

Weaponising Patriotism: The Criminalisation of Dissent and the Promise of Constitutionalism under Zimbabwe's 2013 Constitution

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Abstract

This article examines the connections among patriotism, elections, criminalisation, and constitutionalism in Zimbabwe. The preamble of the 2013 Constitution emphasises a civic-oriented patriotism rooted in democratic participation, respect for basic rights, and compliance with constitutional standards. However, Zimbabwe's evolving political landscape reveals a state-constructed version of patriotism that departs markedly from these constitutional ideals. State narratives, largely advanced by the ruling Zimbabwe African National Union–Patriotic Front (ZANU–PF), increasingly equate patriotism with loyalty to the party's liberation credentials. This framing positions opposition actors, dissenting voices, and critical citizens as 'unpatriotic', thereby politicising national belonging and narrowing democratic space. These tensions intensified with the enactment of the Criminal Law (Codification and Reform) Amendment Act of 2023, the so-called 'Patriotic Act'. The article addresses the following question: while the Patriotic Act is presented as legislation to safeguard national interests and sovereignty, do its broad and ambiguous provisions suppress legitimate political expression? By weaponising patriotism through criminal law, the Act undermines constitutional guarantees of free speech, political pluralism and open electoral participation, ultimately eroding the democratic ethos envisaged by the 2013 Constitution. The article argues that authentic patriotism cannot be legislated, coerced, or enforced through punitive mechanisms. Genuine national loyalty emerges from citizens' voluntary sense of pride, attachment, and civic trust. To realise the constitutional promise of democratic governance, Zimbabwe must disentangle patriotism from partisan control, refrain from criminalising dissent, and recommit to protecting fundamental rights and electoral freedoms as cornerstones of constitutionalism.

Keywords

Criminalisation, constitutionalism, elections, patriotism, Patriotic Act, political pluralism, ZANU-PF, Zimbabwe.

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1. Introduction

The adoption of Zimbabwe's 2013 Constitution¹ marked a pivotal moment in the nation's quest for democratic governance, enshrining the principles of free and fair elections, fundamental rights, and the rule of law.² Designed to resolve longstanding electoral disputes, executive dominance, and political polarisation, the Constitution promised a new era of constitutionalism and democracy rooted in accountability and pluralism.³ Its key features include a Declaration of Rights;⁴ devolution of power to provincial and local governments;⁵ independent institutions, including the electoral and human rights commissions;⁶ and limits on presidential powers.⁷ The preamble cherishes 'freedom, equality, peace, justice, tolerance, prosperity and patriotism in search of new frontiers under a common destiny'.⁸ The components of elections, patriotism, and constitutionalism mutually influence one another, forming a robust democratic system.

Nonetheless, more than a decade later, the interplay between elections, state-driven patriotism, and constitutionalism continues to reveal persistent tensions that challenge the Constitution's transformative potential.⁹ This follows Zimbabwe's promulgation of the Criminal Law (Codification and Reform) Amendment Act, 2023,¹⁰ commonly referred to as the 'Patriotic Act'. The Act criminalises unpatriotic activities, such as any meeting, whether happening in person or virtually, with an agent, proxy, or entity of a foreign government.¹¹ These 'unpatriotic' activities and meetings should be aimed at attracting economic sanctions or penalties against Zimbabwe. The amendment occurred against the background of widespread global debates and condemnations of regressive electoral politics and nominal democratic processes inclined to legitimise authoritarian regimes.¹² Zimbabwe is infamous for using several methods to disfranchise opposition candidates and voters, and for holding regular sham democratic elections aimed at sanitising the electoral victories of the ruling party, Zimbabwe African National Union–Patriotic Front (ZANU–PF).¹³ The regime is also intolerant of genuine electoral democracy, presides over

1 Constitution of the Republic of Zimbabwe, Amendment No 20 of 2013.

2 Mudau, P & 'Nyane, H 'A Critical Analysis of Zimbabwe's Non-Implementation of Constitutional Injunctions on Devolution' (2022) 37(2) *Southern African Public Law* 1.

3 Matanda, T 'Pacifying the Crises of (Un)Constitutional Amendments: The Case of Zimbabwe's Amendment' (2022) 7(1) *Strathmore Law Review* 77.

4 Constitution, chap 4.

5 Ibid, chap 14.

6 Ibid, chap 12.

7 Ibid, s 88.

8 Ibid, preamble.

9 Raftopoulos, B 'The 2013 Elections in Zimbabwe: The End of an Era' (2013) 39(4) *Journal of Southern African Studies* 971.

10 Criminal Law (Codification and Reform) Amendment Act of 2023.

11 Raftopoulos (note 9) 971.

12 Donno, D 'Elections and Democratization in Authoritarian Regimes' (2013) 57 *American Journal of Political Science* 703.

13 Chigwata, T 'Multiparty Democracy in Zimbabwe after the Adoption of the 2013 Constitution' in Fombad, CM & Steytler, N (eds) *Democracy, Elections, and Constitutionalism in Africa* (OUP 2021) 119–120; Agbor, AA & Matlala, R 'Political Instability, Underdevelopment and the Misgivings of Democracy: Problematising the Issue of Political Leadership in Africa' (2025) 20(1) *TWIST* 21.

a hegemonic political culture of impunity, and stifles the multi-party system of democratic governance.¹⁴ Clearly, the 'Patriotic Act' is derogating from the spirit and purport of the 2013 Constitution. It stifles free speech, association, and assembly, making it challenging for citizens to participate in the democratic process.

Elections, intended as a cornerstone of democratic participation,¹⁵ remain marred by allegations of manipulation and institutional bias, raising questions about the independence of the Zimbabwe Electoral Commission (ZEC) and the judiciary's role in upholding constitutional prescriptions.¹⁶ Simultaneously, state-sponsored narratives of patriotism, often rooted in the liberation struggle, are tools used to suppress dissent and undermine constitutional guarantees of freedom of expression and association. This article examines how the 2013 Constitution navigates these dynamics, exploring the legal frameworks governing elections, the implications of patriotic rhetoric on democratic pluralism, and the broader struggle to entrench constitutionalism in a politically contested environment. By analysing key constitutional provisions, electoral practices and socio-political trends, the article argues that while the 2013 Constitution provides a robust foundation for democratic governance, its efficacy depends on bridging the gap between legal ideals and political realities.

The article is organised in seven parts. Part 1 is the introduction, while part 2 provides a historical background on patriotic rhetoric and its implications in both the pre- and post-independence eras. Part 3 offers a conceptual framework of patriotism and constitutionalism, which is followed by an analysis of the 2013 Constitution's entrenchment of fundamental rights and freedoms in part 4. Part 5 critiques the Patriotic Act and its implications for free speech and political pluralism in Zimbabwe. The article concludes with recommendations for policy improvement. The article answers the following question: while the Patriotic Act is presented as legislation to safeguard national interests and sovereignty, do its broad and ambiguous provisions suppress legitimate political expression?

2. Historical background

A government is entitled to exercise its political authority to punish criminal wrongdoings through enacted laws.¹⁷ Therefore, it has a legal and moral obligation to punish rapists, murderers, and fraudsters, no matter how illegitimate it might be to its subjects.¹⁸ While such criminal sanctions are permissible, importantly, the nature and form of the punishment must be strictly limited and qualified,¹⁹ with the state adhering to established constitutional

14 Mudau & 'Nyane (note 2) 12–13.

15 Mudau, P 'Promoting Civic and Voter Education through the Use of Technological Systems during the COVID-19 Pandemic in Africa' (2022) 22(1) *African Human Rights Law Journal* 108.

16 Raftopoulos (note 9) 971.

17 Philips, M 'The Justification of Punishment and the Justification of Political Authority' (1986) 5 *Law and Philosophy* 414.

18 Simmons, AJ *Justification and Legitimacy: Essays on Rights and Obligations* (Cambridge University Press, 2000) 157.

19 Kelly, EI *The Limits of Blame: Rethinking Punishment and Responsibility* (Harvard University Press 2018) 176.

and legal tenets. To understand the motivations for the enactment of the Patriotic Act, its context, which in some instances is informed by pre- and post-independence historical considerations, is important for pinpointing its teleological domicile. It is therefore imperative to identify the Patriotic Act's political origins and motivations before dissecting its constitutionality and constitutional tenets.

