1959) 53 *American Journal of International law* 775 – 786.

duties against it.⁶⁷ Article 19 of the ICCPR provides for freedom of expression on all mediums and platforms including the internet and digital spaces.⁶⁸ The arbitrary limitation of that right through internet censorship, surveillance, and monitoring which is not legal, legitimate, and proportional amounts to violating that right.⁶⁹

Furthermore, Article 17 of the ICCPR prohibits and protects individuals from arbitrary or unlawful interference with their privacy. Interference with and interception of digital communication through surveillance must be based on precise legal rules, and consistent with the principles of legality, necessity, and proportionality.⁷⁰ The UN General Assembly Resolution 68/167 stressed the importance of the right to privacy, and emphasised transparency in state surveillance practices, mandating states to establish independent oversight mechanisms such as the senior court judges to review surveillance activities.⁷¹ The European Court in interpreting the limitation to the right of privacy through surveillance and monitoring of social media has stressed in the cases of *Zakharov vs Russia*, and *Big Brother Watch vs UK* that surveillance must be subject to strict judicial oversight and safeguards against abuse, especially regarding state interference in communication.⁷²

2.3. Regional Framework

2.3.1. African Charter on Human and Peoples' Rights

The African Charter on Human and Peoples' Rights (African Charter) protects the fundamental right to freedom of expression.⁷³ According to the African Commission on Human and Peoples' Rights (African Commission) in the case of

⁶⁷ J L Kunz 'The meaning and range of the norm Pacta Sunt Servanda' (1945) 39 *American Journal of International Law* 180-197.

⁶⁸ General Comment 34; Barendt (n 49) 1821; Magee (n 49).

⁶⁹ General Comment 25.

⁷⁰ Privacy Rights in the Digital Age 'A Proposal for a New General Comment on the Right to Privacy under Article 17 of the International Covenant on Civil and Political Rights' (2014) <https://www.aclu.org/sites/default/files/assets/jus14-report-iccpr-web-rel1.pdf>.

⁷¹ UN Resolution A/RES/68/167 (n 63).

⁷² *Roman Zakharov vs Russia*, Application No 47143/06, [https://hudoc.echr.coe.int/fre#{%22itemid%22:\[%22001-159324%22\]}](https://hudoc.echr.coe.int/fre#{%22itemid%22:[%22001-159324%22]}); *Big Brother Watch v The UK*, Application Nos 58170, 62322/14 and 24960/15 [https://hudoc.echr.coe.int/fre#{%22itemid%22:\[%22001-210077%22\]}](https://hudoc.echr.coe.int/fre#{%22itemid%22:[%22001-210077%22]}).

⁷³ African Charter on Human and Peoples' Rights Article 9.

Constitutional Rights Project & Others v Nigeria,⁷⁴ the enjoyment of the right to freedom of expression is central and indispensable to a person's personal development, well-being, political participation, and political consciousness. Article 9 includes access information disseminated across varying frontiers including, writing, print, form of art, or the internet and in the digital spaces.⁷⁵ Although not explicitly provided for under the African Charter, The African Commission has emphasised that the right to freedom of expression in the digital realm recognises the right to privacy and that states must only engage in targeted surveillance in conformity with international law standards with adequate safeguards such as judicial oversight.⁷⁶ The duty to respect imposes a negative responsibility on the state to refrain from engaging in activities that would violate the right and the duty to protect and fulfill postulates as positive obligations, requiring the state to take actions and implement policies that would guarantee the enjoyment of the right.⁷⁷

2.3.1.1. 'Within the law'

The phrase 'within the law' has invited contentious academic debates amongst many scholars, with some arguing that the African Charter negates the promotion of human rights because of the denegation of international law in favour of domestic law due to clawback clauses.⁷⁸ The import of that phrase seems to suggest that state parties have the full discretion to regulate the application of human rights as long as there is a law governing such conduct.⁷⁹ However, The African Court in *Umuhoza v Rwanda*⁸⁰ held that freedom of expression was an indispensable and crucial cog of a democratic society and that limitations on that right must meet the standards of international

⁷⁴ *Constitutional Rights Project & Others v Nigeria* (2000) AHRLR 227 (ACHPR 1999) para 36. See Also M Wambali 'The practice on the right to freedom of political participation in Tanzania' (2009) 9 *African Human Rights Law Journal* 203.

⁷⁵ African Commission on Human and Peoples' Rights Resolution on the Right to Freedom of Information and Expression on the Internet in Africa - ACHPR/ Res 362(LIX) 2016 Article 1, Resolution on the Adoption of the Declaration of Principles on Freedom of Expression in Africa (2002) meeting at its 32nd ordinary session, Banjul The Gambia 17-23 2002; R Murray *The African Charter on Human and Peoples' Rights: A Commentary* (2019) 22.

⁷⁶ Resolution on the deployment of mass and unlawful targeted communication surveillance and its impact on human rights in Africa - ACHPR/Res.573 (LXXVII) (2023) <https://achpr.au.int/en/adopted-resolutions/573-resolution-deployment-mass-and-unlawful-targeted-communication>.

⁷⁷ General Comment 31 UNHR Committee UN Doc CCPR/C/21/Rev.1/Add.13 (2004) para 8.

⁷⁸ R Higgins 'Derogation under Human Rights Treaties' (1978) 48 *British Yearbook of International Law* 281.

⁷⁹ C Heyns 'African Regional Human Rights System: The African Charter' (2004) 18 *Penn State Law Review* 679.

⁸⁰ *Umuhoza v Rwanda* (2017) 2 AfCLR 165 Para 150.

law.⁸¹ Furthermore the caveat ‘within the law’ has been interpreted by the African Commission to mean international law and not domestic law, therefore, domestic law cannot stand in the way of the full exercise of any of the rights contained in the African Charter.⁸²

2.3.2. Declaration of Principles on Freedom of Expression and Access to Information in Africa (2019)

The Declaration of Principles of Freedom of Expression and Access to Information in Africa (the Declaration) was adopted during the 65th Ordinary Session of the African Commission in Banjul, The Gambia according to its mandate of promotion and protecting human rights in Article 45 of the African Charter.⁸³ The Declaration is an updated and expanded version of the 2002 Declaration of Principles on Freedom of Expression in Africa, demonstrating the inextricable link between digital platforms, the internet, and freedom of expression in the 21st century.⁸⁴ The Declaration affirms the guidelines and principles for freedom of expression and access to information for African states, media practitioners, civil society, and individuals in line with Article 9 of the African Charter.⁸⁵ The Declaration therefore forms part of the soft law corpus of Article 9 and reflects the growing importance of digital platforms in the context of the right to express and disseminate information.⁸⁶ The Declaration calls for African states to domesticate its provisions ensuring that laws and policies on freedom of expression are in line with international law standards for example, repealing laws that criminalize dissemination of false news and insults.⁸⁷ It urges states to establish independent bodies for example media regulatory authorities that are free from government influence.⁸⁸

⁸¹ As above.

⁸² *Zegveld & Another v Eritrea* (2003) AHRLR 84 (ACHPR 2003) paras 59-60.; *Constitutional Rights Project* (n 74) paras 39-40.

⁸³ Declaration of Principles on Freedom of Expression and Access to Information in Africa Adopted by the African Commission on Human and Peoples’ Rights at its 65th Ordinary Session in Banjul The Gambia from 21 October to 10 November 2019.

⁸⁴ Declaration Principle 5 (n 83).

⁸⁵ As above Principle 1.

⁸⁶ As above Principle 1 and 43.

⁸⁷ As above Principle 22 and 38.

⁸⁸ As above Principle 11; See also MA Simiyu ‘Freedom of expression and African elections: Mitigating the insidious effect of emerging approaches to addressing the false news threat’ (2022) 22 *African Human Rights Law Journal* 76-107 <http://dx.doi.org/10.17159/1996-2096/2022/v22n1a4>.

Furthermore, it stresses the importance of safeguarding individual's digital rights and rejects mass surveillance, data breaches, internet shutdowns, or any other arbitrary restrictions on online speech⁸⁹ and calls on states to engage in regular reporting on their progress in upholding these guidelines.⁹⁰ Principle 41 provides that states shall not engage in or condone targeted communication surveillance unless such surveillance is provided by law and conforms to international human rights standards.⁹¹ Further, before targeted surveillance is carried out there must be prior authorization by an independent and impartial judicial body and regular monitoring by that judicial body, and must only be done when a 'serious crime' is reasonably suspected to have taken place or is about to take place.⁹² The writer shall assess the four requirements in international human rights law that must be met in limiting freedom of expression in the digital space.

2.3.3. *Assessing the limitations to freedom of expression*

Unlike jus cogens norms, freedom of expression is a derogative right that can be limited in certain circumstances.⁹³ The limitation must meet the standard of at least four requirements; the limitation must be provided by law, achieve a legitimate aim, be necessary in a democratic society, and must be proportionate to the goal set to be achieved.⁹⁴

2.3.3.1. *Provided by Law*

According to the Human Rights Committee, derogative rights may be limited only if the domestic law is clear, unambiguous, and precise.⁹⁵ However, the existence of a legal basis in domestic law does not suffice to satisfy the principle of lawfulness.⁹⁶ In addition, the legal basis must be compatible with the rule of law and must provide freedom from or guarantees against arbitrariness.⁹⁷ A primary marker to measure arbitrariness is the foreseeability test which demands clarity in the law and that any

⁸⁹ The Declaration Principle 37 and 41.

⁹⁰ As above Principle 41 (4).

⁹¹ As above.

⁹² As above.

⁹³ JM Balkin 'Digital speech and democratic culture: A theory of freedom of expression for the information society' (2004) 79 *New York University Law Review* 4-5.

⁹⁴ General Comment 34 paras 22-36.

⁹⁵ As above para 25.

⁹⁶ *East West Alliance Limited v Ukraine*, Application No 19336/04, ECHR (23 January 2014)167.

⁹⁷ *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Services 2002 (4) SA 768 (CC)*.

interference be accompanied by procedural safeguards allowing an aggrieved party to challenge the substantive correctness of any measure or law interfering with the enjoyment of a legally guaranteed right.⁹⁸ Furthermore, the margin of appreciation⁹⁹ cannot be invoked to justify draconian legislation aimed at muzzling dissent and criticism or the full enjoyment of the right to freedom of expression or the right to privacy.¹⁰⁰ As already discussed domestic law must meet the standards of international human rights norms. The law must provide safeguards against abuse by authoritarian regimes and the law must never be subject to the whims of the executive to weaponise it anyhow.¹⁰¹

2.3.3.2. *Legitimate aim*

The UN Human Rights Committee in discussing the legitimacy requirement in limiting freedom of expression stated, ‘the state must demonstrate a direct and immediate connection between the expression and the threat’.¹⁰² The legitimacy test dictates that freedom of expression must be limited for genuine purposes and acceptable to the public.¹⁰³ Article 27(2) of the African Charter lists ‘right of others, collective security, common interest and, morality’ as possible legitimate grounds for justifying limiting rights.¹⁰⁴ For limitation to be legitimate, the enjoyment of the right must pose a genuine threat to the country's collective security/national security or pose an imminent jeopardy to the rights of others.¹⁰⁵ Suppression of criticism, or muzzling political dissent are not legitimate reasons but they lie at the heartbeat of any democratic society.¹⁰⁶

⁹⁸ *Markus v Latvia*, Application No. 17483/10, ECHR (11 June 2020) para 75.

⁹⁹ According to the *Prince v South Africa* (2004) AHRLR 105 (ACHPR 2004) Para 51 ‘Margin of appreciation doctrine informs and recognises that states are better disposed in adopting national rules, policies and guidelines in promoting and protecting humans and peoples’ rights.

¹⁰⁰ Heacock (n 55) 6. See Also Constitutional Rights Project (n 74).

¹⁰¹ Wambali (n 74) 15; *Malawi Africa Association & Others v Mauritania* (2000) AHRLR 194 (ACHPR 2000) para 102.

¹⁰² General Comment 34; Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights, UN Commission on Human E/CN.4/1985/4 Principle 10.

¹⁰³ As above.

¹⁰⁴ Article 27 of the African Charter.

¹⁰⁵ J Stellios ‘The Second limb of Lange: The Continuing Uncertainties with the Implied Freedom of Political Communication’ Research Paper, ANU College of Law, 2015 14-49; See Also, *Monis v The Queen* (2013) 249 CLR 92 para 349; *Attorney-General (SA) v Corporation of the City of Adelaide* (2013) 249 CLR 1 para 221.

¹⁰⁶ *Bélané Nagy v. Hungary*, Application No. 53080/13, ECHR (13 December 2016).

2.3.3.3. *Necessity*

A limitation is deemed necessary if it meets a legitimate aim, discussed above for instance, if the objective to be served is one of national security, public order, public health or morals, or the protection of the rights of others.¹⁰⁷ In the *Konate case*, the African Court reiterated that the necessity of a limitation can be gauged when that limitation is measured against the advantages obtained.¹⁰⁸ More importantly, the limitation is deemed to be necessary only to the extent that the consequence of it does not render the right illusory. This means that the presence of the limitation should not wipe out the enjoyment of the right entirely or nullify the very existence and purpose of the right.¹⁰⁹ Furthermore, in the *Konate* decision, the court held that public figures in a democratic society will endure more criticism and stoke more dissent than private citizens¹¹⁰ and the law must not stifle public scrutiny and debate.¹¹¹

2.3.3.4. *Proportionality*

The African Commission in the case of *Zimbabwe Lawyers for Human Rights & Associated Newspapers of Zimbabwe v Zimbabwe*,¹¹² stated, ‘proportionality seeks to balance the protection of the rights and freedoms of the individual with the interest of the society as a whole’. The decision to limit must follow a procedurally fair process and the action must have safeguards against abuse and not destroy the essence of the right in issue.¹¹³ A limitation ceases to be proportional if there are less intrusive alternatives that can be employed to achieve the same results.¹¹⁴ Less intrusive alternatives to limit freedom of expression may include court orders for example rather than excessive, punitive custodial sentences.¹¹⁵

2.4. National Legislation

¹⁰⁷ *Siracusa* (n 102).

¹⁰⁸ *Konaté* (n 1) para 132.

¹⁰⁹ As above.

¹¹⁰ As above. para 155.

¹¹¹ *Media Rights Agenda v Nigeria*, Communication No. 224/98, ACHPR (2000) para 74.

¹¹² *Zimbabwe Lawyers for Human Rights & Associated Newspapers of Zimbabwe v Zimbabwe* (2009) AHRLR 235 (ACHPR 2009) paras 1-12.

¹¹³ General Comment 27 UNHR Committee UN Doc CCPR/C/21/Rev.1/Add.9 (1999) Article 12 paras 14-15.

¹¹⁴ *Bodrozic v Serbia and Montenegro*, Communication 1180/2003, UNHR Committee UN Doc CCPR/C/85/D/1180/2003 (2005) para 7.

¹¹⁵ *Zimbabwe Lawyers for Human Rights* (n 111) para 178.

