

## **The Right to Privacy in a Digital Age, General Assembly Resolution 67/167**

### **Submissions by the Zimbabwe Human Rights NGO Forum**

*25 March 2014*

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#### **The Right to Privacy in Zimbabwe**

In May 2013, the Zimbabwean government took a significant step towards affirming citizens' fundamental right to privacy, by including in the newly approved Constitution a specific guarantee of the right to privacy. In doing so, the government brought the country into line with international best practice regarding constitutional rights, and indeed the Constitutional guarantee represented a significant improvement on the rights set out by international covenants and declarations that had already been ratified by the country, such as the African Charter on Human and People's Rights (ACHPR), which does not contain a specific right to privacy. Article 57 of the Constitution now specifies that:

Every person has the right to privacy, which includes the right not to have:

- a. their home, premises or property entered without their permission;
- b. their person, home, premises or property searched;
- c. their possessions seized;
- d. the privacy of their communications infringed; or
- e. their health condition disclosed.

It is clear from this that the right to private communications is constitutionally recognised, and this must be seen as a significant, positive measure that has been taken to address the need to protect Zimbabwean citizens' right to privacy.

However, the protection of this right within Zimbabwe continues to fall short in a number of significant respects. Notably, although the constitution guarantees that every person has the right to privacy, its failure to expand upon all facets of privacy – including those relating to the interception, use and storage of digital and online communications – leaves the way clear for abuses in these areas. That this is indeed the case can be seen to have been illustrated by the government's promulgation in October 2013 of the Post and Telecommunications (Subscriber Registration) Regulations 2013, which extended the state's reach into citizens' private lives by calling for the establishment of a central database of information about all mobile telephone users in the country, increasing the potential for the state to surveil citizens and restrict free speech. Compulsory SIM card registration renders anonymous communications impossible, provides the government with the means to track citizens' whereabouts – and by extension the people with whom they associate – and creates a situation in which personal data could theoretically be shared between departments, potentially allowing for the creation of individual profiles based on data stored elsewhere.

A further shortcoming of the Constitutional guarantee stems from the extremely broad definition of circumstances under which it may be considered acceptable for the right to privacy to be compromised – for example, when it is deemed to be in ‘the general public interest’ to do so – is currently so nonspecific as to be ineffective as a safeguard.<sup>1</sup>

In addition, the existence of legal instruments that now directly contradict these constitutional guarantees undermines the government’s efforts to ensure respect for this right. Existing laws such as the Interception of Communications Act (ICA) 2007, which allows the seizure of personal possessions such as letters, remain in force despite contradicting the constitutional guarantees – in this case both the right of citizens not to have their possessions seized, and their right not to have the privacy of their communications infringed. The ICA specifically allows for the interception of verbal and audio conversations as well as the reading and copying of postal communications, but in failing to define the limitations of the term communications ‘monitoring’, also leaves room for the interception of currently non-established means of communication in the future. The Access to Information and Protection of Privacy Act (AIPPA) 2002 and Broadcasting Services Act (BSA) 2001 also limit communications privacy and freedom of expression in a manner that ought to now lead to their repeal.

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## **Summary**

It is evident that despite the Constitution’s acknowledgement of the importance of the protecting the right to privacy in Zimbabwe, at the time of writing citizens remain vulnerable to the possibility of extensive state monitoring of their online communications and Internet usage. This may be a result of the new Constitution only recently having been adopted. However, at present, this digital monitoring represents an expansion of the government’s ongoing monitoring of the activities of many segments of the population– monitoring that has affected citizens’ ability to exercise their rights to free speech and freedom of assembly and expression, among other things, for many years. A number of steps must therefore be taken to ensure that this right *is* protected, particularly with regard to digital communications.

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## **Recommendations**

**1** - A primary challenge as far as the promotion and protection of the right to privacy in Zimbabwe is concerned is caused by the lack of effective domestic judicial oversight mechanisms, and the lack of effective recourse with which to redress breaches. A significant problem that must be addressed is the lack of separation between judiciary and political roles. The fact that the Ministry for Communications, rather than the courts, is responsible for granting authorisation for the interception

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<sup>1</sup> Zimbabwean Constitution 2013, Article 86.

of communications means that in effect it is a government minister - who may be disposed to favour the State over the rights of its citizens - who is the decision-maker.

**2** - The existing legislation that is at the time of writing still presumed to be constitutional but upon examination clearly contradicts the rights established by the new Constitution must be amended or repealed. It is likely that the will to bring such issues to the attention of the Constitutional Court will be lacking amongst members of the ZANU-PF-dominated Parliament, and that a combined campaign of strategic public litigation and advocacy on both a regional and an international level would be most effective. The Zimbabwe Human Rights NGO Forum is in the process of drafting a blue paper for legal reform to be submitted to the government, in the understanding that the most effective approach in terms of advocacy is likely to involve the submission of a plan that advances the right to privacy without being seen to undermine the interests of national security.

Several positive steps have already been taken with regard to increasing communication between advocates and groups that will be key to any future improvements. Notably, the recent participation of the Postal and Telecommunications Regulatory Authority of Zimbabwe (POTRAZ) in a workshop about the surveillance of human rights defenders in Zimbabwe that was held by the Zimbabwe Human Rights NGO Forum, its members and partners in February 2014 may be seen as a noteworthy development given that the public discussion of so sensitive an issue would have been unthinkable during the period of political tension surrounding the 2013 general elections. On the other hand, the fact that government representatives failed to attend the event, despite having been invited, suggests that a lot of ground remains to be covered. The government's commitment to improving the protection of citizens' right to privacy will be clarified somewhat by their reaction to the receipt of suggestions for legal reform.

**3** - Legislation that relates to digital surveillance and the use or storage of data obtained through such surveillance must also be re-examined and re-written to ensure that the vagaries that currently create uncertainty about the circumstances under which it is justifiable to breach citizens' right to privacy are removed. The creation of a set of specific situations in which such a breach may be considered proportionate and acceptable would go some way to reducing the potential for abuses and to establishing legal provisions to govern the use and collection of digital information.

**4** - Zimbabwe's membership of the African Union may prove beneficial in terms of protection against breaches of privacy arising from data gathering and the collection or use of online personal data, by way of the Draft Convention on Cyber Security. Although the Draft Convention does not explicitly establish a right to privacy, it seeks to establish an integrated regional framework for member states' cyber security, and several points in the document indicate that it could be compatible with the protection of citizens' right to communications- and data-privacy in the future. The Zimbabwe Human Rights NGO Forum is currently leading regional efforts to ensure

that the Convention adequately addresses issues that have been identified. The Zimbabwean government could similarly join or support such efforts.

**5** - It is imperative that the Zimbabwean government collaborates with Internet Access Providers, Internet Service Providers, and the private sector that are supplying surveillance technology or using communications technologies for surveillance purposes to ensure that they all appreciate the human rights implications of their actions, and take steps to ensure compliance with international human rights law.