2.1 The political dichotomy of 'them and us' before independence

The pre-independence colonial Rhodesian Constitution disenfranchised blacks by creating a complex electoral system under the 1961 Constitution, which ensured that no more than 15 of the 65 seats in the enlarged Legislative Assembly would be filled by Africans, with the other 50 seats reserved for representatives of 223,000 European settlers.²⁰ Africans' voting rights were curtailed by the prescribed high-income thresholds, educational qualifications, and professional requirements. Therefore, most Africans were excluded from voting by these discriminatory requirements. The 1961 Constitution was vehemently rejected by black nationalists and political leaders because it was designed to perpetuate white supremacy.²¹ This increased demands for 'one man one vote [as] the only realistic solution to the question of the franchise'.²² The 1969 Constitution also had discriminatory voting measures tilted against Africans, which deprived them of adequate representation in Parliament.²³

Furthermore, the political alienation of opponents, creating a 'with us and or against us' social setup using patriotism as a propaganda tool, has its historical foundation in the country's liberation struggle propaganda.²⁴ ZANU-PF, as a liberation movement through its military wing, the Zimbabwe African National Liberation Army (ZANLA), branded its supporters patriots, while white-colonial collaborators, black critics, or opponents were labelled 'sell-outs' (*Vatengesi*).²⁵ Such an approach was analogous to that of the British colonial settlers' political administration, which employed a 'divide and rule' strategy among the indigenous communities.²⁶ There was also some benefit to be derived from the hostile and rivalrous relations in the communities, which were exploited for the benefit of ZANLA and the British settlers, for simply being a *tertius gaudens*, referred to as a rejoicing third, that is, a party that benefits from a conflict between two other parties.²⁷ This propaganda framing of political discourse defined ZANLA military governance around its rebel-civilian ties in the areas that 'it controlled, unsecured, and rival terrain and the

20 Mutiti, AB 'Rhodesia and her Four Discriminatory Constitutions' (1974) 90 *The African Review* 265.

21 Ibid.

22 Ibid 267.

23 Ibid 266.

24 Muwati, I, Gambahaya, Z & Mheta, G 'Contesting "Patriotic History": Zimbabwe's Liberation War History and the Democratisation Agenda' (2010) 1(1) *Journal of Strategic Studies* 170.

25 Ndawana, E & Hove, M 'Traditional Leaders and Zimbabwe's Liberation Struggle in Buhera District, 1976-1980' (2018) 2(2) *Journal of African Military History* 119.

26 Morrock, R 'Heritage of Strife - Effects of Colonialist Divide and Rule Strategy Upon Colonized Peoples' (1973) 37 *Science & Society* 129.

27 Xypolia, I 'Divide et Impera: Vertical and Horizontal Dimensions of British Imperialism' (2016) 44(3) *Critique* 221.

current explained post-war control, coercion, and co-optation.²⁸ In post-independence Zimbabwe, the term ‘sell out’ (*Vatengesi*) is prevalent in electoral propaganda, in which the opposition is branded as such.²⁹

2.2 The post-independence purpose approach of the Patriotic Act

Laws do not develop in a vacuum but are deliberately enacted to advance the interests of the establishment, thereby inscribing its values and objectives into society.³⁰ There have been consistent attempts to legislate patriotism since the country’s 1980 independence. This raises the question of what conditions allow governments to use laws to encourage and firmly establish patriotism among citizens.³¹ Patriotism is an act of choice rather than coercion. It resonates with one’s worldview, attachment to, love for, and loyalty to a nation. Legislating patriotism can create constitutional infirmities in the enabling legislative framework.

During the 2008 presidential election campaign, former president Robert Mugabe, echoing liberation-war propaganda, warned the electorate that his party would retreat into the bush and wage a war reminiscent of the 1970s struggle if he did not win.³² He further stated: ‘[A]s the British still want to come here, I will not grow old; until we know we no longer have sell-outs among us.’³³ The use of the sell-out epithet is also common in intra-party conflicts. For example, amid leadership disputes in the Citizens Coalition for Change (CCC), former leader Nelson Chamisa described his detractors as ‘sell-outs’, accusing them of aligning with ZANU–PF.³⁴ Labelling someone a ‘sell-out’ remains an inscription designed to subdue and alienate opponents from the mainstream sphere of social acceptability. It also alienates one from mainstream nationalist discourse that celebrates nationhood. As will be demonstrated, it endured post-independence, albeit through coercive legislative interventions.

ZANU–PF’s liberation-struggle political narratives and ethos were designed to downgrade the opposition by portraying them as lacking nationalistic colonial-struggle credentials and a sense of belonging, and positioning them as stooges of the Global North.³⁵ Patriotic discourse carries epithets for the opposition as stooges of the West,

28 Liu, SX ‘The Zimbabwe Liberation War (1972–1979)’ in Liu, SX *Governing After War: Rebel Victories and Post-war State Building* (Oxford Academic 2024) 15.

29 Wallis, W ‘Mugabe Vows MDC Will “Never Rule Zimbabwe”’ 15 June 2008 <<https://www.ft.com/content/2a544286-3afe-11dd-b1a1-0000779fd2ac>> accessed 6 March 2026.

30 Freedman, D *The Politics of Media Policy* (Polity Press, 2008) 1.

31 Mwonzora, G “Who Is Patriotic, Who Is Not?” Enactment of Patriotism Law in Zimbabwe’ (2023) 23(1) *African Identities* 4.

32 Wallis (note 29).

33 Ibid.

34 In a tweet, Chamisa wrote: ‘One thing surprises me; at any given moment in time, there is never a shortage of individuals who are readily available or willingly accessible, to sell their soul to the oppressor, thereby assisting the oppressor to achieve their own power retention motives and wicked ends. And it is always about the thirty pieces of silver’: Staff Reporter ‘Opposition Chamisa Goes After “Sell-Outs”’ <<https://www.thezimbabwemail.com/main/chamisa-goes-after-sell-outs/>> accessed 15 March 2026.

35 Chibwe, A ‘Language and the (Re)production of Dominance: Zimbabwe African National Union–Patriotic Front (ZANU–PF) Advertisements for the July 2013 Elections’ (2017) 31(1) *Critical Arts* 18.

creating a political demarcation in which some belong and others do not.³⁶ The discourse became exclusionary and constricting, dividing the nation into puppets and patriots.³⁷ Significantly, ‘opposition supporters and mostly urban voters were deemed sell-outs while rural peasants and all ZANU–PF supporters were patriots and authentic Zimbabweans.’³⁸ Essentially, what triggered public concerns is that the Patriotic Act was passed on 31 March 2023, four months before the August 2023 general elections, which were regarded as a ‘sensitive time’.³⁹

Matsengarwodzi noted that as the country hurtled towards the August national elections, the new law became the final nail in the coffin of freedom of expression, particularly media freedom.⁴⁰ Similarly, Mwonzora asserts that ‘such an attempt at controlling what people say about their country exhibits ZANU–PF’s strident push of certain ideological orientations aimed at propagating hegemonic dominance’.⁴¹ Furthermore, he believes that the Act’s critics are persuasive in arguing that the Act ‘is a way to police, condition and regulate the advocacy of the political opposition’.⁴² The Act had been previously proposed after the contentious 2018 general elections by the National Peace and Reconciliation Commission (NPRC), which made recommendations in its reports that ‘campaigning against one’s country should be legislated at law and criminalised’.⁴³

Previously, accusations had been made against the opposition for instigating the imposition of economic sanctions by the United States, which passed the Zimbabwe Democracy and Economic Recovery Act (ZIDERA), limiting economic relations between US entities and domestic companies and citizens identified for human rights violations and for thwarting democracy.⁴⁴ While the opposition and government critics blame misrule, corruption, and economic mismanagement for the economic meltdown that has caused immense national suffering,⁴⁵ ZANU–PF blames Western-imposed economic sanctions for the same, which resulted from its seizure of white-owned commercial farmlands and

36 Ibid.

37 Ibid.

38 Freeman, L ‘Contradictory Constructions of the Crisis in Zimbabwe’ (2005) 50(2) *Historica* 287. See also Muzondidya, J ‘From Buoyancy to Crisis, 1980–1997’ in Raftopoulos, B & Mlambo, A *Becoming Zimbabwe: A History from the Pre-colonial Period to 2008* (Weaver Press, 2009) 167.