Sections 61 and 57 of the Constitution of Zimbabwe provides for freedom of expression, freedom of the media, and access to information for all persons and the right to privacy respectively.¹¹⁶ The exercise of those rights is to be regulated by an Act of Parliament and that is where the assault on the rights has emanated.¹¹⁷ However progressive the constitution purports to be on paper, these guarantees have been undermined by several laws particularly the CLCR and the ICA which have seen inundated cases of arrests of political activists and journalists.¹¹⁸

2.4.1. *Interception of Communications Act*

The ICA was one of the earlier legislative measures adopted by the government in response to the growing threat of digital activism and its utility in mobilizing and effecting political change.¹¹⁹ Enacted in 2007, it is the key legal framework for state surveillance of digital communications.¹²⁰ It has weaponised government surveillance of all social media, without prior judicial oversight violating the right to privacy and creating a chilling effect where citizens fear expressing opinions online or critical views on political matters for fear of prosecution.¹²¹ Its lack of judicial safeguards to check and balance the executive arm when a warrant of interception by the Minister of Transport and Communications is given festers an environment of arbitrary decision-making and violates international law standards.¹²² This individual discretion of the Minister facilitates abuse of surveillance powers to target whistle-blowers, human rights defenders, and investigative journalism violating civilian's right to privacy and free speech.¹²³

¹¹⁶ Constitution of Zimbabwe Amendment No.20 2013 Sections 61 & 57.

¹¹⁷ As above.

¹¹⁸ J Maromo 'Zimbabwe government orders another internet shut down' (Harare) *IOL* 18 January 2019 <https://www.iol.co.za/news/zimbabwe-government-orders-another-internet-shut-down-18864823> (accessed 16 August 2024); N Ngwenya 'Surveillance under the grab of rule of law; Global Information Society Watch' <https://www.giswatch.org/en/country-report/communications-surveillance/zimbabwe> (accessed 16 August 2024).

¹¹⁹ See 'An analysis of the Interception of Communication Bill 2006: Interception and deception' <http://hrlibrary.umn.edu/research/ANALYSIS%20OF%20INTERCEPTION%20OF%20COMMUNICATION%20BILL.pdf>.

¹²⁰ Section 2(2) of Chapter Two.

¹²¹ See Section 2.2.2 of Chapter Two and Competent Judicial Authority 'International Principles on the Application of Human Rights to Communications Surveillance' (2014) available at <https://en.necessaryandproportionate.org/>; IAC Sections 6 and 9.

¹²² As above.

¹²³ Stakeholder Report *Universal Periodic Review 26th Session – Zimbabwe* 'The right to privacy in Zimbabwe' 2016 https://humanrightsclinic.law.harvard.edu/wp-content/uploads/2022/10/zimbabwe_upr2016.pdf.

2.4.2. *The Criminal Law and Codification and Reform Act*

Several sections of the CLCR have undermined freedom of expression by criminalising certain types of speech online and offline.¹²⁴ In 2021, the High Court declared section 31 (a)(iii) ultra-vires the constitution as it violates the right to freedom of expression.¹²⁵ Section 31 criminalised ‘the publication of falsehoods prejudicial to the state’, yet even after its annulment various political activists were arrested, detained, and tried under the invalid law.¹²⁶ Section 33 criminalises, online and offline any content that undermines the authority or insults the President.¹²⁷ Under this section, political opposition leaders have been tried for messages posted on WhatsApp, conspicuously demonstrating government intolerance to criticism and dissent.¹²⁸ In 2016, the Constitutional Court repealed Section 96 which provided for criminal defamation, however, Section 95, vaguely defines and provides for ‘criminal insult’.¹²⁹ None of the aforementioned sections can be argued as a justifiable limitation to freedom of expression in international law.¹³⁰ Sections 31, 33, 95, and 96 do not conform with the 2019 Declaration, Principle 22(2) which requires African States to repeal laws that criminalise the publication of false news, insult, and criminal sedition.¹³¹

2.4.3. *Section 22A of the Criminal Law and Codification Reform Act as amended (The Patriotic Act)*

To understand the Patriotic Act, one first must address its background and how it came to be. Following Chin’ono’s address at a human rights summit in Switzerland, wherein the human rights defender spoke out against the abhorrent state of human rights in Zimbabwe, the Permanent Secretary for the Ministry of Information, Publicity, and Broadcasting Services campaigned for legislation that would punish

¹²⁴ Ngwenya (n 118).

¹²⁵ Zimbabwe Lawyers for Human Rights ‘Judge Ends Persecution of Chin’ono in Landmark Decision which Humiliates Magistrate Ncube’ (Harare) 28 April 2021 <https://www.zlhr.org.zw/?p=2356> (accessed 16 August 2024).

¹²⁶ Fact Check Zimbabwe ‘Mahere convicted on a law that was declared invalid’ <https://factcheckzw.org/mahere-convicted-on-a-law-that-has-been-declared-invalid/> (accessed 16 August 2024).

¹²⁷ Criminal Law and Codification and Reform Act Section 33.

¹²⁸ T Kamhungirai ‘MDC Official arrested for insulting ED’ (Harare) *The Daily News* 26 April 2020 <https://dailynews.co.zw/mdc-official-arrested-for-insulting-ed/> (accessed 16 August 2024).

¹²⁹ D Nemukuyo ‘Con-Court outlaws criminal Defamation’ (Harare) *The Herald* 4 February 2016 <https://www.herald.co.zw/concourt-outlaws-criminal-defamation/> (accessed 16 August 2024).

¹³⁰ *Konaté* (n 1) see also General Comment 34, General Comment 25; General Comment 2.

¹³¹ Section 2.3.2 of Chapter Two.

‘campaigning against one’s own country’.¹³² In 2021, the Minister of Information boasted that the government had set up a ‘cyber-team’ tasked with surveilling and monitoring social media.¹³³ Against that background, Section 22A of the amendment to the Criminal Law and Codification and Reform Act was promulgated introducing the crime of ‘wilfully injuring the sovereignty and national interest of Zimbabwe’ an offense popularly known as the ‘patriotic provision’.

Section 22A principally targets and punishes actions, including messages posted online, that are deemed to undermine Zimbabwe’s sovereignty and national interests. It proscribes activities such as:

- Making false statements prejudicial to the state,
- Engaging in unauthorized meetings with foreign governments or officials with the intent to harm the interests of Zimbabwe,
- Calling for or advocating for sanctions or attending a meeting where sanctions are discussed.

The criminal penalties that accrue from violating this law are severe, including 10-year custodial sentences, hefty fines, loss of citizenship for dual citizens or for an individual who is a citizen by registration, prohibition from being registered as a voter or voting for at least five years and the death penalty.¹³⁴

2.4.3.1 *Assessment and Review of the Patriotic Act*

a. Vagueness and Overbreadth

One of the most significant concerns of the Patriotic Act that has stirred national outcries and attracted international criticism is its vague and broad language.¹³⁵ Phrases like ‘prejudicial to the state’, ‘harming the national interests of Zimbabwe’, ‘willfully injuring the sovereignty of the state’, and ‘subverting and upsetting messages’ are not clearly defined or explained leaving room open for broad

¹³² N Mangwana (@nickmangwana) Twitter, 7 April 2022 <https://twitter.com/nickmangwana/status/1512074209802874883>. (accessed 16 August 2024).

¹³³ E Mathanda ‘Govt sets up team to monitor social media’ (Harare) *Newsday* 4 November 2021 <https://www.newsday.co.zw/2021/11/govt-sets-up-team-to-monitor-social-m...> (accessed 16 August 2024).

¹³⁴ The Patriotic Act Section 22A.

¹³⁵ Section 1.3. of Chapter One.

interpretations, and the weaponisation of the law by the authorities.¹³⁶ This vagueness creates a negative effect on freedom of expression as individuals such as human rights activists, may self-censor out of fear of prosecution even when engaging in legitimate critique of government officials, and human rights violations.¹³⁷ This vagueness does not meet the threshold of ‘provided by law’ when limiting rights.¹³⁸ The principle of lawfulness demands clarity in the law leaving no room for arbitrary interpretations.¹³⁹ For example, criticism, digital activism, or any form of dissent the state wishes to clamp down on, can be done through these broad and vague provisions.¹⁴⁰

Gift Mwonzo's in his article, argues that the vague and overbroad language such as the criminalisation of national interest allow for selective interpretation and enforcement, which can stifle legitimate dissent and criticism of the government threatening freedom of expression, as protected under Zimbabwe's Constitution and international human rights law.¹⁴¹ Mwonzo emphasises that constructive criticism is essential for accountability and good governance. Instead, the Act may deter individuals, civil society, and media from engaging in discourse necessary for transparency and reform.¹⁴² Furthermore D Bar-Tal & E Staub, distinguish between ‘blind’ and ‘constructive’ patriotism.¹⁴³ Blind patriotism involves uncritical allegiance to one's country, often leading to exclusionary practices and suppression of dissent. Constructive patriotism, on the other hand, encourages critical engagement, promoting values like justice and equality within the nation. Policies that mandate patriotism risk fostering blind patriotism, which can undermine democratic principles by stifling freedom of expression and diversity of thought.¹⁴⁴

Additionally, Mwonzo and Bar-Tal in related discussions within the volume argues that legislating patriotism can monopolize national loyalty only to conduct that is acceptable to the executive. Such monopolization often equates criticism with

¹³⁶ As above.

¹³⁷ H Chin'ono (n 21).

¹³⁸ Section 2.3.3.1 of Chapter Two.

¹³⁹ As above.

¹⁴⁰ Section 1.3 of Chapter One.

¹⁴¹ G Mwonzo 'Who is patriotic, who is not'? Enactment of patriotism law in Zimbabwe' (2023) 17 *African Identities* 1–16. <https://doi.org/10.1080/14725843.2023.2222920>

¹⁴² As above

¹⁴³ D Bar-Tal & E Staub 'Introduction: Patriotism: Its scope and meaning' In D Bar-Tal & E Staub (eds) *Patriotism in the lives of individuals and nations* (1997) 1–19.

¹⁴⁴ As above

disloyalty, marginalizing dissenters and potentially infringing on individual rights such as freedom of expression and privacy.¹⁴⁵ Chief Justice Gubbay in *Chavunduka v. Minister of Home Affairs* criticized and declared invalid Section 50(2)(a) Law and Order Maintenance Act, which criminalised the publication of false news and statements likely to cause ‘fear, alarm, or despondency’ the statute for its broad and vague terms.¹⁴⁶ The Supreme court held that terms such as ‘fear, alarm or despondency’ could encompass nearly any public communication that might provoke emotional reactions. The court noted that this vagueness could create a chilling effect, deterring individuals from expressing themselves freely for fear of prosecution. This undermines the predictability required of law, making it arbitrary in its application. Although the Supreme court decision dealt with a different piece of legislation, it however emphasised together with the High Court case of *Zimbabwe Lawyers for Human Rights & Another v. Minister of Justice*¹⁴⁷ that vague laws could lead to unjustified restrictions on fundamental rights and that the phrase ‘prescribed by law’ in limiting rights means the law must be adequately accessible and formulated with sufficient precision to enable a person to regulate his conduct. He or she must know, with reasonable certainty, what the law is and what actions are in danger of breaching the law.¹⁴⁸

b. Targeting Political dissent

The Amendment criminalises participation in a ‘meeting’ where the planning or consideration for ‘subverting, upsetting, overthrowing or overturning the constitutional government’ or ‘the planning for the imposition of sanctions or trade boycott over Zimbabwe is discussed’. The Amendment defines ‘meeting’ as any message or communication between two or more people whether physically or virtually.¹⁴⁹ By criminalising online communication the law effectively restricts the ability of political activists, government critics, opposition parties, and civil society from seeking international support or using the Internet and social media to amplify awareness of human rights abuses and other issues in Zimbabwe such as corruption.¹⁵⁰

¹⁴⁵ See Mwonzora (n 141) & As above.

¹⁴⁶ *Chavunduka v Minister of Home Affairs*, Zimbabwe 2001 (1) SACR 260 (ZSC).

¹⁴⁷ *Zimbabwe Lawyers for Human Rights v. Minister of State*, National Security HC 2355/09.

¹⁴⁸ *Chavunduka v Minister of Home Affairs* page 12

¹⁴⁹ Section 22 A (n 12).

¹⁵⁰ *The Conversation* (n 30).

The targeting effect of the Patriotic Act unquestionably falls short of the principles of legitimacy and necessity in limiting rights.¹⁵¹ Targeting social dissent and clamping down on political opposition or journalists does not equate to legitimacy in a democratic society.¹⁵² One of the hallmarks of democracy is the citizens' ability to hold their government accountable. This law renders the right to freedom of expression illusory, nullifies it, and does not meet the legitimate aim test such as collective security.¹⁵³

c. Enhances surveillance and monitoring of social media

Section 6 of the IAC affords the Minister of Information authority to exercise his/her singular discretion to issue a warrant to conduct surveillance and monitoring of social media when a serious crime is being committed or likely to be committed. Since the Patriotic Act provides that any social media communication that is prejudicial to the state amounts to a serious crime, then surveillance of social media shall occur under the cover of the law to target critics and quell activism, violating not only freedom of expression but the right to privacy.¹⁵⁴ Furthermore, considering that the government has already invested in surveillance technologies, such as the 'Cycles', a surveillance technology that monitors texts, calls, and the digital space and telecommunication infrastructure,¹⁵⁵ and the 'Zim Cyber City' surveillance technologies,¹⁵⁶ interference with privacy shall occur without limitation.

International standards on communication surveillance require robust judicial oversight to guard against state abuse.¹⁵⁷ The European Court has held in a plethora of cases, that interference with an individual's right to privacy through communication surveillance must be necessary in a democratic society, proportionate, guarantee effective and adequate measures against abuse, and must not undermine or destroy

¹⁵¹ Section 2.3.3 of Chapter Two.

¹⁵² J Brownlee *Authoritarianism in an age of democratization* (2007) 56.

¹⁵³ Konaté (n 1) para 155.

¹⁵⁴ Amnesty International (n 11).

¹⁵⁵ FS Matiashe 'Zimbabwe's cyber city: safe for residents or compromised privacy?' (Harare) *Business Live* 21 February 2023 <https://www.businesslive.co.za/bd/world/africa/2023-02-21-zimbabwes-cyb...> (accessed 16 August 2024).

¹⁵⁶ E Mathanda 'Govt has no gadgets to monitor social media: Mangwana' (Harare) *Zimbabwe Independent* 24 October 2022 <https://www.newsday.co.zw/theindependent/local-news/article/200002476/g...> (accessed 16 August 2024).

¹⁵⁷ Section 2.2.2 of Chapter Two.

democracy under the cloak of defending it.¹⁵⁸ The Patriotic Act derelicts all the safeguards of international law on communication surveillance firstly, the Act enhances the surveillance and monitoring powers of the state without judicial checks and balances circumventing the principle of proportionality.¹⁵⁹ Proportionality requires that the decision-making process be procedurally fair and importantly there be safeguards against abuse of such powers.¹⁶⁰ Ministerial powers over the issuance of warrants to intercept communication violate international human rights law because there are no checks and balances to the executive's power.¹⁶¹ Secondly, in gauging proportionality General Comment 27 requires the limiting legislation to be the 'less intrusive instrument'. However, the severe penalties such as loss of citizenship, inability to vote for 5 years when found to violate the act, 10-year custodial sentences, hefty fines, and the death penalty which is a violation of the right to life,¹⁶² make the Patriotic Act one of the most intrusive pieces of legislation in Zimbabwe.

2.5. Conclusion

This chapter examined the legal content, nature, and scope of the right to freedom of expression and right to privacy in the digital space and analysed the robust legal framework guaranteeing its protection. Although the regional framework of the 2019 Declaration provides an expansive and progressive normative framework for digital rights, its status as a soft law instrument creates substantial gaps in its lack of implementation by African States, particularly Zimbabwe. This study further provided a comprehensive overview of the four requirements that limitation measures must meet, to be justifiable in a democratic society and an analysis of the Patriotic Act

¹⁵⁸ *Weber and Saravia v. Germany*, Application No. 54934/00, ECHR (29 June 2006); *Szabó and Vissy v. Hungary*, Application No. 37138/14, ECHR (12 January 2016); *Digital Rights Ireland Ltd v. Minister of Communications, Marine and Natural Resources* ECHR (8 April 2014).

¹⁵⁹ As above.

¹⁶⁰ As above.

¹⁶¹ General Comment 27.

¹⁶² UN OHCHR 'death penalty incompatible with the right to life' 31 January 2024 <https://www.ohchr.org/en/stories/2024/01/death-penalty-incompatible-right-life> (accessed 25 August 2024).

CHAPTER THREE

3.1. Introduction

Zimbabwe's landscape of human rights, in particular, freedom of expression in the digital space, has been marred by persistent repression and brazen violations.¹⁶³ leading political analysts, critics, and opposition leaders have leveraged the power of the digital space to amplify their voices against autocratic governments and backward policies.¹⁶⁴ Unfortunately, in the same vein, the Zimbabwean government under the leadership of ZANU-PF has used its rule to stifle dissent and suppress opposition critics, and human rights defenders such as Hopewell Chin'ono, Fadzai Mahere, and Job Sikhala.¹⁶⁵ These human rights violations have surfaced through stringent laws, arbitrary arrests, illegal detentions, targeted surveillance, enforced disappearances, and extra-judicial killings, all aimed at silencing critical voices.¹⁶⁶ The courts have perpetuated state-sanctioned repression of freedom of expression by frequently upholding draconian laws and legitimising censorship in the digital space under the pretext of quelling 'incitement of public violence' or the 'protection of national security'.¹⁶⁷ This chapter discusses contextual examples of such repression, the complicit role of the judiciary..

3.2. Overview of Freedom of Expression in the digital space in Zimbabwe

¹⁶³ B Mutsvairo 'Mapping social media trajectories in Zimbabwe' In G Mickle (ed) *Companion to media and activism* (2018) 298–306; See Also, B Mutsvairo & C Muneri *Journalism, democracy and human rights in Zimbabwe* (2019).

¹⁶⁴ A Pirannejad & M Janssen 'Internet and political empowerment: Towards a taxonomy for online political empowerment' (2019) 35 *Information Development* 80-95. <https://doi.org/10.1177/0266666917730118>.

¹⁶⁵ Amnesty International's research on repressive legislation presented in *Zimbabwe: Rights under siege* 2003, AI Index AFR 46/012/2003; Southern African Litigation Centre 'SALC statement on attacks of human rights defenders and journalists in Zimbabwe' 13 April 2021 <https://www.southernafricalitigationcentre.org/statement-on-the-attacks-on-human-rights-defenders-and-journalists-in-zimbabwe/> (accessed 10 September 2024).

¹⁶⁶ T M Mashingaidze 'Unmasking silence and impunity: the Zimbabwe Peace Project's e-activism in a polarised political dispensation' (2016) 25 *African Security Review* 378–392. <https://doi.org/10.1080/10246029.2016.1225583>.

¹⁶⁷ *S v Chin'ono* (2021) ZWHHC 22 (27 January 2021) <https://zimlil.org/akn/zw/judgment/zwhhc/2021/22/eng@2021-01-27>; *S v Sikhala* (2020) ZWMSVHC 4 (14 February 2020) <https://zimlil.org/akn/zw/judgment/zwmsvhc/2020/4/eng@2020-02-14>; *The State v Evan Mawarire* (2017) HH 802-17 <https://www.jsc.org.zw/upload/Judgements/High%20Court/Harare/2019/HH%2067-19.pdf>.

Over the past two decades, the utility of the digital space and internet technologies in Zimbabwe has been an empowering tool for citizens.¹⁶⁸ However, the positives of the internet in enlarging the breadth of activism and challenging authoritarian regimes have simultaneously been upset by the expansive capacity of the state to repress and clamp down on dissent through arbitrary laws and draconian policies.¹⁶⁹ This double-edged impact of the Internet on civil liberties in Zimbabwe can be understood through the lens of political instability that has dominated the country since 1980 and its poor human rights record.¹⁷⁰ Since 1980 Zimbabwe has known one political party leadership which is ZANU-PF. Throughout its tenure, first under the authoritarian regime of former President Mugabe and then current President Mnangagwa, election results have been subjected to judicial contestations, and dilapidated socioeconomic conditions punctuated by corruption and mismanagement of resources.¹⁷¹

Violent crackdowns on protests using military forces and other organs of the state have resulted in enforced disappearances, torture,¹⁷² beatings, and deaths of civilians and the brazen impunity of military personnel guilty of committing these crimes.¹⁷³ In response digital platforms and online activism have provided a haven for political critics, opposition leaders, journalists, and human rights defenders to protest safely the authoritarian regime.¹⁷⁴ Between 2009 and 2019 there was an increase from 5.1% to 60.6% in internet penetration usage and social media activities.¹⁷⁵ This increase in internet penetration has led to the proliferation of citizen-led digital activism and anti-government protests. Campaigns such as

¹⁶⁸ G Karekwaivanane & N Msonza 'Zimbabwe Digital Rights Landscape Report' (2021) *AfricArXiv* <https://africarxiv.pubpub.org/pub/zimbabwe-digital-rights-landscape-report-2021/release/1>.

¹⁶⁹ G Karekwaivanane *The Struggle over State Power in Zimbabwe: Law and Politics since 1950* (2017) 10.

¹⁷⁰ As above.

¹⁷¹ B Raftopoulos (ed) *The Hard Road to Reform: The Politics of Zimbabwe's Global Political Agreement* (2013) 33.

¹⁷² United States Institute of Peace 'Zimbabwe and the Politics of Torture Special Report 92' 2002 https://www.govinfo.gov/content/pkg/GOVPUB-Y3_P31-PURL-LPS22872/pdf/GOVPUB-Y3_P31-PURL-LPS22872.pdf.

¹⁷³ Amnesty International (n 11).

¹⁷⁴ Karekwaivanane (n 168).

¹⁷⁵ Post and Telecommunications Regulatory Authority of Zimbabwe (POTRAZ) *Annual Postal and Telecommunications Sector Performance Report 2019*.

#OccupyAfricaUnitySquare,¹⁷⁶ #This Flag,¹⁷⁷ #Tajamuka,¹⁷⁸ and #ShutdownZimbabwe.¹⁷⁹

3.3. Case Studies of Government's Oppression of Freedom of Expression in the Digital Space in Zimbabwe

3.3.1. Hopewell Chin'ono

Hopewell Chin'ono, a well-known Zimbabwean investigative journalist and human rights activist between July 2020 and January 2021 has been arrested three times for his tweets and online media activism against the government.¹⁸⁰ With a very large following on X (formerly known as Twitter) of more than 700,000 people, the digital civic space has afforded him a crucial platform to voice his criticism, and his opinions and to expose corruption and brazen human rights abuses by the state.¹⁸¹ In July 2020 he was charged for allegedly contravening Section 187(1)(a) as read with Section 37(1)(a)(i) of the CLCR which criminalises the 'incitement of people to commit public violence and breaches of peace or bigotry'.¹⁸² The government claimed that his Twitter messages criticizing the government's corruption involving a 60 million dollars scandal during COVID-19 procurement processes incited the public to revolt in the July 31 protests.

In the same year, November 2020, he was charged with obstruction of justice after tweeting about the corruption charges against Chief Justice Luke Malaba

¹⁷⁶ Front line defenders 'Case History: Kennedy Masiye' (<https://www.frontlinedefenders.org/en/case/case-history-kennedy-masiye> (accessed 28 August 2024)).

¹⁷⁷ T Nenjerama 'A Subaltern Pastor versus a Dictator President in the #ThisFlag Movement in Zimbabwe' (2020) 17 *Irish Communication Review* 1 (<https://arrow.tudublin.ie/cgi/viewcontent.cgi?article=1173&context=icr>).

¹⁷⁸ BBC 'Tajamuka activists tortured in Zimbabwe' (London) 15 September 2016 (<https://www.bbc.com/news/world-africa-37373378> (accessed 28 August 2024)).

¹⁷⁹ BBC 'Zimbabwe shut down over economic crisis' (London) 6 July 2016 (<https://www.bbc.com/news/world-africa-36724874> (accessed 28 August 2024)).

¹⁸⁰ *Hopewell Chin'ono vs Magistrate Marehwanazvo Gofa & The state* HH 294-23 HC 8485/22; Frontline Defenders 'Charges against the human rights defender and journalist Hopewell Chin'ono nullified' (<https://www.frontlinedefenders.org/en/case/human-rights-defender-hopewell-chinono-detained-and-charged> (accessed 29 August 2024)).

¹⁸¹ H Chin'ono (@daddyhope) (<https://x.com/daddyhope/status/1753820453800390704>).

¹⁸² Zimbabwe Lawyers for Human Rights 'Judge ends Persecution of Chin'ono in Landmark decision that humiliates Magistrate Ncube' (Harare) 28 April 2021 (<https://www.zlhr.org.zw/?p=2356> (accessed 29 August 2024)).

violating Section 182 of the CLCR.¹⁸³ In January 2021, for a third time, Hopewell was arrested following his tweet about the death of a child at the hands of a police officer enforcing COVID-19 lockdown regulations.¹⁸⁴ He was charged with ‘disseminating information deemed to be false’ violating Section 31 (a)(iii) of the CLCR. This case drew widespread condemnation because Hopewell was charged and arrested for violating a law that had been struck down by the Constitutional Court in 2014.¹⁸⁵ The Constitutional Court emphasized that ‘Section 31(a)(iii) of the Criminal Code had the effect of interfering with the exercise of the right to freedom of expression and that the law was not reasonably justifiable in a democratic society’.¹⁸⁶

3.3.2. *Fadzayi Mahere*

Fadzayi Mahere, a prominent Zimbabwean lawyer, and the main spokesman for the opposition political party Citizens Coalition for Change (CCC) was accused, arrested, and spent several days in custody for allegedly ‘publishing falsehoods’.¹⁸⁷ She tweeted a video on her Twitter handle about an incident involving a police officer and the death of a baby in January 2021, the same incident that Hopewell was arrested for in January 2021. She was charged with violating Section 31(a)(iii) of the CLCR.¹⁸⁸ Various scholars have articulated the hysterias and significant impacts of false/fake news on national security, with H Allcott & MGentzkow highlighting that misinformation manipulates public opinion, incites violence, disrupts elections, undermines national institutions, and sows discord among citizens.¹⁸⁹ Furthermore, empirical evidence has demonstrated that false news significantly in the digital age diffuses farther, faster, deeper, and more broadly than truth and has destabilized government operations eroding trust in state institutions, and incited hate crimes, communal violence, or

¹⁸³ As above.

¹⁸⁴ As above.

¹⁸⁵ *Chimakure v Attorney General CCZ* 06/14 <https://ntjwg.uwazi.io/entity/qwl3stor67s?page=1&file=1551429003694arjigime5eba.pdf>.

¹⁸⁶ As above.

¹⁸⁷ Amnesty International ‘Zimbabwe: Conviction and Sentencing of opposition spokesperson shows escalating assault on freedom of expression’ 6 April 2023 <https://www.amnesty.org/en/latest/news/2023/04/zimbabwe-conviction-and-sentencing-of-opposition-spokesperson/> (accessed 30 August 2024).

¹⁸⁸ N Chingono ‘Zimbabwe opposition tweet case fuels poll crackdown fears’ (Harare) *The Guardian* 6 April 2023 <https://www.theguardian.com/world/2023/apr/06/zimbabwean-opposition-figure-fadzayi-mahere-avoids-jail-over-tweet> (accessed 30 August 2024).

¹⁸⁹ H Allcott & M Gentzkow ‘Social Media and Fake News in the 2016 Election’ (2017) 31 *Journal of Economic Perspectives* 211-236.

panic, as seen in numerous global incidents.¹⁹⁰ Although the Twitter message of Mahere contained false news as the mother of the child confirmed that the baby did not die, both she and the baby were injured,¹⁹¹ one argues that the uprisings and protests that resulted in the aftermath of January in Zimbabwe had been caused by the years of inordinate mismanagement of resources, the abundant levels of corruption, and the poor livelihoods of the Zimbabwean people over a long period. Yes, the writer acknowledges the impact of false news sighted by the literature above, yet in this context the law was used to guise the reality of suffering caused by hyperinflation, poverty and to impede protests.¹⁹²

Simiyu, highlights that in the spectrum of speech and international law expression that harms others, endangers national security, or incites discrimination and violence falls under prohibited speech and states must rightly prohibit it.¹⁹³ The writer however argues that this particular legislative measure by the state and the convictions that followed was an authoritarian regime exercising the law to restrict the online civic space and to crush dissent rather than to prevent harm or protect national security.¹⁹⁴ What is particularly concerning about this case is that the State again used an outdated, struck-down legal provision of ‘communicating falsehoods aimed at inciting violence’ same as in Hopewell’s case to stifle freedom of expression in the digital space.¹⁹⁵

3.3.3. *Job Sikhala*

The case of Job Sikhala is another example of the extremely worrying human rights situation in Zimbabwe and the judiciary's use of pre-trial incarceration to

¹⁹⁰ S Vosoughi & Others ‘The Spread of True and False News Online’ (2018) 359 *Science* 1146-1151.

¹⁹¹ Zim Citizens News Facebook, <https://www.facebook.com/watch/?v=2522621491370383> See Also Amnesty International (n 179).

¹⁹² See A S Mlambo *A History of Zimbabwe* (2017) 56. A Moyo & G Crafford ‘The impact of hyperinflation on the Zimbabwean construction industry’ (2009) <file:///C:/Users/Lenovo/Downloads/103-Article%20Text-194-1-10-20170519.pdf>

¹⁹³ Simiyu (n 88).

¹⁹⁴ Amnesty International (n 11).