39 Panchia, Y ‘Elections Ahead in Zimbabwe, and Criticism for Country’s New Patriotic Bill’ 5 June 2023 <<https://www.forbesafrica.com/current-affairs/2023/06/05/elections-ahead-in-zimbabwe-and-criticism-for-countrys-new-patriotic-bill/>> accessed 25 January 2026.

40 Matsengarwodzi, D ‘What Does Zimbabwe’s New “Patriot Bill” Mean for Journalists?’ 21 August 2023 <<https://institute.aljazeera.net/en/ajr/article/2299>> accessed 25 February 2026.

41 Mwonzora (note 31) 18.

42 Media Institute of Southern Africa Zimbabwe (MISA Zimbabwe) ‘Zimbabwe’s Looming Patriot Bill Cause for Great Concern’ 14 October 2020 <<https://zimbabwe.misa.org/2020/10/14/zimbabweslooming-patriot-bill-cause-for-great-concern/>> accessed 20 March 2026.

43 Mwonzora (note 31) 17.

44 Jaeger, MD ‘Constructing Sanctions: Rallying around the Target in Zimbabwe’ (2016) 29(3) *Cambridge Review of International Affairs* 952.

45 Moyo-Nyede, S ‘Zimbabweans Blame Government, Not Sanctions, For Country’s Economic Meltdown’ 21 October 2021 <<https://www.afrobarometer.org/wp-content/uploads/2021/10/AD485-Zimbabweans-blame-government-not-sanctions-for-economic-meltdown-Afrobarometer-29oct21.pdf>> accessed 20 March 2026.

the implementation of the land reform programme.⁴⁶ In this divisive electoral contest, concerted attempts were made to mobilise the electorate, particularly disaffected youths, towards the ruling party to rally around the national flag and its policies.⁴⁷

In particular, ZIDERA has motivated the government to engage in national anti-sanctions crusades in which the opposition is accused of inviting sanctions and pursuing a treacherous neo-colonial agenda.⁴⁸ This follows submissions and interactions between opposition officials and the US Foreign Relations Committee that were deemed unpatriotic, as well as lobbying activities aimed at maintaining economic sanctions.⁴⁹ Such interactions were perceived to have cost the country more than US\$40 billion in investment and over US\$4 billion in donor support annually, for over two decades. Economic commentators are quoted on the ZANU–PF website, blaming sanctions for causing damage to the economy and the lives of ordinary Zimbabweans.⁵⁰ Apparently, the economic embargo is intended to stall the country's economic progress. Sanctions on local businesses are intended to severely curtail access to cheap offshore financing and to slow down foreign direct investment.⁵¹ The concerns and wording on the ZANU–PF website resonate with how the Patriotic Act was drafted. This also echoes the purposive effect of the amendments' textual phrasing, which regulates how citizens should interact with and communicate with foreigners.⁵² Dorman has posited that Zimbabwe's elections have become 'an international crisis point not simply because of observer reports or electoral fraud, but because of the interactions between Zimbabwe's domestic politics and external relationships.'⁵³ In this regard, the Patriotic Act was compared to the US Logan Act as a justification for its enactment.⁵⁴

3. Conceptual framework of patriotism and constitutionalism

Scholars vary widely in their definitions of patriotism. Mwonzora posits that patriotism involves a degree of love for and pride in one's country that resides in citizens' hearts and minds, and it cannot be imposed on them through coercive measures, including national legislation.⁵⁵ On the other hand, Mzikamanda postulates that constitutionalism entails a

46 Chakawa, J 'Why Sanctions Have Not Worked: Zimbabwe's Experience From 2001–2021' (2022) 8(4–6) *Third World Thematics: A TWQ Journal* 205.

47 Taruberekera, B 'The Zimbabwean Youth and Patriotism' 20 September 2017 <<https://kubatana.net/2017/09/20/Zimbabwean-youth-patriotism/>> accessed 20 March 2026.

48 United States Senate, Public law 107–99 – Dec. 21, 2001 Zimbabwe Democracy and Economic Recovery Act of 2001 <<https://www.congress.gov/107/plaws/publ99/PLAW-107publ99.pdf>> accessed 14 March 2026; Marapira, F 'SB Moyo Exposes MDC – A Sell-Out Stand on Anti Sanctions Drive' 20 October 2020 <<https://www.zanupf.org.zw/news/sb-moyo-exposes-mdc-a-sellout-stand-on-anti-sanctions-drive>> accessed 19 March 2026.

49 Mwonzora (note 31) 8.

50 Ibid.

51 Ibid.

52 Patriotic Act, s 22A(1) and (3).

53 Dorman, SR 'Make Sure They Count Nicely This Time': The Politics of Elections and Election Observing in Zimbabwe' (2005) 43(2) *Journal Commonwealth and Comparative Politics* 155.

54 Ndlovu, R 'Bad-Mouthing the State is Outlawed Before Election in Zimbabwe' 2 June 2023 <<https://www.bloomberg.com/news/articles/2023-06-02/bad-mouthing-the-state-is-outlawed-before-election-in-zimbabwe>> accessed 20 April 2026.

55 Mwonzora (note 31) 17.

government that is limited, open, transparent, and accountable, while truly representing the people's will.⁵⁶ The objective of constitutionalism is to tame wayward governments in pursuit of the common good, limiting governmental power both in theory and in practice. Accordingly, the modern concept of constitutionalism as advanced by Fombad is anchored on the following fundamentals: the recognition and protection of fundamental rights and freedoms; the separation of powers; an independent judiciary; the review of the constitutionality of laws; the control of the amendment of the constitution; and institutions that support democracy.⁵⁷

The 2013 Constitution is considered democratic and, among other objectives, seeks to establish a multi-party democratic system and embeds various political rights and freedoms.⁵⁸ The Constitution is the yardstick used to test the validity of criminal laws. It represents a transition from a system marked by arbitrary power to one founded on constitutional principles and the rule of law.⁵⁹ Of significance is the fidelity of the state to constitutionalism and of government to operating within the letter and spirit of the Constitution, inter alia, the rule of law, justice, respect for fundamental human rights and freedoms, and other core constitutional values and principles.⁶⁰ Gutto stated that the 'spirit of a constitution is expressed in, amongst others, manifest deeds, policies, laws, regulations and the manner of their implementation or practical realisation'.⁶¹

Nonetheless, defining constitutionalism is problematic. Political scientists and constitutional law scholars have struggled to define it.⁶² While the constitution provides a framework for interpreting and governing the country's affairs, constitutionalism goes beyond merely limiting governmental arbitrariness.⁶³ It encompasses the principle that there are sufficient limits on government to protect citizens against arbitrary rule, while ensuring that the government operates efficiently within constitutional limits.⁶⁴ The state's capacity to adhere to a constitution manifests in the nature of laws it enacts, its policy formulations and implementations, and eventual practical realisation. The standards and implications of the Patriotic Act are determined by the purpose of the law, its restrictive nature, whether it is arbitrary, and the extent to which it violates the core principles and substance of the Constitution, in particular section 67 and ancillary fundamental rights and freedoms.

56 Mzikamanda, RR 'Constitutionalism and the Judiciary: A Perspective from Southern Africa' 2011 <https://www.justice.gov.za/alraesa/conferences/2011malawi/constitutionalism-and-the-judiciary_mzikamanda.pdf> accessed 20 April 2026.

57 For a more detailed discussion of these elements, see Fombad, CM 'Constitutional Reforms and Constitutionalism in Africa: Reflections on Some Current Challenges and Future Prospects' (2011) 59(4) *Buffalo Law Review* 1013.

58 Chigwata (note 13) 119.

59 Klaasen, A 'Constitutional Interpretation in the So-Called "Hard Cases": Revisiting *S v Makwanyane*' (2017) 1 *De Jure* 5.