¹⁹⁵ Centre for Human Rights ‘The Centre for Human Rights condemns the conviction of Zimbabwean political activist Fadzayi Mahere’ *Press statement* 18 April 2023 <https://www.chr.up.ac.za/press-statements/3376-press-statement-the-centre-condemns-the-conviction-of-zimbabwean-political-activist-fadzayi-mahere> (accessed 31 August 2024).

violently clamp down on freedom of expression in the digital space.¹⁹⁶ An opposition leader, member of parliament, and distinguished human rights defender, Job Sikhala was arrested, detained, and denied bail for allegedly inciting public violence on 14 June 2022, after a video circulated on Twitter, in which he accused ZANU-PF of being responsible for the disappearance, death and bodily mutilation of CCC member Moreblessing Ali.¹⁹⁷ The High Court later found a ZANU-PF activist and sympathizer guilty of murdering and mutilating Moreblessing Ali.¹⁹⁸

3.3.4. *Evan Mawarire #ThisFlag*

Evan Mawarire is a prominent pastor, adept human rights defender, and the main protagonist of the state-vilified social media #ThisFlag movement which began in April 2016.¹⁹⁹ He initiated the hashtag movement by posting a video on his Twitter handle and other social media platforms, draped in the Zimbabwean flag around his neck, in which he made a spirited call against the widespread corruption and human rights violations of the government, inspiring nationwide protests.²⁰⁰ #ThisFlag became a rallying cry for peaceful protests and in July 2016 he was arrested after calling for a national stay away (strike) using his digital platforms. Initially, he was charged with inciting public violence under Section 36 of the CLCR Act, however, when he made his initial appearance, he was charged with a far graver offence, that of overthrowing the constitutional government under Section 22.²⁰¹ This case significantly highlighted the seismic utility of digital activism, its mobilizing effect, and the state's intolerance of incongruous, critical voices. He was acquitted of both charges.²⁰² Concerning the first charge of inciting violence, the charges were dismissed at the close of the prosecution case due to lack of sufficient evidence, and on the second

¹⁹⁶ C Muronzi 'Prosecution and Persecution: The Zimbabwean Politician imprisoned 65 times' (Harare) *Aljazeera* <https://www.aljazeera.com/features/2023/11/14/prosecution-by-persecution-the-zimbabwean-politician-imprisoned-65-times> (accessed 31 August 2024).

¹⁹⁷ I Nassah 'Zimbabwean Opposition leader freed after 595 days behind bars' (Harare) *Human Rights Watch* 30 January 2024 <https://www.hrw.org/news/2024/01/31/zimbabwe-opposition-leader-freed-after-595-days-behind-bars> (accessed 31 August 2024).

¹⁹⁸ 'ZANU-PF Activist gets 30 years for killing CCC Activist Moreblessing Ali' (Harare) *VOA News* 20 December 2023 <https://www.voazimbabwe.com/a/zanu-pf-activist-gets-30-years-for-killing-ccc-activist-moreblessing-ali/7406186.html> (accessed 31 August 2024).

¹⁹⁹ NPR 'Fight for Rights will continue in Zimbabwe, #ThisFlag Movement Pastor Vows' (Harare) 10 December 2017 <https://www.npr.org/sections/parallels/2017/12/10/569757806/fight-for-rights-will-continue-in-zimbabwe-thisflag-movement-pastor-vows> (accessed 1 September 2024).

²⁰⁰ K Pipkin 'Evan Mawarire and #ThisFlag' *Johns Hopkins Science and Arts Magazine* <https://magazine.krieger.jhu.edu/2022/11/evan-mawarire-and-thisflag/> (accessed 1 September 2024).

²⁰¹ *The State v Evan Mawarire* (n 201).

²⁰² As above.

charge, the court held that there was nothing in the videos posted by the accused wherein he urged citizens to overthrow the government. On the contrary, he advocated for peaceful protests and in both instances, the state failed to prove the essential elements of the main and alternative charge.²⁰³

Following the #ThisFlag movement, the government massively increased internet data prices, resulting in the inaccessibility of social media and in turn digital activism against President Robert Mugabe.²⁰⁴ The government's actions were widely criticized for being politically motivated, and the writer argues that this case demonstrates the weaponisation of the law to silence dissent and activism of all kinds.²⁰⁵ Furthermore, Principle 37 of the 2019 Declaration provides that states must incorporate policies aimed at providing, amongst other things, affordable and meaningful access to the Internet. The state of Zimbabwe went contrary to that provision, by hiking data costs, effectively denying access to the internet, which is integral to freedom of expression.

3.3.5. *Auxiliary Case Studies*

Since 2014, the Zimbabwe Lawyers for Human Rights (ZLHR) has offered legal representation and counsel to at least 200 individuals who have been arrested for posts made on social media against the government.²⁰⁶ In November 2022, a teacher, Edith Mupondi was arrested for violating Section 88b of the Postal and Telecommunication Act, an offense 'of sending false information with the intent to cause annoyance, inconvenience and anxiety'.²⁰⁷ Edith sent a message on her WhatsApp group chat about the poor economic conditions teachers are subjected to

²⁰³ As above.

²⁰⁴ A Magaisa 'In the run-up to elections in Zimbabwe, social media plays a larger role than ever' *Centre for International Media Assistance* 26 June 2018 <https://www.cima.ned.org/blog/in-the-run-up-to-elections-in-zimbabwe-social-media-playing-a-larger-role-than-ever/> (accessed 1 September 2024).

²⁰⁵ Amnesty International 'Zimbabwe: Elections in the context of systematic human rights violations and criminalization of state critics' 26 July 2023 <https://www.amnesty.org/en/latest/news/2023/07/zimbabwe-elections-in-the-context-of-systematic-human-rights-violations-and-criminalization-of-state-critics/> (accessed 1 September 2024).

²⁰⁶ CIPESA 'State of Internet Freedom in Zimbabwe 2019: Mapping Trends in Government Internet Controls 1999-2019, Kampala: Collaboration on International ICT Policy for East and Southern Africa' (2020) <https://cipesa.org/wp-content/files/State-of-Internet-Freedom-in-Zimbabwe-2019.pdf>.

²⁰⁷ 'Surveillance of social media under spotlight' (Harare) *The Zimbabwean* 10 November 2022 <https://www.thezimbabwean.co/2022/11/surveillance-of-social-media-under-spotlight/> (accessed 02 September 2024).

due to meager salaries, inflation of goods, and deteriorating economic conditions.²⁰⁸ She was acquitted in January of 2023.²⁰⁹ In September 2022, Hope Chizuzu, a journalist was charged with spreading false messages intending to cause harm on his Facebook account, allegedly contravening Section 164(c) of the Criminal law.²¹⁰ Two journalists Wisdom Mudzungairi and Desmond Chingarande, were arrested for violating Section 164(c) after disseminating information on their social media platforms over a legal dispute between local authorities and private owners of a park in Harare. The journalists claimed this arrest was an intimidation tactic by the police officers because this case implicated ZANU-PF officials.²¹¹ In June 2022, Mududuzi Mathuthu, an editor for the news website Zimlive, was arrested for allegedly undermining the authority of the president, after criticizing the fiscal policies introduced by the President on his Twitter account.²¹²

3.4. Enforced disappearances, abductions and torture

State organs and security forces have used the evil of enforced disappearances, abductions, and torture as a political tool to silence political detractors and critics, particularly those belonging to opposition political parties and human rights defenders.²¹³ The State has repeatedly refused to acknowledge and keep an official record of the crime of enforced disappearance, however, according to the UN more than 49 cases of abductions and politically motivated tortures were recorded in 2019 alone.²¹⁴ Unresolved cases of enforced disappearances such as those of human rights

²⁰⁸ Zimbabwe Lawyers for Human Rights (@ZLHRLawyers) 'ZLHR Breaking News' Twitter, 17 January 2023 <https://twitter.com/ZLHRLawyers/status/1615299848244428800?s=20>.

²⁰⁹ As above.

²¹⁰ 'Journalist arrested and charged for publishing falsehoods' (Harare) *MISA Zimbabwe* 3 October 2022 https://zimbabwe.misa.org/media_violations/journalist-arrested-and-charged-for-publishing-falsehoods/ (accessed 2 September).

²¹¹ Committee to Protect Journalists 'Zimbabwe police charge 2 journalists with publishing false information' (Harare) 5 August 2022 <https://cpj.org/2022/08/zimbabwe-police-charge-2-journalists-with-publishing-false-information/> (accessed 2 September 2024).

²¹² Committee to Protect Journalists 'Police charge ZimLive editor Mduduzi Mathuthu with insulting the president' (Harare) 6 June 2022 <https://cpj.org/2022/06/police-charge-zimlive-editor-mduduzi-mathuthu-with-insulting-the-president/> (accessed 2 September 2024).

²¹³ Zimbabwe Human Rights NGO Forum 'Submissions to the working group-enforced disappearance' 8 November 2023 <https://www.ohchr.org/sites/default/files/documents/issues/development/session24/submpreparati-on-visit-cso-zimbabwe-hr-ngo-forum.pdf> (accessed 03 September 2023)

²¹⁴ See UN Office of the High Commissioner 10 June 2020 <https://www.ohchr.org/en/news/2020/06/zimbabwe-un-experts-demand-immediate-end-abductionsandtorture#:~:text=The%20experts%20expressed%20grave%20alarm,perpetrators%20being%20held%20to%20account> (accessed 03 September 2024).

activist Itai Dzamara,²¹⁵ the torture and disappearance of political activist Nelson Mukwenha,²¹⁶ the abduction and arbitrary killing of political opposition and church leader Tapfumanei Masaya and fellow activist Jeffrey Kalosi, with their bodies found dumped in a farm in Mashonaland East,²¹⁷ and many other cases²¹⁸ demonstrates a strategy to suppress government critics and any political opposition.²¹⁹ Victims often face reprisals and are denied justice by state organs as investigations are often shrouded in secrecy, and lack of accountability.²²⁰ Although the Constitution of Zimbabwe in section 53 provides ‘for freedom from torture or cruel, inhumane, or degrading treatment or punishment’, the government has ensured blanket impunity for state operatives responsible, cultivating the continued scourge of political killings, enforced disappearances, and torture.²²¹

3.5. The Role of the Judiciary in Suppressing Freedom of Expression

Under Chapter 8 of the constitution, the judiciary has the protective mandate of upholding fundamental freedoms and human rights.²²² However, the courts have played an active role in suppressing the right to freedom of expression in the digital space by its lack of independence, upholding repressive laws, selective enforcement, and pretrial detentions and denial of bail.²²³

i. Judicial Independence

²¹⁵ Amnesty International 7 March 2024 <https://www.amnesty.org/en/latest/news/2024/03/zimbabwe-authorities-must-reveal-whereabouts-of-prodemocracy-activist-and-journalist-forcibly-disappeared-nine-years-ago/> (accessed 02 September 2024).

²¹⁶ Amnesty International 29 August 2023 <https://www.amnesty.org/en/latest/news/2023/08/zimbabwe-authorities-must-investigate-abduction-of-political-activist/> (accessed 02 September 2024).

²¹⁷ Human Rights Watch 15 November 2023 <https://www.hrw.org/news/2023/11/15/zimbabwe-joint-statement-calling-authorities-investigate-escalation-abductions> (accessed 02 September 2024).

²¹⁸ ‘A history of abductions and assassinations’ *The Standard* 1 September 2019 <https://www.newsday.co.zw/thestandard/2019/09/01/history-abductions-assassinations> (accessed 02 September 2024).

²¹⁹ Centre for Human Rights ‘OP-ED: A Forbidden Memory: Reflecting on the International Day of Victims of Enforced Disappearances in Zimbabwe’ 30 August 2024 <https://www.chr.up.ac.za/opinion-pieces/3856-op-ed-a-forbidden-memory-reflecting-on-the-international-day-of-victims-of-enforced-disappearances-in-zimbabwe> (accessed 02 September 2024).

²²⁰ As above.

²²¹ Amnesty International 25 June 2002 <https://reliefweb.int/report/zimbabwe/zimbabwe-impunity-enables-ever-more-human-rights-violations> (accessed 02 September 2024).

²²² Constitution of Zimbabwe Chapter 8.

²²³ C Goredema ‘Whither Judicial Independence in Zimbabwe?’ in Raftopoulos B and Savage T (eds) *Zimbabwe: Injustice and Political Reconciliation* (2004) 99-118.

One of the hallmarks of Judicial independence is how judges are appointed to office.²²⁴ If the path to appointment is marred with political party influence and is at the whim of one individual then the independence of that body is not only called into question but it can be suggested that it is non-existent.²²⁵ Fombad reiterates ‘[t]he independence of the judiciary and its ability to discharge its functions without fear, favour or prejudice depend largely on how judges are appointed’.²²⁶ International law stipulates that Judges’ appointments must follow a strict transparent criterion, based on merit, and be overseen by an independent body.²²⁷ In Zimbabwe, Constitution Amendment No. 1, bestows upon the President the individual responsibility and power to appoint the Chief Justice, Deputy Chief Justice, and Judge President of the High Court.²²⁸ This power to appoint is exercised without following any recommendations from the Judicial Service Commission (JSC) and his only obligation is to merely inform the Senate of his decision.²²⁹ This allows the executive to play a decisive role in the appointment of judges leaving courts vulnerable to manipulation and control.²³⁰

ii. Upholding Repressive Laws

The courts have upheld repressive laws that do not meet the standards of International human rights law, such as the criminalisation of false news, speech deemed to be offensive, or inciting public violence.²³¹ As a dualistic state,²³² section 34 of the Constitution requires the domestication of international treaties and conventions to which Zimbabwe is a party to, however, Section 46 of the Constitution requires the courts when interpreting domestic law, to take into account international law, and treaties the country is party to and may consider foreign law.²³³ General

²²⁴ JA Ferejohn ‘Independent Judges, Dependent Judiciary: Explaining Judicial Independence’ (1998) 72 *South California Law Review* 353.

²²⁵ R Hirschl ‘The Judicialization of Mega-Politics and the Rise of Political Courts’ (2008) 11 *Annual Review of Political Science* 93-95.

²²⁶ C M Fombad ‘A Comparative Overview of Recent Trends in Judicial Appointments: Selected Cases from Africa’ (2021) 55 *Canadian Journal of African Studies* 161 162.

²²⁷ United Nations Basic Principles on the Independence of the Judiciary Principle 10 (1985). See also Universal Charter of the Judge A 9 (1999); Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa (2003) Principle A para 4(i) & (k).

²²⁸ Constitution of Zimbabwe Amendment No. 1 of 2016.

²²⁹ Constitution of Zimbabwe.

²³⁰ Fombad (n 226).

²³¹ See Section 3.3.1 of Chapter Three.

²³² *Kenya Court of Appeal: Rono v Rono* (2005) AHRLR 107 at para 21. ‘Dualist states are those where international treaty obligations only become domestic law once they have been enacted by the legislature’.

²³³ Constitution of Zimbabwe Section 46.

Comment No. 25 provides that free communication about political and public issues must be protected, without restraint or censorship.²³⁴ The criminalisation of criticism of government policies, political discourse, or false communication violates international law,²³⁵ for example, General Comment 34 on Article 19 of the ICCPR.²³⁶ Although the General Comment and the 2019 Declaration are soft law instruments, states are encouraged to consider them because the normative interpretation of the right in General Comments sets the parameters and corpus of the right itself as provided for in the relevant treaty.²³⁷

Furthermore, Principle 22 of the 2019 Declaration provides that freedom of expression must not be limited on the grounds of public order unless there is a ‘close causal link’ between the expression and the public disorder.²³⁸ The South African case of *R v Maxaulana*,²³⁹ held that in deciding if a statement incites violence, there must be an objective assessment of the probable consequence of the statement, for example, is one urging or stirring up or ordering people to commit violence. A close look at the cases brought against Hopewell and Fadzayi for allegedly inciting violence shows there was nothing in their posts or words that ordered or urged people to commit violence or to cause harm against the state.²⁴⁰ The writer argues that the goal of this prosecution was to arrest and remand in custody, was to ensure that critical voices are suppressed, and the law is used to target and muzzle political dissent. Furthermore, the arrest, trial, and conviction of Hopewell Chin’ono and Fadzayi Mahere for publishing false news and incitement of public violence under the repressive CLCR Act demonstrates the overarching effect of the executive in using the judiciary to stifle and repress political dissent or criticism of government organs.²⁴¹

²³⁴ General Comment 25.

²³⁵ *Federation of African Journalists vs The Republic of Gambia EWC/CCJ/JUD/04/18*; 83. *Media Council of Tanzania and Others v Attorney General of the United Republic of Tanzania (Application 5 of 2019) 2020 EACJ*.

²³⁶ General Comment 34.

²³⁷ G C Shaffer & M A Pollack ‘Hard vs. Soft Law: Alternatives, Complements and Antagonists in International Governance’ (2010) 94 *Minnesota Law Review* 706.

²³⁸ The Declaration Principle 22.

²³⁹ *R v Maxaulana* 1953 (2) All SA 146 (E); See Also *R. v. Mqati*, 1952 (3) S.A. 112 at p. 115 (N).

²⁴⁰ See Section 3.3.1 & 3.3.2 of Chapter Three.

²⁴¹ M Chifamba ‘Zimbabwe: Mnangagwa’s capture of the judiciary a red flag for state failure’ (Harare) 23 November 2020 <https://www.theafricareport.com/51602/zimbabwe-mnangagwas-capture-of-judiciary-a-red-flag-for-state-failure/> (accessed 29 August 2024); See Zimbabwe Lawyers for Human Rights ‘Concerns Over judicial Independence in Zimbabwe’ <https://rfkhumanrights.org/wp-content/uploads/2024/04/Joint-Advocacy-Letter-on-Judicial-Independence-in-Zimbabwe.pdf> (accessed 29 August 2024).

iii. *Selective Enforcement of the Law*

The Judiciary in Zimbabwe has selectively enforced laws, targeting certain groups particularly those that aim their criticism against the government for example human rights defenders. Even though the constitutional court decided in favor of Fadzayi Mahere for allegedly violating Section 31(a)(iii) of the CLCR, the same charge leveled against Hopewell Chin'ono, this matter was not supposed to be entertained in court, to begin with. Section 31(a)(iii) had been declared invalid and struck down by the Constitutional Court in 2014.²⁴² However, the Magistrate courts exercising their authority convicted both Mahere and Chin'ono based on non-existent legislation.²⁴³ This displays the courts' partiality and the active role it plays in suppressing dissent through non-existent laws.²⁴⁴ Following the Military Coup in November 2017, selective enforcement of the law under the leadership of President Mnangagwa has continued to increase.²⁴⁵

iv. *Pre-Trial Detention and Denial of Bail*

In several cases involving human rights defenders, journalists, and activists, the judiciary has used the denial of bail and delaying of trials to effectively punish individuals.²⁴⁶ Hopewell was denied bail and spent 45 days in pre-trial detention in Chikurubi Maximum Prison while his health deteriorated in custody.²⁴⁷ Job Sikhala was denied bail 15 times and held in pre-trial detention for 595 days, due to that, he could not run for political office in the 2023 elections.²⁴⁸ On 3 May 2023, he received a six-month suspended sentence and was fined 600 United States Dollars.²⁴⁹ Job's lawyers and relatives were repeatedly denied access to see him while in custody and

²⁴² See Section 3.3.1 & 3.3.2 of Chapter Three.

²⁴³ As above.

²⁴⁴ Chifamba (n 241).

²⁴⁵ 'Editorial Comment: Selective Application of the law breeds anarchy' (Harare) *The Standard* 10 September 2023 <https://www.newsday.co.zw/thestandard/standard-people/article/200016452/editorial-comment-selective-application-of-the-law-breeds-anarchy> (accessed 09 September 2024).

²⁴⁶ 'Zimbabwean court clears journalist Hopewell Chin'ono on incitement charges' *The East African* 7 December 2021 <https://www.theeastafrican.co.ke/tea/rest-of-africa/zimbabwe-court-clears-journalist-hopewell-chin-ono-of-charges-3644088> (accessed 29 August 2024).

²⁴⁷ As above.

²⁴⁸ 'High Court throws out Job Sikhala's bail appeal' (Harare) *The Herald* 4 January 2023 <https://www.herald.co.zw/high-court-throws-out-job-sikhalas-bail-appeal/> (accessed 31 August 2024).

²⁴⁹ Nassah (n 197 above).

his health deteriorated to the point of getting an operation while still in custody.²⁵⁰ Article 6 of the African Charter and Article 9(1) of the ICCPR guarantee an individual's right to liberty and security. The International Court of Justice (ICJ) in *United States of America v. Iran (the Hostages in Tehran case)*²⁵¹ held that pro-longed detentions and to subject one to conditions of hardships are incompatible with international human rights law as it violates the 'right to life, liberty and security of person'. Furthermore, the Human Rights Committee in the case of *AW. Mukong v. Cameroon*²⁵² held that remand in custody 'must not only be lawful but reasonable and necessary in the circumstances, for example, to prevent flight, interference with evidence or the occurrence of another crime'.

Job's deteriorating health and the suspended sentence given to him made the pretrial detention of 595 days unreasonable for two reasons, firstly, as a man with strong ties to the community, a family man, and a member of the parliament of Zimbabwe, Job was not a likely flight risk individual, and his lack of criminal record made him reasonably less likely to interfere with evidence or witnesses. Secondly, 595 days in remand is unreasonable considering that Fadzayi Mahere, spent one week in custody for allegedly committing the same offence.²⁵³

3.7. Conclusion

The systematic repression of freedom of expression in the digital space and the policing of the online civic space is nothing new in Zimbabwe. Human rights defenders, activists, journalists, and ordinary civilians have faced the wrath of the state via pre-trial detentions, torture, intimidations, arrests for their online posts, and enforced disappearances. Chapter Four will pay attention to a comparative study,

²⁵⁰ 'Zimbabwe Court Orders Chikurubi Prison to Allow Relatives, Lawyers to visit CCC'S Job Sikhala' <https://www.theeastafrican.co.ke/tea/rest-of-africa/zimbabwe-court-clears-journalist-hopewell-chinono-of-charges-3644088> VOA news 03 November 2022 <https://www.voazimbabwe.com/a/zimbabwe-court-orders-chikurubi-prison-to-allow-relatives-lwyers-to-visit-ccc-s-job-sikhala/6817956.html> (accessed 31 August 2024).

²⁵¹ *Case Concerning United States Diplomatic and Consular Staff in Tehran (United States of America v. Iran)*, ICJ Reports 1980, p. 42, para. 91.

²⁵² *A. W. Mukong v. Cameroon*, Communication No. 458/1991 UNHK Committee (21 July 1994) UN Doc CCPR/C/51/D/458/1991 (1994).

²⁵³ J Moyo 'Zimbabwe: Jailed opposition officially granted bail' *World Africa* 18 January 2021 <https://www.aa.com.tr/en/africa/zimbabwe-jailed-opposition-official-granted-bail/2114434> (accessed 01 September 2024).



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using South Africa as a comparator in assessing the protection of freedom of expression in the digital space.

CHAPTER FOUR

4.1. Introduction

The rapid growth of digital platforms in South Africa has reshaped the landscape of communication, amplifying the importance of freedom of expression in the online environment.²⁵⁴ This chapter comparatively examines the legal framework that governs freedom of expression in South Africa's digital space, with a particular focus on enabling legislation and the pivotal role of the judiciary. Anchored in Section 16 of the Constitution, which enshrines the right to free speech, this analysis explores the intersection of digital freedoms with privacy, dignity, and security.²⁵⁵ Through an exploration of key statutes such as the Protection of Personal Information Act (POPIA), and the Regulation of Interception of Communications and Provision of Communication-Related Information Act (RICA Bill) and the Hate Cimes Act this chapter assesses how these laws regulate online expression while addressing challenges such as the protection of the right to privacy. Through landmark cases, South African courts have shaped the contours of digital speech, providing critical protections while imposing necessary limitations.²⁵⁶ This chapter offers a comprehensive and comparative analysis of how the legal system in South Africa both enables and regulates freedom of expression online, ensuring a balance between safeguarding individual liberties and addressing the potential harms of digital expression while drawing a stark contrast with the Zimbabwean context.

4.2. Domestic legal framework on the right to freedom of expression

²⁵⁴ G Fick 'Elections and Democracy' in R Calland & P Graham (eds) *Democracy in the Time of Mbeki*, Cape Town (2005); P C Schmitter 'The Ambiguous Virtues of Accountability' (2004) 15 *Journal of Democracy* 4; R Southall & B Mattes *Popular Attitudes Towards the South African Electoral System: Report to the Electoral Task Team* (2002).

²⁵⁵ Constitution of the Republic of South Africa of 1996 Section 16; H Van Vollenhoven and others 'The Right to Freedom of Expression: The Mother of our Democracy' (2006) *Journal of Education* 119-140 <http://dx.doi.org/10.4314/pelj.v18i6.08>

²⁵⁶ Cases such as, *Laugh it Off Promotions vs South African Breweries* CCT 42/04 Para 45 <https://globalfreedomofexpression.columbia.edu/cases/laugh-it-off-promotions-v-south-african-breweries/>, *Economic Freedom Fighters and Another v Minister of Justice and Correctional Services and Another* 2021 (1) SA (CC) para 1 <http://www.saflii.org/za/cases/ZACC/2020/25.htm> *Holomisa v Argus Newspapers Ltd* 1996 (2) SA 588 (W) <https://www.saflii.org/za/cases/ZASCA/2007/56.rtf>. *Hoho v The State* 2009 (1) SACR 276 (SCA) at para 29 <https://www.saflii.org/za/cases/ZASCA/2008/98.html>.

The legal framework governing Freedom of Expression in the digital space in South Africa is shaped by constitutional protection and various legislative instruments that impose both a positive and negative duty to the state.²⁵⁷

4.2.1. *The Constitution*

Section 16 of the Constitution guarantees the civil liberty of freedom of expression, which includes freedom of the press, and other media, freedom to impart and receive information, artistic creativity, academic freedom, and scientific research.²⁵⁸ The word ‘includes’ used in section 16, extends beyond the four aspects to encompass all forms of expression, including digital expression.²⁵⁹ With over 22 million social media users in the republic, digital space has become the fulcrum mode in the enjoyment of the right.²⁶⁰ Section 16(2) propagates the grounds upon which the right can be limited, for example when freedom of expression is used as propaganda for war, to incite imminent violence or hate speech.²⁶¹ The constitutional court has emphasised when interpreting section 16, that ‘freedom of expression is the lifeblood of a genuine constitutional democracy, keeping it fairly vibrant, stable and peaceful’.²⁶²

4.2.2. *The Protection of Personal Information Act*

The Protection of Personal Information Act (POPIA) 2013 intersects the protection of freedom of expression and the right to privacy, playing a critical role in the enjoyment of both rights.²⁶³ POPIA primarily regulates how personal information is collected, stored, and processed by both public and private authorities and entities.²⁶⁴ Section 12 provides that personal information must be collected directly from the subject, and the subject must consent to any extraction of his/her data that is shared online. This implies that when data is shared online, such as personal

²⁵⁷ NG Wood ‘Freedom of Expression of Learners at South African Public Schools’ (2001) *The South African Journal of Education* 142-146; O Shyllon ‘The Link Between Socio-economic Rights and the Decriminalisation of Laws that Limit Freedom of Expression in Africa’ (2012) *ESR Review* 7-10.

²⁵⁸ Section 16(1) of the Constitution of South Africa.

²⁵⁹ H Van Vollenhoven (n 255); See Also EFF (n 256).

²⁶⁰ Datareportal ‘South Africa’ (2020), <https://datareportal.com/reports/digital-2020-south-africa>.

²⁶¹ Section 16(2) (n 258).

²⁶² EFF (n 256).

²⁶³ Protection of Personal Information Act 4 of 2013 https://www.gov.za/sites/default/files/gcis_document/201409/370672611act4of2013protectionofpersonalinformationcorrect.pdf

²⁶⁴ POPIA Section 2; LA Abdulrauf ‘Data Protection in the Internet: South Africa’ In D. M Vicente, S. de Vasconcelos Casi-miro (eds) *Data Protection in the Internet, Ius Comparatum–Global Studies in Comparative Law* (2020) 38.

information, that information can only be collected lawfully and not used arbitrarily. Furthermore, data subjects must be notified about the processing of personal information and the purpose and manner of collection of their personal information. This enhances the transparency and accountability of state and private entities when it comes to the processing of digital communications.²⁶⁵ Sections 37 and 38 explicitly protect freedom of expression, particularly for journalists and content creators, by providing specific exemptions for the processing of personal information when it is in the public interest or related to journalistic, artistic, and literary purposes.²⁶⁶

These sections recognise that digital expression may sometimes conflict with privacy rights, however, it enables public-interest journalism.²⁶⁷ In June 2013, Karyn Maughan, a journalist for News24 published a medical report of Former President Zuma, the high court prohibited the former president from pursuing private prosecution, the court opined that Zuma's medical condition was a matter of public interest and noted media's right to freedom of expression.²⁶⁸ The POPIA establishes an independent juristic person, the Information Regulator (IR) who provides education on data protection, monitors compliance of public and private entities on the lawful processing of private and personal information and handles complaints on alleged violations of personal information of data subjects.²⁶⁹

4.2.3. The Regulation of Interception of Communications and Provision of Communication Related Information Amendment Bill

In a landmark decision by the Constitutional Court of South Africa (CC) in the case of *AmaBhungane Centre for Investigative Journalism and Others v Minister of Justice and Correctional Service (Rica case)*,²⁷⁰ The Regulation of Interception of

²⁶⁵ POPIA (n263) Section 18.

²⁶⁶ As above Section 37 & 38.