60 Gutto, S *Constitutionalism, Elections and Democracy in Africa: Theory and Praxis* (African Union 2003).

61 Ibid.

62 Fombad (note 57) 1013.

63 Ibid.

64 Fombad, CM 'Challenges to Constitutionalism and Constitutional Rights in Africa and the Enabling Role of Political Parties: Lessons and Perspectives from Southern Africa' (2007) 55(1) *The American Journal of Comparative Law* 7.

Already, as previously noted, the Patriotic Act inverts fundamental rights and freedoms by being unduly restrictive, arbitrary in scope, and imposing disproportionate criminal sanctions. The state's political intent subverts the rule of law and has a chilling effect on the exercise of rights.

Both procedural and value-based approaches to interpreting constitutionalism are significant. It is important to have mechanisms controlling state power. Hence, judicial review becomes paramount. Therefore, a liberal, broad, and generous interpretation of the Patriotic Act's constitutional validity is necessary to give effect to citizens' rights. Compelling citizens to behave in a particular manner is a form of state overreach and may constitute a breach of its positive obligations. Thus, constitutionalism holds that the powers of government ought to be limited by law and cannot exceed it.⁶⁵ Constitutionalism is closely associated with the rule of law, which prevails when laws uphold values such as the separation of powers, equality before the law, and certain basic human rights. Since independence, we have witnessed a raft of controversial and unconventional pieces of legislation passed to advance particular political objectives that are inimical to the rule of law.⁶⁶ The same laws were made to legalise violent actions, where, as Madhuku puts it, a different approach would have been more aligned to the rule of law and human rights, without condoning arbitrary state actions simply because compliance with an unjust law does not amount to adherence to the rule of law. Under constitutional tenets, the rule of law means adherence to fair, just, and generally acceptable laws.⁶⁷ The rule of law requires that government powers are limited by the constitution and therefore that laws are clear, publicised, stable, and fair, and that they protect fundamental rights, including the security of persons and property. The problematic aspect of implementing the Patriotic Act is that compliance with an unjust law does not constitute adherence to the rule of law.⁶⁸ The rule of law means adherence to fair, just, and generally acceptable laws.⁶⁹ Therefore, any law must be aligned with the rule of law and human rights.

4. The 2013 Constitution

First, the judiciary is mandated by section 46(c) of the Constitution to consider international law, regional instruments and treaties to which the country is a party in

65 Fombad, CM 'Post 1990 Constitutional Reforms in Africa: A Preliminary Assessment of The Prospects for Constitutional Governance and Constitutionalism' in Nhema, AG & Zeleza, PT (eds) *The Resolution of African Conflicts* (2008) 181.

66 Jafari, J 'Attacks from Within: Zimbabwe's Assault on Basic Freedoms through Legislation' (2003) 10(3) *Human Rights Brief* 6. These restrictions have been codified in two new laws – the Access to Information and Protection of Privacy Act (AIPPA) of 2002 and the Public Order and Security Act (POSA) of 2002. Both laws were passed prior to a contentious presidential race in March 2002 and allowed Mugabe to solidify his hold on power by subrogating any opposition while claiming to uphold the rule of law. This effort, which secured him an electoral victory despite the election failing to meet international standards, had far-reaching consequences for Zimbabweans' rights to assemble, speak, and exercise freedom of the press.

67 Madhuku, L 'Law, Politics, and the Land Reform Process' in Masiwa, M (ed) *Post Independence Land Reform in Zimbabwe: Controversies and Impact on Economy* (Friedrich-Ebert-Stiftung 2004) 124.

68 Ibid.

69 Ibid.

human rights jurisprudence to safeguard and protect human rights. Such a provision illustrates that international law has a special place in Zimbabwe's domestic law, as defined by the Constitution. Thus, when interpreting the Patriotic Act, the judiciary is obliged to adopt a reasonable interpretation of the legislation that is consistent with any international convention, treaty, or agreement binding on Zimbabwe.

Constitutions should guarantee the right to free and fair elections and the right to equality for all. Fombad provides a framework for the validity and relevance of legislation governing elections and their attendant processes, which must ordinarily conform to principles that do not hinder the free and fair exercise of political rights or negate the essential content of that exercise.⁷⁰ Section 67 of the Constitution of Zimbabwe guarantees citizens the right to participate in democratic governance. It protects the right to free, fair and regular elections; the freedom to make political choices; and the right to form, join and support political parties and causes. The provision also safeguards participation in peaceful political activities and assemblies. Citizens aged 18 years and above have the right to vote by secret ballot and to stand for and hold public office if elected.

Additionally, section 155(1) of the Constitution enunciates the principles of an electoral system, and provides that elections should be peaceful, free and fair, and based on universal adult suffrage and equality of votes. Section 155(2) imposes an obligation on the state to ensure that 'every citizen who is eligible to vote in an election or referendum has an opportunity to cast a vote and must facilitate voting by persons with disabilities or special needs.' Reference to the eligibility to vote obviously connotes recognition that it is not absolute.

The state is obliged not to act in any manner that would infringe or restrict the right. Eligibility to vote can be limited in certain circumstances provided by the law, for example, if a person has an electoral fraud conviction, is mentally incapacitated,⁷¹ or is a minor, a non-citizen or not on the national voters' roll.⁷² The Fourth Schedule of the Constitution adds to the criterion.⁷³ Scholars argue that citizens abroad should be able to vote in their national elections.⁷⁴ If criminal law is employed as a blunt legal instrument to disenfranchise citizens for exercising their freedom of expression and for serving a criminal sentence, it raises questions about the constitutional limits on its justification in a reasonably democratic society.

Furthermore, the right to vote and to hold office is enshrined in section 67 of the 2013 Constitution, and its interpretation can be informed and buttressed by the foundational values and principles encapsulated in section 3 of the Constitution. This article examines

70 Fombad (note 57) 1037.

71 United Nation Human Rights Committee, General Comment No. 25: The Right to Participate in Public Affairs, Voting Rights and the Right of Equal Access to Public Service (Art. 25), 12/07/1996, CCPR/C/21/Rev.1/Add.7, Article 4.

72 Constitution, Schedule 4.

73 Fourth Schedule of the 2013 Constitution: (a) mentally disordered or intellectually handicapped persons; (b) anyone declared by order of a court to be incapable of managing his or her affairs during the duration of that order; (c) anyone convicted of an offence under the Electoral Law and declared by the High Court to be disqualified for registration as a voter or from voting, for the period he or she has been declared disqualified, but the period must not exceed five years.

74 Vambe, MT 'Voting Rights of Zimbabweans in the Diaspora' (2021) 20 *Journal of African Elections* 137.

the implications of the Patriotic Act for political rights and argues that it undermines fundamental rights and constitutional principles. This approach must be viewed in the context of Zimbabwe's electoral contestations, which often spark intense debates divided along lines of loyalty or disloyalty to the country.⁷⁵ The opposition is usually labelled as unpatriotic agents of the Global North or Western powers.⁷⁶ While it is within the legislature's and the executive's power to propose and make legislative amendments, respectively, the repressive statutory products emerging from formally recognised procedural processes and democratic institutions can be described as competitive authoritarian regimes' statutory outcomes,⁷⁷ constituting partial or diminished forms of democracy.⁷⁸ The emerging contentious aspect of the criminal law amendment is the arbitrary deprivation of citizens' rights to vote and hold office. In general, defining and legislating patriotism is divisive, as it alienates society and restricts political rights, which are legitimate forms of expression.

5. The Patriotic Act and its implications

The Patriotic Act specifies criminal offences that can also result in the disenfranchisement of citizens. Section 22A(3) criminalises the participation by Zimbabwean citizens or permanent residents, whether inside or outside the country, in meetings aimed at considering, planning, implementing or expanding sanctions or trade boycotts against Zimbabwe. A person who knowingly engages in such activities may be found guilty of wilfully harming Zimbabwe's sovereignty and national interests and may be subject to criminal penalties.