²⁶⁷ G Mushwana & H Bezuidenhout 'Social media policy in South Africa' (2014) 19 *South African Journal of Accountability and Auditing Research* 63–74.

²⁶⁸ Committee to Protect Journalists 'South African court prohibits former president's private prosecution of journalist Karyn Maughan' 8 June 2023 <https://cpj.org/2023/06/south-african-court-prohibits-former-presidents-private-prosecution-of-journalist-karyn-maughan/> (accessed 17 September 2024).

²⁶⁹ POPIA (n263) Section 40.

²⁷⁰ *AmaBhungane Centre for Investigative Journalism NPC and Another v Minister of Justice and Correctional Services and Others; Minister of Police v AmaBhungane Centre for Investigative Journalism NPC and Others* 2021 (3) SA 246 (CC) <https://www.saflii.org/za/cases/ZACC/2021/3.html>.

Communications and Provision of Communication-Related Information Act (RICA Act) was declared unconstitutional because in certain aspects it violated the right to freedom of expression and the right to privacy.²⁷¹ These certain respects include RICA's failure to provide notification post-surveillance to individuals to necessitate them to be able to challenge the surveillance in courts. Further, RICA fails to protect legal professional privilege to protect confidential and sensitive client communication and to protect Journalistic privilege as it pertains to the disclosure of information related to sources.²⁷²

The CC suspended its declaration of unconstitutionality on the contingency that the legislature remedy the defects of the RICA Act.²⁷³ In response, the Minister of Justice tabled an Amendment Bill, the Regulation of Interception of Communications and Provision of Communication-Related Information Amendment Bill (RICA Bill).²⁷⁴ The RICA Bill remedies the defects of the RICA Act by providing for post-surveillance notification, the knowledge that individuals will be notified post-surveillance ensures transparency and accountability of state organs as this discourages abusive or politically motivated monitoring of digital communications.²⁷⁵ The Bill Strengthens judicial oversight mechanisms required for lawful interception ensuring interception of communications cannot occur arbitrarily. For instance, the RICA Bill provides for security of tenure in office for a designated judge of 7 years and the Bill introduces a review judge, whose duty is to review decisions made by the designated judge over granting of warrants of interceptions.²⁷⁶ Additionally, the RICA Bill introduces protections for journalistic sources and legal practitioners' privilege, ensuring that communications cannot be intercepted without stringent and robust reasons to satisfy the Judge. The law enforcement agencies must demonstrate that the interception is 'necessary' for national security or crime prevention.²⁷⁷ This section is crucial for

²⁷¹ D Nicholls 'Unfettered State Surveillance to end: RICA Declared unconstitutional' Harrington Johnson Wands Attorneys and Conveyancers <https://hjwattorneys.co.za/newsandmedia/unfettered-state-surveillance-to-end-rica-declared-unconstitutional> (accessed 18 September 2024).

²⁷² J P Ongeso 'South Africa: Constitutional Court Upholds declaration of Invalidity of RICA' 5 February 2021 <https://bowmanslaw.com/insights/south-africa-constitutional-court-upholds-declaration-of-invalidity-of-rica/> (accessed 18 September 2024).

²⁷³ RICA Case (n 270).

²⁷⁴ Regulation of Interception of Communications and Provision of Communication-Related Information Amendment Bill published in Government Gazette 49189, August 25th, 2023 https://www.gov.za/sites/default/files/gcis_document/202308/b28-2023rica.pdf.

²⁷⁵ RICA Bill Section 25A (2).

²⁷⁶ As above Section 15A & 15D.

²⁷⁷ As above Section 23A.

protecting media freedom and ensuring that investigative journalists can communicate freely in digital spaces without fear of unwarranted surveillance.

4.2.4. *Prevention and Combating of Hate Crimes and Hate Speech Act*

The Judiciary in South Africa has often recognised that not all forms of speech warrant constitutional protection, particularly hate speech.²⁷⁸ The Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 (PEPUDA) in an attempt to regulate and stamp out hate speech defined it as words that a harmful or hurtful or those that propagate hatred.²⁷⁹ The CC in *Qwelane v South African Human Rights*,²⁸⁰ declared section 10(1) unconstitutional and held that the constitutional standard for hate speech is provided in Section 16(2) of the Constitution, which is when a speech advocates for hatred, based on race, ethnicity, gender, or religion. Speech that is hurtful or invokes mere emotional response provided by the PEPUDA was held as the wrong standard, harmful speech is what is what is protected.²⁸¹ The court clarified that hurtful speech—speech that merely causes emotional distress or offends—cannot be prohibited under the Constitution. This is because freedom of expression includes the right to express ideas and opinions, even if they are offensive, shocking, or disturbing to others. Instead, the court held that only harmful speech—speech that causes demonstrable harm or incites harm and hatred—can be restricted as hate speech. The court aligned the hate speech standard with section 16(2) of the Constitution, which limits protection for speech that incites violence, hatred, or harm based on prohibited grounds.²⁸²

²⁷⁸ *Masuku and Another v South African Human Rights Commission obo South African Jewish Board of Deputies* 2019 (2) SA 194 (SCA) <https://www.saflii.org/za/cases/ZASCA/2018/180.html>, *Moyo v Minister of Justice and Constitutional Development and Others* 2018 ZASCA 100, at paragraphs 31–32 <https://www.saflii.org/za/cases/ZASCA/2018/100.html>; See also *Hotz and Others v University of Cape Town* 2017 (2) SA 485 (SCA) <https://www.saflii.org/za/cases/ZASCA/2016/159.html>.

²⁷⁹ The Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 Section 10(1)

²⁸⁰ *Qwelane v South African Human Rights Commission and Another* 2021 (6) SA 579 (CC). <https://www.saflii.org/za/cases/ZACC/2021/22.html>.

²⁸¹ As above.

²⁸² See ME Marais & JL ‘The Constitutionality of the Prohibition of Hate Speech in terms of Section 10(1) of the Equality Act: A Reply to Botha and Govindjee’ (2019) 22 *Potchefstroom Electronic Law Journal (PELJ)* 1–37. <https://dx.doi.org/10.17159/1727-3781/2019/v22i0a5718>; See B Winks ‘Hate Hurts: Qwelane and the Lingering Obscurity in South Africa’s Hate Speech Law’ (2023) 13 *Constitutional Court Review* 67–123. <https://journals.co.za/doi/epdf/10.2989/CCR.2023.0005>

In the fight against hate speech and in an attempt to strike a balance between combating harmful expression and protecting freedom of expression the legislator recently passed the Prevention and Combating of Hate Crimes and Hate Speech Act (Hate Crimes Act).²⁸³ The Hate Crimes Act unlike the PEPUDA introduces criminal sanctions and penalties such as imprisonment providing for a more robust protection against hate-driven content online.²⁸⁴ Section 4 of the Hate Crimes Act defines hate speech to include harmful speech and Section 2 of the act defines harm as ‘substantial emotional, psychological, physical, social or economic detriment’. The author argues that the definition provides for the constitutionally recognised grounds over which the CC declared the PEPUDA section 10 to be invalid. However, the CC is still yet to make a declaration on the new legislation. Section 4(2) carves out specific exemptions to protect freedom of expression such as fair and accurate reporting, and expression of bonafide religious, artistic, or academic content as long as it does not incite violence or hatred. With the rising concerns over hate speech,²⁸⁵ increase in hate crimes, xenophobia,²⁸⁶ racial epithets,²⁸⁷ and gender discrimination and harassment,²⁸⁸ The Hate Crimes Act seeks to criminalise harmful speech while protecting freedom of expression in the digital space.²⁸⁹

For instance, journalists in KwaZulu Natal, because of the severity of threats and hate speech, had to close down their social media accounts, negatively impacting their ability to report without fear, openly, and without favor.²⁹⁰ Political parties, in particular, the Economic Freedom Fighters (EFF), have speared headed and fanned the flames, to encourage violent vitriol and physical confrontations with journalists.

²⁸³ Prevention and Combating of Hate Crimes and Hate speech Act No. 16 of 2023.

²⁸⁴ As above Section 6.

²⁸⁵ SANEF Statement 19 June 2018 <https://sanef.org.za/calls-for-action-to-stop-attacks-on-kzn-journalists-19-june-2018/> (accessed 18 September 2024). K Satchwell and others ‘Independent panel report, Inquiry into Media Ethics and Credibility, South African National Editors’ Forum’ (2021) <https://sanef.org.za/wp-content/uploads/2021/04/Satchwell-Report.pdf>.

²⁸⁶ Centre for Analytics and Behavioural Change ‘Interim report on xenophobia on South Africa Social Media’ (2020) <https://drive.google.com/file/d/1aEKfwQfo-gower4Te9FlWRBj5NYql2Li/view>.

²⁸⁷ K Barlett ‘In South Africa, Racial Tensions Simmer Amid a Pandemic’ (2020) <https://foreignpolicy.com/2020/06/12/south-africa-coronavirus-pandemic-racial-tensions/>.

²⁸⁸ N Iyer and others ‘Alternate Realities, Alternative Internets: African Feminist Research for a Feminist Internet’ (2020) https://www.apc.org/sites/default/files/Report_FINAL.pdf; See further Gender Links Glass Ceilings ‘Women in South African Media Houses’ (2018) <http://www.womeninnews.org/ckfinder/userfiles/files/Glass-Ceilings-Report-19-October-2018.pdf>.

²⁸⁹ Section 4 of the Hate Crimes Act; N Mkhize and others *The country we want to live in: Hate crimes and homophobia in the lives of black lesbian South Africans* (2010).

²⁹⁰ SANEF (n 285).

In 2019 Julius Malema, President of the EFF called on his 2.4 million followers to ‘go for the kill’ against investigative journalist Pauli Van Wyk, following her article uncovering the banking scandal involving the EFF party.²⁹¹

4.3. Judicial Interpretation of Freedom of Expression

As the main guardrail and protective mechanism of freedom of expression in South Africa, the judiciary has remained an unwavering and steadfast umpire when it comes to the protection, enforcement, and promotion of the right.²⁹² The Supreme Court of Appeal accentuated that ‘freedom of expression constitutes one of the essential foundations of a democratic society’.²⁹³ At the core of its protective mandate, lies its independence, severed from executive control and manipulation.²⁹⁴ In South Africa, the President appoints CC Judges from the list submitted by the Judicial Service Commission (JSC).²⁹⁵ However, such appointments follow a robust consultation with the Chief Justice and leaders of political parties in the National Assembly.²⁹⁶ Due to this, the judiciary has stood firm as the watchdog for human rights protection and the unwavering guardrail to the powers of the executive arm.²⁹⁷ The Former Chief Justice of the Republic of South Africa, Arthur Chaskalson, a few weeks before his death underscored the following on judicial independence while addressing the Cape Law Society:²⁹⁸

Judicial independence is a requirement demanded by the Constitution, not in the personal interests of the judiciary, but in the public interest, for without that protection, judges may not be, or be seen by the public to be, able to perform their duties without fear or favour.

²⁹¹ Satchwell (n 273).

²⁹² H Van De Vijver (ed) *The Judicial Institution in Southern Africa: A Comparative Study of Common Law Jurisdictions* (2006) 122.

²⁹³ *Hoho v The State* 2009 (1) SACR 276 (SCA) para 29 <https://www.saflii.org/za/cases/ZASCA/2008/98.html>.

²⁹⁴ S Seedorf & S Sibanda ‘Separation of Powers’ in S Woolman (ed) *Constitutional Law of South Africa* (2008) 12-39; See also *South African Association of Personal Injury Lawyers v Heath* 2001 (1) SA 883 (CC).

²⁹⁵ *Acting Chairperson: Judicial Service Commission v Premier of the Western Cape Province* 2011 3 SA 538 (SCA) <https://www.saflii.org/za/cases/ZASCA/2012/115.html#:~:text=In%20Acting%20Chairperson%3A%20Judicial%20Service,Premier%20or%20her%20designated%20alternate>.

²⁹⁶ Section 174(4) of Constitution of South Africa; L Siya & JC Mubangizi ‘The Independence of South African Judges: A Constitutional and Legislative Perspective’ (2015) 18 *Potchefstroom Electronic Law Journal* 4 <http://dx.doi.org/10.4314/pelj.v18i4.03>.

²⁹⁷ As above; *Hoho v The State* (n 293).

²⁹⁸ Southern African Legal Information Institute ‘Justice Chaskalson on the future of the profession at the Cape Law Society AGM’ (2013) <https://www.saflii.org/za/journals/DEREBUS/2013/10.html> (accessed 17 September 2024)

i. Political criticism

The courts have held strong epithets and criticism of political leaders and government policy by the public come readily to the tongue.²⁹⁹ Judge Cameron emphasized the close link between criticism of public officials and the progress of a constitutional democracy when he underscored, “The success of our constitutional venture depends upon robust criticism of the exercise of power, this requires alert and critical citizens.”³⁰⁰ The courts have consistently ruled that public figures, especially politicians and government officials, should expect more scrutiny and criticism than private individuals and that criticism of government is central to the functioning of a democratic society.³⁰¹ In *Democratic Alliance v African National Congress*³⁰², the CC ruled that political speech, especially that which criticizes government policies, must enjoy elevated and heightened protection under Section 16 of the Constitution. The court opined that open debate on political policies and matters, even when it involves harsh or provocative criticism is protected speech under the constitution.³⁰³

In the landmark case of *Economic Freedom Fighters v Speaker of National Assembly*,³⁰⁴ The CC acknowledged that robust political discourse and parliamentary criticism are essential for democracy and that any level of intimidation of the public is unconstitutional. The Court in *Le Roux v Dey*,³⁰⁵ touched on the balance between freedom of expression and the right to dignity. The court reiterated that public officials must tolerate a higher level of criticism than private individuals. However, this does not mean that defamatory statements enjoy protection under the guise of free speech.³⁰⁶ Furthermore, the Supreme Court of Appeal (SCA) in the case of *Media 24*

²⁹⁹ *Pienaar v Argus Printing and Publishing Company Ltd* 1956 (4) SA 310 (W) <https://www.saflii.org/za/cases/ZASCA/1992/63.html>.

³⁰⁰ *Holomisa v Argus Newspapers Ltd* 1996 (2) SA 588 (W) <https://www.saflii.org/za/cases/ZASCA/2007/56.rtf>.

³⁰¹ *S v Mamabolo* 2001 (3) SA 409 (CC) <https://www.saflii.org/za/cases/ZACC/2001/17.html>.

³⁰² *Democratic Alliance v African National Congress and Another* 2015 (2) SA 232 (CC) <https://www.saflii.org/za/cases/ZACC/2015/1.html>.

³⁰³ As above.

³⁰⁴ *Economic Freedom Fighters v Speaker of the National Assembly and Others; Democratic Alliance v Speaker of the National Assembly and Others* 2016 (3) SA 580 (CC) <https://www.saflii.org/za/cases/ZACC/2016/11.html>.

³⁰⁵ *Le Roux and Others v Dey* 2011 (3) SA 274 (CC) <https://www.saflii.org/za/cases/ZACC/2011/4.html>.

³⁰⁶ As above.

Ltd v SA Taxi Securitisation (Pty)Ltd (2011),³⁰⁷ emphasised freedom of the press and enunciated that journalists play an essential role in ensuring government accountability. The court held that the media's right to criticize government policies and expose mismanagement and corruption of state organs must be protected by the courts.³⁰⁸

ii. *Surveillance and Monitoring of the digital space*

In South Africa, the courts have addressed the intersection of surveillance and monitoring of the digital space, the right to privacy, and freedom of expression particularly in the context of the constitution and relevant legislation such as the RICA and POPIA.³⁰⁹ The courts often balance these constitutional rights with public interests, including national security and crime prevention, which sometimes necessitates the monitoring and surveillance of digital communication.³¹⁰ In the RICA case,³¹¹ discussed above, the CC found interception of digital communication without adequate and robust judicial oversight and sufficient safeguards to be unconstitutional and emphasized the need for transparency in digital surveillance. Although the court stressed that cases of national security, such as terrorism and serious organised crime, could justify limitations on privacy and freedom of expression, it, however, underscored the importance of proportionality, stating that any surveillance measures must be carefully tailored to guarantee that they do not disproportionately infringe on fundamental rights.³¹² The Rica case succinctly ruled that limitations to privacy and freedom of expression must be:³¹³

- Based on clear and demonstrable security threats,
- Proportionate, meaning they must not infringe more on rights than is strictly necessary,
- Subject to adequate judicial oversight and transparency to prevent abuse.

³⁰⁷ *Media 24 Ltd and Others v SA Taxi Securitisation (Pty) Ltd 2011 (5) SA 329 (SCA)* <https://www.saflii.org/za/cases/ZASCA/2011/117.html>.

³⁰⁸ As above.

³⁰⁹ *South African History Archive Trust v South African Reserve Bank and Another 2020 (6) SA 127 (SCA)* <https://www.saflii.org/za/cases/ZASCA/2020/56.html>.

³¹⁰ *Albutt v Centre for the Study of Violence and Reconciliation and Others 2010 (3) SA 293 (CC)* <https://www.saflii.org/za/cases/ZACC/2010/4.html>; *Glenister v President of the Republic of South Africa and Others 2011 (3) SA 347 (CC)* <https://www.saflii.org/za/cases/ZACC/2011/6.html>.

³¹¹ The RICA case (n 270).

³¹² See Section 2.2.2 & 2.3.3.4 of Chapter Two.

³¹³ As above.

The landmark RICA case led to the formulation of the amendment, RICA Bill, which improves on the defects and shortfalls of the RICA Act.³¹⁴

4.4. Abductions, Enforced disappearances, and Torture of Human Rights defenders and Political activists

In South Africa, cases dealing with enforced disappearances and abductions of political activists and human rights advocates are often linked to the country's apartheid past, with very few post-apartheid cases.³¹⁵ The Working Group on Enforced and Involuntary Disappearances (WGEID) reports that it has only dealt with twelve cases of enforced disappearance as of 2014.³¹⁶ Regardless the South African courts have taken a strong stance against abductions, enforced disappearances, and torture.³¹⁷ In 2007, Nokuthula Simelane's³¹⁸ sister sued the government over its amnesty and pardon policy. In the case of *Nkadimeng v The National Director of Public Prosecutions*,³¹⁹ the court ruled that the government's policy to grant additional pardons to apartheid and state agents that perpetrated abductions and enforced disappearance was unconstitutional, claiming it an absurdity and that prosecutors must investigate and prosecute offenders when there is sufficient evidence to do.

In the case of *Kaunda v President of South Africa*,³²⁰ the CC held that the South African government has an unwavering duty to protect its citizens from abductions and torture even when the would-be victims are abroad. This duty can be in the form of diplomatic representation with the host country, extradition agreements, and offering assistance and intelligence into the investigations of the abductions. In the

³¹⁴ See Section 4.2.3 of Chapter Four.

³¹⁵ J Aronson 'The Strengths And Limitations of South Africa's Search For Apartheid-Era Missing Persons' (2011) *International Journal of Transitional Justice* 262-281; Foundation for Human Rights 'The Cradock Four' <https://unfinishedtrc.co.za/the-cradock-four/> (accessed 02 October 2024).

³¹⁶ United Nations Working Group on Enforced and Involuntary Disappearances Report 2014 A/HRC/27/49 <http://daccessddsny.un.org/doc/UNDC/GEN/G14/099/81/PDF/G1409981.pdf?OpenElement>.

³¹⁷ J Sarkin 'An evaluation of the South African Amnesty Process' in AR Chapman & H Van Der Merwe (eds) *Truth and Reconciliation: Did the TRC Deliver* (2008) 55. See also J Sarkin 'The Amnesty Hearings In South Africa Revisited' in G Werle (ed) *Justice In Transition – Prosecution And Amnesty In Germany And South Africa* (2006) 43-53.

³¹⁸ TRC Final Report <https://www.sahistory.org.za/archive/trc-final-report-volume-6-section-3> paras 199-206.

³¹⁹ *Nkadimeng and Others v National Director of Public Prosecutions and Others* 2008 ZAGPHC 422 <https://www.saflii.org/za/cases/ZAGPHC/2008/422.html>.

³²⁰ *Kaunda and Others v President of the Republic of South Africa* 2005 (4) SA 235 (CC) <https://www.saflii.org/za/cases/ZACC/2004/5.html>.

case of *South African Litigation Centre v Minister of Justice and Constitutional Development (The Omar Al-Bashir Case)*³²¹, although the case focused on the state's failure to arrest and extradite the former Sudanese President, the court reiterated South Africa's obligation under international and domestic law to combat crimes against humanity, including torture and enforced disappearances. Furthermore, the courts have also addressed, condemned, and cracked down on police brutality, torture, and arbitrary arrests of journalists, for instance the court ruled in *Minister of Police v Mlungwana and others*,³²² that law enforcement must act within constitutional bounds when it comes to arrests of journalists and use the minimal force required to subdue protesters.

4.5 Comparative analysis of the South African and Zimbabwean Context

This section discusses the enabling frameworks, judicial jurisprudence, and contextual analysis from the two jurisdictions on freedom of expression and the right to privacy in the digital space. The author shall critically examine the two countries and build on the analysis provided in Chapters 2, 3, and the first part of Chapter 4 to compare the methodology of the two states.

i. Judicial independence

As reiterated above and in Chapter 3,³²³ at the core of a State's protective mandate to guarantee the full enjoyment of human rights, lies judicial independence,³²⁴ and one of the main indicators of institutional independence of the courts is how judges are appointed into office.³²⁵ In South Africa, although the President makes the final appointment, the JSC largely governs the appointment of judges.³²⁶ The JSC plays a central role in recommending judicial appointments, it provides a list to the president that must have three more names, than the number of vacancies advertised, and the President is mandated to make the appointments from

³²¹ *Minister of Justice and Constitutional Development and Others v Southern African Litigation Centre and Others* 2016 (3) SA 317 (SCA) <https://www.saflii.org/za/cases/ZASCA/2016/17.html>.

³²² *Mlungwana and Others v S and Another* 2019 (1) SACR 429 (CC) <https://www.saflii.org/za/cases/ZACC/2018/45.html>.

³²³ See Section 3.5 of Chapter 3 of this Study.

³²⁴ As above.

³²⁵ Section 174(3) of The Constitution of South Africa; Judicial Service Commission Act 9 of 1994

³²⁶ Section 174(6) of The Constitution of South Africa.

the list provided.³²⁷ This reflects a broad and relatively transparent selection process that checks and balances the powers of the President, while also ensuring institutional independence from the executive.³²⁸ For instance, the court reprimanded and barred Jacob Zuma from privately prosecuting Karyn Maughan, a journalist for News24, as it went against media freedom,³²⁹ or the court dealing with the constitutional powers of the public protector and emphasizing that the President is accountable to the courts, parliament and the citizens about how public funds are appropriated,³³⁰ or the landmark RICA Case, which emphasized the importance of the right to privacy and free expression in the digital space.³³¹

In contrast, even though the 2013 constitution of Zimbabwe establishes the JSC,³³² with the mandate to recommend appointments, the law has been weakened by systematic amendments that have crippled the institutional independence of the courts.³³³ For instance, the Constitutional of Zimbabwe Amendment No. 1 of 2016 and Constitutional Amendment No.2 of 2021 have bestowed singular power on the President over judicial appointments and the tenure of Judges thus weakening the independence of the courts.³³⁴ Amendment No. 1 gives the President the power to directly appoint senior judges of the Constitutional Court, Supreme Court, and High Court without relying upon JSC recommendations, or public interviews. This has centralised power in the executive and reduced transparency of the whole process.³³⁵ Amendment No. 2 allows the president the discretion to extend the tenure of senior judges like the Chief Justice, beyond 70 years for periods of up to five years.³³⁶ This power to extend the tenure of judges at his discretion raises concerns about judicial independence as judges who serve at the discretion of the President may be less willing

³²⁷ AfriMAP and Open Society Foundation for South Africa 'South Africa Justice Sector and the Rule of Law: A discussion document' (2005) <http://www.afrimap.org/english/images/report/sa-eng-part-2-chapter-4.pdf> ; P N Langa 'The Protection of Human Rights by the Judiciary and Other Structures in South Africa' (1999) 52 *Southern Methodist University Law Review Journal* 1531 <https://scholar.smu.edu/smulr/vol52/iss4/3>.

³²⁸ H Van De Vijver (ed) *The Judicial Institution in Southern Africa: A Comparative Study of Common Law Jurisdictions* (2006) 122.

³²⁹ Committee to Protect Journalists (n 257).

³³⁰ EFF (n 256).

³³¹ RICA Case (n 270).

³³² Section 162 of the Constitution of Zimbabwe 2013.

³³³ A Magaisa 'Zimbabwe: An Opportunity Lost' (2019) 30 *Journal of Democracy* 143-154.

³³⁴ Section 3.5 (i) of Chapter Three.

³³⁵ As above.

³³⁶ Constitution of Zimbabwe Amendment No 2 of 2021 Section 13.

to rule against the executive in contentious matters for fear of not having their term in office extended.³³⁷ For example, Chief Justice Malaba's term in office was unilaterally extended after he had ruled against Opposition leader Nelson Chamisa's electoral petition against President Mnangagwa's election victory even when faced with evidence of election impropriety.³³⁸

ii. Political criticism

South African courts have played a central role in defending free speech, and political activism and underpinning the enabling legal framework that protects human rights defenders and provides a check against government overreach.³³⁹ The courts have reiterated that political activism and criticism of the government are not only essential but central to the function of a democratic society,³⁴⁰ contending that legal provisions that are too vague and broad and that have the import of criminalising political discourse infringe on freedom of expression.³⁴¹ The CC has emphasized that under Section 16 of the constitution, citizens are allowed to express radical or dissenting views to political figures, underpinning in the same breath the proscription of hate speech,³⁴² and speech that poses a real threat to public safety.³⁴³ This approach underscores similar international human rights law standards such as General Comment 25,³⁴⁴ and General Comment 34 on Article 19 of the ICCPR,³⁴⁵ which read together provide for free communication on political and public issues without restraint and that the criminalisation of criticism of government violates international law.³⁴⁶

³³⁷ L Madhuku 'Constitutional Protection of the Independence of the Judiciary: A Survey of the position in Southern Africa' (2002) 46 *Journal of African Law* 232; *Kika v Minister of Justice Legal & Parliamentary Affairs & 19 Ors 2021 ZWHHC 264* <https://zimlil.org/akn/zw/judgment/zwhhc/2021/264/eng@2021-05-15>.

³³⁸ *Chamisa v Mnangagwa & 24 Ors 2018 ZWCC 42* <https://zimlil.org/akn/zw/judgment/zwcc/2018/42/eng@2018-08-24>.

³³⁹ Section 4.3(i) of Chapter Four.

³⁴⁰ As above.

³⁴¹ As above.

³⁴² *Masuku and Another v South African Human Rights Commission obo South African Jewish Board of Deputies 2019 (2) SA 194 (SCA)* para 31 <https://www.saflii.org/za/cases/ZASCA/2018/180.html>;

³⁴³ D Benatar & A Fagan 'On the genocidal fantasies of Masixole Mlandu' Politics Web (2018) <https://www.politicsweb.co.za/opinion/on-the-genocidal-fantasies-of-masixole-mlandu>. See Also *S v Nkosiyana and Another 1966 (4) SA 655 (A)* <https://www.saflii.org/za/journals/PER/2013/74.html>.

³⁴⁴ General Comment 25.

³⁴⁵ General Comment 34.

³⁴⁶ As above.

In Zimbabwe, political activists, human rights defenders, and journalists face severe consequences for criticizing the government, both online and offline.³⁴⁷ Repressive laws,³⁴⁸ selective enforcement of those laws, and the court's indifference in using pretrial detention and refusal of bail has created a chilling effect, stifling of dissent and political activism. The introduction of the Patriotic Act which severely restricts free expression and criminalises any form of criticism of the government, whether within the country or in the international arena, clamps down on any form of dissent or political discourse that may be deemed 'unpatriotic' and introduces criminal sanctions such as the death penalty, 20 to 10-year sentences exacerbates the already difficult environment for political activism and human rights.³⁴⁹ Zimbabwe presents a much more repressive environment for civil criticism and online activism, coupled with the judiciary's lack of independence, the online space has transformed to be a dangerous space for activists who risk government reprisals.³⁵⁰

iii. Monitoring and Surveillance

A comparative analysis of social media interception in South Africa and Zimbabwe, reveals distinct legal frameworks and approaches to protecting the right to privacy and freedom of expression. In South Africa following the decision of CC in the RICA Case, the RICA Amendment Bill was tabled addressing the loopholes in the original Act.³⁵¹ The amendment emphasises and strengthens judicial oversight, providing strong legal oversight by a review judge over a designated judge, and introducing post-surveillance notification aligning with international law standards on transparency, proportionality, and legality.³⁵² Additionally, the POPIA establishes the Information Regulator (IR) which tightly controls and oversees the strict regulations regarding the procession and storage of personal information and any surveillance complies with the robust protections for an individual's right to privacy.³⁵³ These protections provide an independent complaint mechanism that handles complaints of alleged violations of personal information.³⁵⁴ This independent review

³⁴⁷ Section 3.3.1 -3.3.5 of Chapter Three.

³⁴⁸ Section 2.4 of Chapter Two.

³⁴⁹ Section 2.4.3 of Chapter Two.

³⁵⁰ Section 3.3 of Chapter Three.

³⁵¹ Section 4.2.3 of Chapter Four.

³⁵² As above.

³⁵³ Section 4.2.2. of Chapter Four.