Furthermore, the Act carries disproportionate penalties. Section 22A (3)(i)(ii) empowers a court to impose additional penalties on a convicted person, including disqualification from registering or voting in elections, or from holding public office, for a period of 5 to 15 years. Where applicable, the court may also declare a public office held by the convicted person vacant from the date of conviction. In determining the sentence, the court must consider the impact of the conduct in question, including whether it resulted in the imposition of sanctions or trade embargoes. Such criminal sanctions curtail the exercise of freedom of expression. It blurs the exercise of freedom of expression, shielding legitimate political expressions of the right from potentially prejudicial economic repercussions and/or admonishments arising from their exercise. It is difficult to establish a nexus between the expressions and the contemplated prejudicial economic repercussions, leaving room for far-fetched, remote inferences divorced from the facts. Freedom of expression is considered an enabler of other rights and is indispensable in a free, fair, credible and transparent election process.⁷⁹ Simuyu posits that citizens meaningfully exercise their

75 Mawere, T 'The Politics and Symbolism of the #ThisFlag in Zimbabwe' (2020) 42(1) *Strategic Review for Southern Africa* 180.

76 Mlambo, AS 'The Zimbabwean Crisis and International Response' (2006) 31(2) *Journal for Contemporary History* 71.

77 Levitsky, S & Way, LA 'Elections Without Democracy the Rise of Competitive Authoritarianism' (2002) 13(2) *Journal of Democracy* 53.

78 Ibid.

79 Benedek, MC & Kettemann, W 'Freedom of Expression Online' in Susi, M (ed) *Human Rights, Digital Society and The Law: A Research Companion* (Routledge, 2019).

right to political participation if the political climate allows for free engagement in public debate.⁸⁰ This entails having access to accurate, relevant and credible information that guides their voting decisions, thus legitimising the electoral process.

Therefore, given the fundamental nature of the right to vote, any restrictions imposed by the Patriotic Act require scrutiny; if they are inconsistent with the spirit of the Constitution, they should be challenged.⁸¹ The Act came under scrutiny in *Media Alliance of Zimbabwe and Ndebele v Minister of Justice, Legal and Parliamentary Affairs and Attorney-General*.⁸² This case is one of the most important judicial engagements with the provisions of the Patriotic Act. The applicants challenged the constitutionality of section 22A(2) and (3) of the Act, arguing that the provisions were vague, overbroad and incompatible with the rights guaranteed in the 2013 Constitution. They challenged provisions that criminalised the participation of Zimbabwean citizens or permanent residents in meetings involving foreign actors where the purpose was planning military intervention or the overthrow of the constitutional government,⁸³ and discussing or promoting sanctions or trade boycotts against Zimbabwe.⁸⁴

The applicants argued that the provisions violated several constitutional rights, including freedom of expression (section 61); freedom of assembly and association (section 58); political rights, including the right to vote and stand for office (section 67); and constitutional protections relating to citizenship.⁸⁵ Their core argument was rooted in the constitutional doctrine of legality. They contended that criminal offences must be defined with sufficient precision to enable citizens to foresee which conduct is prohibited. Vague criminal laws create opportunities for arbitrary enforcement and can stifle legitimate political activity.⁸⁶ The court adopted the orthodox constitutional methodology by (a) recognising the presumption of constitutionality of legislation; (b) examining the scope of the constitutional rights implicated; and (c) assessing whether the impugned provisions were sufficiently clear and justifiable.⁸⁷ The court upheld section 22A(2) of the Patriotic Act, which criminalises collaboration with foreign powers in efforts aimed at military intervention or the overthrow of the constitutional government. The court accepted that the provision served the legitimate purpose of protecting state sovereignty and constitutional order. It found the offence to be sufficiently identifiable and not incompatible with constitutional standards.

80 Simiyu, MA 'Freedom of Expression and African Elections: Mitigating the Insidious Effect of Emerging Approaches to Addressing the False News Threat' (2022) 22(1) *African Human Rights Law Journal* 66.

81 *Frank v Canada (Attorney General)*, [2019] S.C.J. No. 1, 2019 SCC 1 (S.C.C.) para 1.

82 *Media Alliance of Zimbabwe and Ndebele v Minister of Justice, Legal and Parliamentary Affairs and Attorney-General* (HH 315-25).

83 Patriotic Act, s 22A(2).

84 Patriotic Act, s 22A(3).

85 *Media Alliance of Zimbabwe* (note 82) 2.

86 Fissell, BF & Binder, G 'A Political Interpretation of Vagueness Doctrine' (2019) 5 *University of Illinois Law Review* 1527.

87 *Media Alliance of Zimbabwe* (note 82) 2.

The second provision was particularly controversial because it imposed severe penalties, including imprisonment, disqualification from voting, prohibition from holding public office, and, in some circumstances, loss of citizenship or permanent residence status. Within the broader context of Zimbabwean politics, these provisions formed part of a legislative trend towards the criminalisation of certain forms of dissent, international advocacy and opposition political engagement, all justified under the language of protecting sovereignty and national interests.⁸⁸

However, the court reached a different conclusion regarding section 22A(3) of the Patriotic Act. It held that the provision was vague, overbroad and constitutionally deficient because it could criminalise participation in discussions about sanctions without clearly defining the prohibited conduct.⁸⁹ The court found that the provision's breadth posed serious risks to freedom of expression, freedom of association, political participation and legal certainty. The judgment emphasised that criminal law must be drafted with precision, particularly where severe penalties are attached to conduct that overlaps with political speech and advocacy. This part of the judgment reflects a judicial willingness to recognise that the Constitution permits the state to defend itself against genuine threats to constitutional government. Scholars note increasingly rigid partisan political loyalties, which incline the state or influential political players to control who votes, offering more leverage than persuading voters to change their minds.⁹⁰ This gives the state latitude to legislate patriotism and impose arbitrary statutory requirements on who may or may not vote.⁹¹ Therefore, in judicial review, the rules of engagement set out in section 67 of the Constitution should be broadly, liberally and generously interpreted to protect voters' rights to exercise their franchise free from statutory encumbrances. In the US, without an explicit right to vote, scholars note that a right to vote amendment could fundamentally change the constitutional calculus regarding felon disenfranchisement laws, which limit nearly six million Americans, including four million who are no longer incarcerated.⁹² As with other voting limitations, these laws disproportionately affect African-Americans.⁹³ The fundamental effect of constitutionalising the right to vote under the 2013 Constitution is a broader interpretation of the political right, giving effect to its positive interpretation that promotes democratic values, which were denied to the majority black population under the colonial administration.

88 The Zimbabwean, 'High Court Rules Part of Patriotic Act Unconstitutional' <<https://www.thezimbabwean.co/2025/06/high-court-rules-part-of-patriotic-act-unconstitutional/>> accessed 9 August 2026; Mudau, P 'The Ramifications of Communication Surveillance Laws on Human Rights Pertinent to Elections in Zimbabwe' (2025) 25(2) *African Human Rights Law Journal* 801.

89 *Media Alliance of Zimbabwe* (note 82) 22.

90 Soros, J 'The Missing Right: A Constitutional Right to Vote' (2013) 28 *Democracy: A Journal of Ideas* <<https://democracyjournal.org/magazine/28/the-missing-right-a-constitutional-right-to-vote>> accessed 20 March 2026.

91 Ranger, T 'Nationalist Historiography, Patriotic History and the History of the Nation: The Struggle Over the Past in Zimbabwe' (2004) 30(2) *Journal of Southern African Studies* 215.