³⁵⁴ As above

mechanism aligns with General Assembly Resolution 68/167 and Article 17 of the ICCPR which prohibits arbitrary interference with the right to privacy mandating states to set up review and control mechanisms that guard against state abuse.³⁵⁵

In Zimbabwe, on the other hand, the IAC circumvents judicial oversight and grants extensive powers to the state.³⁵⁶ The Patriotic Act overreaches in terms of surveillance and censorship of social media because it extends the power of the Minister by providing crimes beyond those that threaten national security, over which a warrant of interception can be issued.³⁵⁷ As discussed at length, social media surveillance in Zimbabwe and the legal framework provide unmetered powers to the state to police the online civic space and to target political opponents infringing on freedom of expression and the right to privacy.³⁵⁸ Zimbabwe's laws contravene international law as they lack the necessary safeguards to ensure that any restrictions on the right to privacy and free expression are necessary and proportionate.³⁵⁹ They fail to strike a proper and genuine balance between national security interests and an authoritarian regime's own personal interests of protecting its power by any means and cracking down on criticism and dissent.³⁶⁰

iv. Abductions and Enforced Disappearances of Human Rights Defenders

Enforced disappearances and abductions of political activists and human rights defenders pose a critical human rights concern, particularly stifling dissent and cracking down on political activism.³⁶¹ Although most South African cases dealing with enforced disappearances are a relic of its political apartheid past, a stronger record of judicial independence and state accountability through mechanisms such as the Truth Reconciliation Commission (TRC) have resulted in almost non-existent, and

³⁵⁵ Section 2.2.2 & 2.3.2 of Chapter Two.

³⁵⁶ Section 2.4.1 of Chapter Two.

³⁵⁷ See Section 2.4.3 of Chapter Two.

³⁵⁸ As above

³⁵⁹ Section 2.4.1 of Chapter Two.

³⁶⁰ As above.

³⁶¹ J Sarkin 'The Role of the International Criminal Court (ICC) in Reducing Massive Human Rights Violations Such as Enforced Disappearances in Africa: Towards Developing Transitional Justice Strategies' (2011) 11 *Studies in Ethnicity and Nationalism* 130-142; P Berman & R S Clark 'State Terrorism: Disappearances' (1982) *Rutgers Law Journal* 531; S McCrory 'The International Convention for the Protection of All Person from Enforced Disappearance' (2007) 7 *Human Rights Law Review* 545.

irregularly reported cases.³⁶² Although not as widespread due to the underpinnings of progressive democracy and a more tolerant political atmosphere, the government has not been immune from facing criticism for failing to fully investigate the disappearances of activists during the apartheid era.³⁶³ The CC and TRC in cases of abductions or unlawful detention of political activists and human rights defenders have stood as the bastion of independence and human rights protection, effectively issuing habeas corpus writs and ensuring state accountability.³⁶⁴

Comparatively, the situation of enforced disappearances, abductions, and torture in Zimbabwe read for a dire narrative, with political activists and dissenting voices constantly targeted, found dead and when abducted never to be seen again.³⁶⁵ This reality, often brazenly carried out by state agents, has seen perpetrators consistently clothed with state impunity, and courts, reflecting a lack of independence, have largely been ineffective in providing justice and state accountability.³⁶⁶ Instances of this deplorable cancer are especially heightened during periods of political tension or elections targeting opposition activists, journalists, and human rights activists.³⁶⁷ In 2019 alone, more than 49 cases were recorded by the UN,³⁶⁸ and more recently the abduction of activist Tawanda Muchehiwa in 2020, demonstrates that enforced disappearance remains a method of utility for intimidating and stifling critical voices.³⁶⁹ While courts have the institutional authority to address cases involving enforced disappearances, their effectiveness has often been left compromised due to

³⁶² Section 4.4 of Chapter Four.

³⁶³ J Sarkin 'Dealing with Enforced Disappearances in South Africa (with a focus on the Nokuthula Simelane Case) and around the world: The need to ensure progress on the rights to Truth, Justice And Reparations in Practice' (2015) <https://www.saflii.org/za/journals/SPECJU/2015/5.pdf>; The Dulcie September Case (1988) <https://www.sahistory.org.za/people/dulcie-evonne-september>

³⁶⁴ *Azanian Peoples Organization (AZAPO) and Others v President of the Republic of South Africa and Others* 1996 (4) SA 672 (CC) <https://www.saflii.org/za/cases/ZACC/1996/16.html>; Truth Commission Special Report 'The Cradock Four' https://sabctrc.saha.org.za/glossary/cradock_four.htm (accessed 4 October 2024); Simelani case (n 306); Foundation for Human Rights 'The Ahmed Timol Case' (1971) [https://unfinishedtrc.co.za/ahmed-timol/#:~:text=CASE%20OVERVIEW,Square%20police%20headquarters%20in%20Johannesburg;Foundation%20for%20Human%20Rights%20%27Neil%20Aggett%20Case%27%20\(1982\)&context=South%20African%20History](https://unfinishedtrc.co.za/ahmed-timol/#:~:text=CASE%20OVERVIEW,Square%20police%20headquarters%20in%20Johannesburg;Foundation%20for%20Human%20Rights%20%27Neil%20Aggett%20Case%27%20(1982)&context=South%20African%20History) (accessed 04 October 2024).

³⁶⁵ Section 3.4 of Chapter Three.

³⁶⁶ As above

³⁶⁷ Zimbabwe Lawyers for Human Rights 'Rights of Human Rights Defenders 3rd Cycle Universal Periodic Review' (2022) https://upr-info.org/sites/default/files/documents/2021-12/zimbabwe_lawyers_for_human_rights.pdf

³⁶⁸ Section 3.4 of Chapter Three.

³⁶⁹ ZimRights 'Summary of how Tawanda Muchehiwa came into the hands of the State' <https://www.zimrights.org.zw/summary-of-how-tawanda-muchehiwa-came-into-the-hands-of-the-state/> (accessed 04 October 2024).

political pressure and the lack of law enforcement agencies to implement court rulings, with many cases remaining unsolved.³⁷⁰

The torture of activists and critics not only violates international law but a *jus cogens* norm, for which no state, regardless of reasons, can ever violate.³⁷¹ Furthermore, Article 1 of the International Convention for the Protection of All Persons and Enforced Disappearances postulates that the prohibition on enforced disappearance and abduction has no exception.³⁷² Therefore the continued violation of international Human rights laws and *jus cogens* provisions emphasizes the critical human rights records in Zimbabwe particularly when compared to the South African Context.

4.5 Conclusion

This Chapter comparatively analysed the legal framework in South Africa, paying particular attention to the progressive interpretation of Section 16 of the constitution, the analysis of the role that the courts and enabling legislation play in the protection of the right to privacy and freedom of expression. The Chapter further comparatively discussed the South African context against the Zimbabwean methodologies in the law and the functioning of the Judiciary and its jurisprudential limits. Chapter Five will proffer conclusions and recommendations.

³⁷⁰ J Burke & N Chingono 'The Abduction of MDC Trio (Joana Mamombe, Cecilia Chimbi, and Netsai Marova)' *The Guardian* (2020) <https://www.theguardian.com/world/2020/may/17/zimbabwean-mdc-activists-abducted-and-sexually-assaulted> ; D Mavhinga 'Outspoken Zimbabwean Doctor Abducted' (2019) <https://www.hrw.org/news/2019/09/18/outspoken-zimbabwe-doctor-abducted>; Human Rights Watch 'Zimbabwe Events of 2021' (2022) <https://www.hrw.org/world-report/2022/country-chapters/zimbabwe>; Zimeye (2020) <https://www.zimeye.net/2020/08/05/zimbabwe-at-the-precipice-as-illegal-arrests-continue/> (accessed 04 October 2024).

³⁷¹ S Greer 'Is the Prohibition against Torture, Cruel, Inhuman and Degrading Treatment Really 'Absolute' in International Human Rights Law?' (2015) 14 *Oxford Human Rights Law Review* 1–37.

³⁷² International Convention for the Protection of All Persons from Enforced Disappearance Article 1.

CHAPTER FIVE

Recommendations and Conclusion.

5.1. Recommendations

To improve the protection of the right to freedom of expression in the digital space and other related rights such as privacy, Zimbabwe can take the following measures:

5.1.1. *Legislative Reforms*

- **Repeal of the Patriotic Act:** A complete nullification of this retrogressive legislation that has posed a significant negative impact on freedom of expression, association, and privacy. Repealing this legislation would address several problematic issues such as the criminalisation of dissent or any subverting communication, the targeting of political and human rights activists, excessive penal sanctions, and the encouragement of unmetered surveillance and monitoring of the digital space, arbitrarily infringing on the right to privacy contrary to international law standards on the protection and limitation of these rights.
- **Review the Interception of Communication Act:** This Act must be revised to include clear limitations on the interception of digital communication. Specifically, it should require judicial oversight or an independent mechanism that will regulate and oversee permissible surveillance, ensuring that the state meets strict necessity and proportionality requirements before a warrant is given.
- **Repeal of Constitutional Amendments No.1 and No.2:** these two amendments must be repealed because they expand Presidential Powers over judicial appointments and extension of tenure of office compromising judicial independence. These amendments offer bypasses of checks and balances of the executive offering a monopoly over the whole judiciary.

5.1.2. *Enforce Judicial Oversight and Accountability Mechanisms*

- **Independent Oversight of Surveillance Practices:** Establish an independent and impartial judicial authority to grant prior authorisation and to oversee all surveillance practices and to ensure that they adhere to the due

processes of the law in providing safeguards against arbitrary surveillance that violates the right to privacy. . This body should have the power to review and challenge surveillance requests, ensuring they are lawful, necessary, and proportionate.

- **Strengthen Judicial Oversight:** Surveillance practices, such as wiretapping or interception of online communications, should require prior judicial authorisation as the RICA Amendment Bill requires, following a clear set of criteria that considers the necessity, proportionality, and legitimacy of the measure.
- **Transparency Reporting:** Post-surveillance reporting from the government and private entities must be mandated to be published in transparency reports detailing surveillance and data collection activities. This would allow the public to hold these entities accountable for respecting digital rights.
- **Strengthen Accountability Mechanism:** Introduce stronger accountability mechanisms for human rights perpetrators such as security agents responsible for enforced disappearances, abductions, and tortures of human rights defenders. Impunity must be stamped out by a stronger judiciary and investigative framework to solve outstanding cases and provide closure to the families of victims.

5.1.3. *Promote the Role of Civil Society and Media Freedom*

- **Engage Civil Society and multi-stakeholders in Policy Development:** Include civil society organisations, academic personnel, private sectors such as corporations and businesses and media houses in the policymaking process related to digital rights. This would help ensure that the concerns of all stakeholders, including vulnerable and marginalized groups, are taken into account.
- **Protect Media Freedom:** Remove legislative and regulatory restrictions that impede media freedom. This includes revising laws that restrict journalistic work or enable censorship. A free press is crucial for ensuring the public has access to information and can freely express opinions.
- **Strengthen Protections for Whistleblowers:** Zimbabwe should establish or improve legislation to protect whistleblowers, particularly those revealing

information on human rights abuses or corruption in the digital space. This will encourage transparency and accountability.

5.1.4. *Strengthen Digital Literacy and Awareness Campaigns*

- **Public Awareness Campaigns on Digital Rights:** Educate the public on their digital rights, including the right to freedom of expression and privacy online. Awareness campaigns can empower citizens to assert their rights and recognize when they are being infringed upon.
- **Digital Literacy Programs:** Invest in digital literacy programs to equip citizens with skills to safely navigate the internet, understand data privacy issues, and recognize cyber threats. Educating users will promote responsible and informed use of digital platforms.

5.1.5. *Ratify and Implement Relevant International Treaties*

- **Ratify the African Union Convention on Cyber Security and Personal Data Protection (Malabo Convention):** Zimbabwe should ratify and implement this convention, which provides a comprehensive framework for protecting personal data and cybersecurity in Africa.
- **Engage with International and Regional Human Rights Mechanisms:** Commit to periodic reporting to regional and international human rights bodies, such as the UN Human Rights Council, to demonstrate Zimbabwe's commitment to protecting digital rights and making the country more accountable.
- **Adopt Guidelines from the Declaration of Principles on Freedom of Expression and Access to Information in Africa (2019):** This regional declaration promotes internet rights, including freedom of expression and privacy online, and aligns with best practices in the African context.

5.2. Conclusion

This research crystallised in detail the concerning state in which the right to freedom of expression and related rights, such as the right to privacy in the digital space, have been repressed and unjustly limited in Zimbabwe. These rights continue to be severely threatened through repressive legislation and a differential judiciary that lacks independence and fails continuously to offer a buffer against governmental

overreach. For Instance, legislative frameworks such as the Criminal Law and Codification and Reform Act (CLCR), the Interception of Communication Act (ICA), and the greatly repressive and controversial Patriotic Act enable widespread and robust curtailment of civil liberties by permitting excessive surveillance and monitoring, cracking down on political speech and critical views and facilitating the targeting of political opponents through its vague and overbreadth provisions. The Patriotic Act facilitates the targeting of certain people that challenge the despotic authoritarian leadership of ZANU-PF, by broadening the scope over what the law can prosecute, making it an arbitrary instrument in the hands of the executive to crush dissent and literally kill individuals that criticise the government.

In Zimbabwe, the crackdown on free expression has resulted in the routine harassment and imprisonment of human rights defenders, such as Job Sikhala, Hopewell Chin'ono, and Fadzayi Mahere who are often subjected to frivolous and vexatious court charges, prolonged detention, and denial of bail. Furthermore, enforced disappearances, torture, and arbitrary killings of political and human rights activists including journalists have emerged as a *modus operandi* of state security operatives that has created an atmosphere of anxiety and fear added on to by the fact that these crimes are usually perpetrated in broad daylight and the would-be offenders rewarded with impunity.

Compounding these issues is a lack of judicial independence, which has further empowered the executive to wield the law as a tool to suppress, rather than protect, these fundamental rights. The appointment process and tenure of security of Judges is heavily influenced by political discretions and the power centralised with the executive often wielding significant control over judicial appointments and decisions. As a result, courts are often complicit in legitimising crackdowns on dissent and political activism, undermining democratic principles and the protection of fundamental rights. In contrast, South Africa has shown greater adherence to upholding freedom of expression and privacy in the digital realm. While not without its own challenges, South African courts have generally safeguarded these rights, striking a more balanced approach between security and civil liberties. This reflects a judiciary that operates with a higher degree of independence and contributes to a more robust protection of rights in the digital space.

To improve Zimbabwe's poor human rights record and systematic repression of civil liberties, the country must undergo massive legislative reforms, aligning the laws to international standards, and draw lessons in terms of the best practises from the South African jurisdiction; strengthen judicial oversight and independent review mechanisms for the interception of digital communication; improve judicial independence, reinforce digital awareness campaigns and promote civic engagement and media groups to ensure that legislative frameworks cater to all groups. In addition, Zimbabwe must guarantee that human rights perpetrators are prosecuted, and impunity is brought to an end, which requires strengthening accountability mechanisms such as investigative agencies, and ensuring that they are fully funded and independent from the executive.

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