92 Soros (note 91).

93 *Ibid.*

5.1 Effects on the right to vote and hold office

The criminalisation of the conduct envisaged under section 22A(3) of the Act, which is protected by section 67 of the Constitution, effectively limits the right to vote and to hold office, and corollary rights such as freedom of expression, dignity, freedom from discrimination and freedom of association. The right to vote is part of the exercise of a political right that is also an exercise of freedom of expression. Its significance lies in it being interpreted as a plural right, that is, it contains a 'bundle of rights' which recognises multiple democratic rights that entail good governance and participatory politics, such as elections.⁹⁴ The teleological premise underpinning the right to vote protects the right to vote and to hold office, as well as attendant democratic rights, such as the right to effective representation, meaningful participation and an informed vote.⁹⁵ Therefore, section 67 is a firm constitutional undertaking of universal suffrage for all Zimbabweans under the Constitution. Its background and purposive effect are also partly grounded in the deliberate and undemocratic disenfranchisement of the black population in the colonial era, when the majority of the black population were denied the right to vote.⁹⁶

The court in *Media Alliance of Zimbabwe* rightly declared section 22A(3) of the Act unconstitutional.⁹⁷ The power of the judiciary to review legislation can be exercised without compromising the power of the legislature to regulate the behaviour of citizens in accordance with the representative will of the majority.⁹⁸ There is always the temptation to argue that, through judicial activism, the courts, comprising unelected judges, are unduly trampling on Parliament's authority. However, judicial review occurs when an individual alleges that their fundamental rights are being, or are likely to be, contravened.⁹⁹ This entails a reasonable probability of such a contravention occurring.¹⁰⁰ Notwithstanding, where the constitutional invalidity of a statute is raised, the test to be applied involves an inquiry into whether the guaranteed right has been infringed; if so, there is a further inquiry into whether such infringement is justified under the limitation clause.¹⁰¹ As the Patriotic Act was taken on judicial review, Chidyausiku J in *Mawarire v Mugabe* held that:

[I]t appears to me that the applicant is entitled to approach this Court for relief. Certainly, this Court does not expect to appear before it only those who are dripping with the blood of the actual infringement of their rights or those who are shivering incoherently

94 Dawood, Y 'Democracy and the Right to Vote: Rethinking Democratic Rights under the Charter' (2013) 51 *Osgoode Hall Law Journal* 252.

95 Dawood, Y 'Electoral Fairness and the Law of Democracy: A Structural Rights Approach to Judicial Review' (2012) 62(2) *University of Toronto Law Journal* 524.

96 International Commission of Jurists 'Racial Discrimination and Repression in Southern Rhodesia' (1976) <<https://www.icj.org/resource/racial-discrimination-and-repression-in-south-ern-rhodesia-a-legal-study/32>> accessed 20 March 2026.

97 *Media Alliance of Zimbabwe* (note 82).

98 Berry III, WW 'Unconstitutional Punishment Categories' (2023) 84(1) *Ohio State Law Journal* 7.

99 *Mawarire v Robert Mugabe & Ors* Judgment No. CCZ 1/13 para 3.

100 *United Parties v Minister of Justice, Legal and Parliamentary Affairs and Ors* 1997 (2) ZLR 254 CS.

101 *Ferreira v Levin NO and Others; Vryenhoek v Powell NO and Others* 1996 (1) SA 984 (CC).

with the fear of the impending threat which has actually engulfed them. This Court will entertain even those who calmly perceive a looming infringement and issue a declaration or appropriate order to stave the threat, more so under the liberal post-2009 requirements.¹⁰²

Where a criminal law amendment restricts constitutional rights, the procedure for amending the Constitution is provided for in section 328. The Act's effect in prohibiting individuals from being registered as a voter and/or voting at an election and holding or filling a public office for a period of at least 5 years but not exceeding 15 years, is a fundamental change to the section 67 provisions. This would ordinarily have attracted the procedural requirements set out in section 328 of the Constitution, which sets out the procedures for constitutional amendment Bills. The provision, in part, collapses the existing order and the basic principles set out in sections 2, 3, 67, and 155, and may be used to set new rules.¹⁰³

Gubbay has previously voiced the view that certain features of a constitution are immutable under any circumstances, and that if the 'structural pillars of the Constitution are destroyed, the whole constitutional edifice will crumble'.¹⁰⁴ Notwithstanding, the deprivation of such a right, even when someone has served their prison term for three or four years, is disproportionate to the offence, given that it arises from the exercise of several fundamental rights provided in the Constitution, *inter alia*, freedom of expression and of the media, freedom of association, and freedom of conscience. Not only are these democratic rights fundamentals to the review of the democratic process, but their violation will also require compelling justifications under the limitations clause. Therefore, as the Patriotic Act is now law, citizens do not need to fear the impending threat of being disenfranchised and being denied the right to self-defence and the right to hold public office. There is reasonable apprehension of a looming infringement of their rights, which ought to be interpreted in the light of judicial review considerations, having regard to the liberal outlook espoused under the new democratic Constitution.

5.2 Constitutional principles guiding interpretation of the right to vote and hold office

The Patriotic Act infringes on the constitutional values and political rights enshrined in sections 3 and 67 of the Constitution. As per section 3, the framework of principles, the Constitution provides for principles of good governance, which require the state and all institutions and agencies of government to provide for a multi-party democratic political system and an electoral system based on universal adult suffrage and equality of votes; free, fair and regular elections; adequate representation of the electorate; and, following elections, respect for the rights of all political parties.¹⁰⁵

¹⁰² *Mawarire* (note 100).

¹⁰³ Roznai, Y *Unconstitutional Constitutional Amendments: The Limits of Amendment Powers* (OUP 2017) 8.

¹⁰⁴ Commonwealth Secretariat 'The Role of the Courts in Zimbabwe in Implementing Human Rights: The Case of Zimbabwe' <<https://policycommons.net/artifacts/1155979/the-role-of-the-courts-in-zimbabwe-in-implementing-human-rights-with-special-reference-to-the-application-of-international-human-rights-norms/>> accessed 20 March 2026.

¹⁰⁵ Constitution, s 2(a)–(d).

African states, in general, and Zimbabwe in particular, have adopted constitutions that espouse democratic norms. The Zimbabwean Constitution enumerates multiple values and foundational principles that should guide the interpretation of the law. Section 3 provides the founding values and principles, including, *inter alia*, the supremacy of the Constitution, fundamental rights and freedoms, the rule of law and good governance. Matanda posits that it is reasonable to assume that constitutional provisions must be in harmony with these foundational values.¹⁰⁶

To date, Zimbabwe's political landscape continues to feature robust, often contentious, electoral contests between the ruling party and the opposition.¹⁰⁷ Since independence from colonial rule, general elections, particularly in the years 1980, 1990, 2000, 2002, 2008 and, to a lesser extent, 2018 and 2023, were conducted in a polarised political environment in which widespread voter intimidation, violence and murders often occurred on a wide scale.¹⁰⁸ A culture of intolerance perverted society, creating societal divisions that often led to large-scale displacements, forced exile, and deaths. An acknowledged trend is that:

The polling phase may exhibit varying intensity, as seen in Zimbabwe's seemingly calm polling days despite preceding violence in the 2000 and 2008 elections. The immediate post-election period between voting and result proclamation is considered particularly dangerous, as are outcomes and their aftermath when election disputes, perceived as fraudulent or stolen, anticipate violence that can escalate into armed conflict or civil war.¹⁰⁹

Therefore, the adoption of the 2013 Constitution was premised on drawing lines and ushering in a new era in which democratic governance would be the norm. The Constitution is often regarded as fairly democratic, suggesting that the tide of constitutionalism is rising and could serve as a bridge to a democratic and constitutional order.¹¹⁰ Scholars note that this requires a new mindset among government officials, who should value the fundamental tenets of constitutionalism.¹¹¹ A nationwide referendum produced the new democratic Constitution. Thus, Mhodi states that the Constitution's teleological premise and adoption were designed to take the country out of the political doldrums, with principles that foster democracy and inspire hope that Zimbabwe 'will break the mould of countries that have constitutions without constitutionalism'.¹¹²

106 Matanda (note 3) 77.

107 Sithole, T 'SADC and Election-Related Conflicts in Zimbabwe: An Assessment and Recommendations' 14 March 2024 <<https://www.accord.org.za/conflict-trends/sadc-and-election-related-conflicts-in-zimbabwe-an-assessment-and-recommendations/>> accessed 5 March 2026.

108 Hove, S 'Preventing Violence in Future Elections: Moving Towards an Early Warning System for Zimbabwe' (2013) 8(1) *Journal of Peacebuilding & Development* 79.

109 Sithole, T 'SADC and Election-Related Conflicts in Zimbabwe: An Assessment and Recommendations' 14 March 2024 <<https://www.accord.org.za/conflict-trends/sadc-and-election-related-conflicts-in-zimbabwe-an-assessment-and-recommendations/>> accessed 5 March 2026.

110 Mhodi, PT 'An Analysis of the Doctrine of Constitutionalism in the Zimbabwean Constitution of 2013' (2023) 28(2) *Southern African Public Law* 397.

111 *Ibid.*

112 *Ibid.*

Furthermore, section 44 imposes a duty on the state to respect, protect, promote and fulfil the rights and freedoms set out in Chapter 4 of the Declaration of Rights, including the right to vote and to hold office. In *Figueroa v Canada*,¹¹³ the court identified a fourth democratic right, which ‘impose[d] on Parliament an obligation not to interfere with the right of each citizen to participate in a fair election’.¹¹⁴ In a mature democracy, each citizen must be afforded a genuine opportunity to participate in the country’s governance through elections.¹¹⁵ Hence, section 3 of the Constitution provides guiding principles that illuminate the interpretative value of enabling legislation, thereby subjecting it to judicial review. It also provides important context for interpreting the other constitutional provisions. Section 3(2)(a) and (b) reinforces self-determination; democratic norms around the establishment of a multi-party democratic political system; an electoral system based on universal adult suffrage and equality of votes; free, fair, and regular elections; and adequate representation of the electorate.

The right to vote and even to hold office is of similar significance to the right to assemble, which is central to a constitutional democracy and gives a voice to the powerless.¹¹⁶ Those involved in active citizenship seeking political renewal are often citizens who lack political or economic power and who exercise freedom of expression as an outlet for their frustrations.¹¹⁷ Therefore, an enabling legislative framework must be informed by the principles of legality and comply with acceptable limitations on fundamental rights and freedoms under section 86(2) of the Constitution. The principles provided under section 3(2)(a) and (b) can be used to challenge the constitutionality of section 22A3(i) (ii) through judicial review, as the High Court found in *Media Alliance of Zimbabwe*.¹¹⁸ In this regard, the principle carries constitutional force, and section 3(2)(a) and (b) enshrine a multi-party democratic political system; free, fair and regular elections; and adequate representation of the electorate. The principles must be read in conjunction with section 67 of the Constitution, which is the substantive provision. Importantly, the principles in section 3(2)(a) and (b) must therefore be recognised as playing a role in the assessment of the constitutionality of legal rules and in the interpretation of constitutional provisions protecting fundamental human rights.

From the foregoing, it follows that the Patriotic Act’s criminal amendments are unconstitutional because their material form fails to conform to the fundamental features of sections 3 and 27 of the Constitution. It can be argued: ‘In essence the substance of an amendment conflicts with some “unamendable” provisions or a principle of fundamental importance’.¹¹⁹ Furthermore, section 2(1) provides for the supremacy of the Constitution, and that any law, practice, custom or conduct inconsistent with it is invalid to the extent of the inconsistency. Furthermore, section 3 sets out the nation’s founding values and

113 *Figueroa v Canada (Attorney General)* [2003] S.C.J. No. 37, 2003 SCC 37.

114 *Ibid* para 51.

115 *Ibid* para 30.

116 *South African Transport and Allied Workers Union and Another v Garvas and Others* (2012) 33 ILJ 1593 (CC) paras 61–63.

117 *Ibid*.

118 *Media Alliance of Zimbabwe* (note 82).

119 *Ibid* para 12.

principles, encompassing the rule of law, fundamental human rights and freedoms, and the recognition of the equality of all human beings. Juxtaposed with this, the rights contained in Chapter 4 of the Declaration of Rights include the rights to equality, dignity and various other human rights and freedoms, which correspond to the founding values enunciated in section 3 and therefore must be construed consistently with them.

Section 46(c) of the Constitution requires the courts to consider international law, regional instruments and treaties to which the country is a party. It should be noted that the High Court, in the judgment, relied primarily on Zimbabwean constitutional jurisprudence rather than international human rights law.

5.3 Criminal sanctions and the proportionality test

The Patriotic Act provides for unconstitutionally disproportionate penalties that disenfranchise citizens. The Act denies citizens the right to hold office, contradicting the provisions and values espoused by the rest of the Constitution, and thereby infringing on their right in section 67 of the Constitution. The provision carries a bundle of other rights: freedom of expression, dignity and equality. The state's legislative overreach, and the criminal sanctions envisaged in section 22A3(i)(ii) of the Act, are lopsided in nature and have a chilling effect that may deter others from active citizenship and the exercise of freedom of expression. These criminal sanctions constitute an unjustifiable limitation on the exercise of sections 61 and 67 of the Constitution while interfering with the rights to dignity and equality.

The first point to consider is that the disproportionate nature of the penalties serves no purpose in the punishment.¹²⁰ The penal powers of the state are always contestable, and in these proscribed circumstances it is debatable whether the state and the legislature have a positive constitutional duty to criminalise interactions with foreign governments or their agents for the purposes of advancing a particular political cause or view, which may unwittingly or inadvertently attract economic sanctions or admonishments from a foreign government, notwithstanding its indisputable wide discretion to determine and defend the constitutional rights of its citizens through criminal law sanctions.

The Act threatens the internal coherence of the Constitution itself, as it overly penalises and infringes upon constitutionally guaranteed rights. Thus, there is a lack of rational connection between the restriction on the exercise of the right to vote and hold office and the objective pursued. Its provisions are devoid of the reasonable justification envisaged in an open, democratic society, as there is a demonstrable lack of a reasonable proportionality between the means used to impose the restriction on the exercise of the right to vote and to hold office and the objective to be achieved. The effects of the restrictions on the right to vote and freedom of expression, with the objective sought, are outweighed by the restrictions on the right. Democracy, by implication, provides electoral frameworks that citizens exploit by entrusting others with public office.

120 Proportionality in this sense could just refer to retribution. However, a better approach would be to assess proportionality by considering all the purposes of punishment. See Berry III, WW 'Separating Retribution from Proportionality: A Response to Stinneford' (2011) 97 *Virginia Law Review* 61.

The public-interest consideration and purpose of the limitation could have been informed by a legitimate governmental purpose, namely, protecting the state from economic harm arising from citizens' interactions with a hostile foreign government intent on imposing crippling economic sanctions. From the foregoing, the limitation does not serve a legitimate purpose as it arbitrarily overrides fundamental rights.

5.4 Limitations clause

The right to vote and hold office is not absolute and, in principle, is subject to limitation in terms of section 86 of the Constitution, and the law of general application to the extent that the limitation is *inter alia*, fair, reasonable, necessary and justifiable in a democratic society based on openness, justice, human dignity, equality and freedom, taking into account all relevant factors. These factors include the nature of the right or freedom concerned; the purpose of the limitation, in particular whether it is necessary in the interests of defence, public safety and public order; the nature and extent of the limitation; the need to ensure that the enjoyment of rights and freedoms by any person does not prejudice the rights and freedoms of others; the relationship between the limitation and its purpose, in particular whether it imposes greater restrictions on the right or freedom concerned than are necessary to achieve its purpose; and whether there are any less restrictive means of achieving the purpose of the limitation.

The constitutional validity of the Patriotic Act is best assessed through the framework applied by the High Court in *Media Alliance of Zimbabwe*.¹²¹ The High Court approached the matter by first identifying the constitutional rights implicated, then examining the legislative purpose of the impugned provisions, and finally assessing whether the restrictions imposed could be constitutionally justified. Although the court did not invalidate the entire legislative scheme, it distinguished between section 22A(2) and section 22A(3), concluding that the former survived constitutional scrutiny while the latter did not.¹²² This distinction is important because it demonstrates that the Constitution does not prevent the state from protecting national sovereignty, but requires that limitations on rights comply with the requirements of legality, precision and proportionality.¹²³

In relation to section 22A(2), the court accepted the respondents' argument that Zimbabwe, as a sovereign state, has a legitimate interest in protecting itself against foreign-sponsored attempts to overthrow the constitutional government or facilitate military intervention. The provision targets conduct involving threats against the constitutional order, rather than mere political criticism. Furthermore, the prohibited conduct was regarded as sufficiently identifiable and capable of objective determination. The court therefore found that any limitation of rights occasioned by section 22A(2) served a legitimate constitutional purpose and was justified in the interests of protecting sovereignty, national security and constitutional government. Consequently, the provision survived constitutional scrutiny.

121 Note 82.

122 Ibid.

123 Constitution, s 86.

The position was markedly different with respect to section 22A(3). While the objective of shielding Zimbabwe from harmful sanctions may have been legitimate, the court found that the means employed by the legislature failed constitutional standards. The provision criminalised participation in meetings involving discussions about sanctions or trade boycotts against Zimbabwe, yet key concepts such as ‘intentionally partakes’ and the scope of prohibited participation were not defined with sufficient precision. The breadth of the provision created uncertainty about what conduct was prohibited and exposed citizens to criminal liability for activities that fell within the ordinary exercise of political expression, advocacy, journalism and civic engagement.

In effect, section 22A(3) failed to meet the legality requirement inherent in section 86 and the rule of law. Criminal legislation limiting constitutional rights must be drafted with sufficient certainty to allow individuals to regulate their conduct. As the court recognised, vague offences create opportunities for arbitrary enforcement and have a chilling effect on the exercise of constitutional freedoms. The provision, therefore, substantially burdened the rights to freedom of expression, freedom of association and political participation guaranteed by sections 61, 58 and 67 of the Constitution. The disproportionality of the sanctions attached to section 22A(3) further contributed to its constitutional infirmity. The provision exposed offenders not only to imprisonment but also to disenfranchisement, disqualification from public office, and, in certain circumstances, citizenship-related consequences. These penalties directly affected rights protected in section 67 of the Constitution. The court considered such consequences particularly significant because they were attached to an offence whose boundaries were uncertain and whose prohibited conduct overlapped with constitutionally protected political activity. In those circumstances, the restriction imposed far greater burdens on constitutional rights than were necessary to achieve the provision’s stated objective.

Karlan has argued that disenfranchisement is not only a violation of the right to vote but amounts to cruel, inhuman and degrading punishment.¹²⁴ This argument is persuasive since there is no link between the ban from voting and the offence committed. Therefore, there is no evidence that disenfranchisement can serve as punishment. Karlan argues that denying the right to vote cannot serve the goals of deterrence, incapacitation, rehabilitation or retribution.¹²⁵ Mukumbiri and Mlambo state that disenfranchisement only emphasises prisoners’ exclusion rather than integration in society.¹²⁶ In this context, disenfranchisement as a punitive measure applies only to election-related crimes, including election fraud.¹²⁷ No other punishment for any offence is proportionate or achieves retribution, nor can it promote rehabilitation, as it lacks proportionality to the offence.¹²⁸

124 Karlan, PS ‘Convictions and Doubts: Retribution, Representation, and the Debate Over Felon Disenfranchisement’ (2004) 56(5) *Stanford Law Review* 1147.

125 Ibid.

126 Mukumbiri, P & Mlambo, C ‘Towards a Just and Inclusive Penal System: A Comparative Analysis of Prisoners’ Right to Vote in Zimbabwe, South Africa and Sweden’ 5 November 2019 <<https://zimlil.org/akn/zw/doc/paper/2019-11-05/towards-a-just-and-inclusive-penal-system-a-comparative-analysis-of-prisoners-right-to-vote-in-zimbabwe-south-africa-and-sweden/eng@2019-11-05>> accessed 2 March 2026.

127 Ibid.

128 Ibid.

The High Court's reasoning, therefore, demonstrates that section 22A(3) failed section 86 not because the objective of protecting national interests was inherently illegitimate, but because the provision was drafted and structured in a manner that imposed excessive and uncertain restrictions on protected political freedoms. By contrast, section 22A(2) survived because it targeted a more narrowly defined category of conduct involving threats to constitutional government and could therefore be justified as a proportionate limitation on freedom of expression in a democratic society. The distinction drawn by the court reinforces the principle that constitutionalism does not prohibit state protection of sovereignty; rather, it requires that restrictions on rights are carefully tailored, clearly defined and proportionate to the governmental interest pursued.

The right being limited is the right to vote and hold office upon conviction of a criminal offence. Such rights are part of the entitlements and responsibilities of citizenship, and corollary state duties and responsibilities, or obligations to respect the rights and to comply with the law, as provided in section 67 of the Constitution. Therefore, the right to vote is vested in all prescribed citizens, and this is also largely informed by the foundational values in section 3 of the Constitution. This right is not absolute, and citizens may often break the law, contravening the Constitution itself. The act of disenfranchising citizens for alleged infringement of the Patriotic Act should be tested for proportionality to warrant such sanctions.

6. Conclusion and recommendations

This article has examined the complex relationship between patriotism, elections, criminalisation and constitutionalism under Zimbabwe's 2013 Constitution. The main question that it sought to address was: while the Patriotic Act is presented as legislation to safeguard national interests and sovereignty, do its broad and ambiguous provisions suppress legitimate political expression? By weaponising patriotism through criminal law, the Act undermines constitutional guarantees of free speech, political pluralism, and open electoral participation, ultimately eroding the democratic ethos envisaged by the 2013 Constitution. While the Constitution seeks to establish a democratic order founded on political pluralism, fundamental rights, the rule of law, and free and fair elections, the enactment of the Patriotic Act has exposed enduring tensions between constitutional ideals and state-centred conceptions of patriotism. The analysis demonstrates that patriotism, as contemplated in the Constitution's preamble, is best understood as a civic virtue grounded in democratic participation, constitutional loyalty, and respect for diversity of political opinion, rather than unconditional allegiance to a political party or state ideology.

The significance of the High Court's decision in *Media Alliance of Zimbabwe* lies in being the first substantial judicial interrogation of the Patriotic Act. The High Court accepted that the state has a legitimate constitutional interest in protecting sovereignty and the constitutional order, and for that reason upheld section 22A(2), which criminalises participation in activities directed at military intervention or the unconstitutional overthrow of government. However, the court reached a different conclusion regarding section 22A(3), holding that the provision was impermissibly vague, overbroad, and constitutionally deficient because it failed to define with sufficient clarity the conduct

that it sought to criminalise. The court further recognised that the provision posed serious threats to freedom of expression, freedom of association, political participation, legal certainty, and electoral rights, particularly given the severe sanctions attached to conviction, including voter disqualification, exclusion from public office, and citizenship-related consequences.

The decision is important because it reaffirmed fundamental constitutional principles of legality, precision in criminal law, and proportionality in the limitation of rights. The judgment demonstrates that appeals to patriotism, sovereignty, and the national interest cannot be used to insulate legislation from constitutional scrutiny. Criminal offences that regulate political expression and participation must be drafted with sufficient precision to enable citizens to foresee the legal consequences of their conduct, and any limitation of rights must satisfy the requirements of section 86 of the Constitution.

Although subsequent constitutional litigation has continued to shape the legal status of the Patriotic Act, the High Court's reasoning remains highly instructive for understanding the constitutional tensions generated by attempts to regulate patriotism through criminal law. The judgment supports the broader argument advanced in this article that genuine patriotism cannot be manufactured through coercive legislation or sustained by the threat of criminal prosecution. Rather, patriotism flourishes where citizens enjoy meaningful opportunities to participate in political life, criticise government policies, engage in public debate, and exercise electoral rights without fear of arbitrary sanction.

Accordingly, the constitutional future of the Patriotic Act or any related legislation should be guided by the principles articulated in the Constitution and reinforced by the High Court. Legislative measures aimed at protecting national sovereignty must be narrowly tailored, clearly defined, and demonstrably necessary in a democratic society. Provisions that criminalise political engagement, advocacy, or interactions with foreign actors should be reviewed to ensure compliance with sections 58, 61, 67, and 86 of the Constitution. Equally, sanctions that restrict voting rights, eligibility for public office, or citizenship status should be reserved for exceptional circumstances and only where a clear constitutional justification exists. Ultimately, the most effective safeguard of Zimbabwe's sovereignty is not the criminalisation of dissent but the cultivation of democratic institutions, electoral integrity, judicial independence, constitutional fidelity, and active citizenship. In this sense, constitutionalism itself provides the most enduring and legitimate foundation for patriotism in Zimbabwe's 2013 constitutional order.

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