

**MIDLANDS STATE UNIVERSITY
FACULTY OF LAW**



THE LEGALITY OF INTERNET SHUTDOWNS IN ZIMBABWE

**By
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**A DISSERTATION SUBMITTED IN PARTIAL FULFILMENT OF A MASTER OF
LAWS IN CONSTITUTIONAL AND HUMAN RIGHTS LAW DEGREE.**

2019

TITLE PAGE

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2019

DECLARATION

I, **JOSEPH TATENDA MAKUNI**, do hereby declare that this dissertation is the result of my own investigation and research, except to the extent indicated in the acknowledgement, references and by comment included in the body of the report, and that it has not been submitted in part or full for any other degree at any other university.

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APPROVAL FORM

This dissertation of **JOSEPH TATENDA MAKUNI** is approved as fulfilling the requirements or partial fulfilment of the requirements for the award of the Master of Law in Constitutional and Human Rights Law Degree.

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ABSTRACT

In an ever-increasingly global age, the world has become dependent on the internet for communication purposes and transacting, the internet has become a conduit through which people exercise realise their rights. The internet provides enhanced connectivity of persons and offers a platform for free expression. The internet has further become a conduit through which individuals can realise the right to freedom of expression. Autocratic governments that feel threatened by the difficulty of regulating the internet have resorted to shutting down entire communication systems leaving their citizens stranded and frustrated. Governments have been overtaken by technological developments which have been particularly rapid in the 21st Century. As such in situations where legislation fails to regulate modern communication structures, this leads to undesirable situations where governments use outdated legislation which does not grant authority to act in such a manner. The study answers the question of whether internet shutdowns are legal in Zimbabwe and in so doing examines the impact of internet shutdowns on the right to the freedom of expression. The study explores the relationship between the internet and the right to freedom of expression examining the boundaries of free expression and the circumstances under which as a right it can be limited. The study identifies how in order for rights to be limited such limit should be proportional, provided for in the law and should seek to serve a legitimate aim. An analysis of Zimbabwe's constitutional provisions on the right to freedom of expression and how they reverberate with international principles on the right to freedom of expression. An examination of the scope of government's powers in respect of the Interception of Communications Act in order to determine if there is in place a legal framework that authorises the shutting down of the Internet is conducted. In line with this is a consideration of the possible justifications for shutting down communications which include the need for the preservation of the national security. The study encompasses perspectives from the jurisdiction of Pakistan in order to obtain insight into the justifiability of internet shutdowns in a modern democratic society. It is arrived at a conclusion that internet shutdowns have no place in Zimbabwean law as there is no legislation that so provides for such a phenomenon. Furthermore, the justifiability of shutting down communications for whole communities is a drastic and draconian move. Recommendations are thereby proffered to the government on how best it can maintain national security without depriving entire populations of their ability to communicate freely.

ACKNOWLEDGEMENTS

Thank you, Dr Katsande, for believing in me and trusting me to produce this work. I am grateful to Mr Vhudzi and Zimbodza and Associates Legal Practitioners for affording me this opportunity, your confidence and trust were not misplaced. To Mr and Mrs Makuni, I could never thank you enough, your love is limitless, thank you for encouraging me to believe that the sky is the limit. To my late parents, this is a tribute to your legacy.

DEDICATIONS

To my unborn children. Dad loves you to the moon and back.

Table of Contents

TITLE PAGE	i
DECLARATION	ii
APPROVAL FORM	iii
ABSTRACT.....	iv
ACKNOWLEDGEMENTS	v
DEDICATIONS.....	vi
Table of Contents.....	vii
ACRONYMS	ix
CHAPTER ONE	1
1.1 INTRODUCTION.....	1
1.2 BACKGROUND TO THE STUDY	3
1.3 PROBLEM STATEMENT	11
1.4 RESEARCH QUESTIONS.....	12
1.4.1 MAIN RESEARCH QUESTION.....	12
1.4.2 SUB RESEARCH QUESTIONS	12
1.5 RESEARCH METHODOLOGY.....	12
1.5 SIGNIFICANCE OF THE STUDY.....	13
1.6 LIMITATION OF STUDY	14
1.7 CHAPTER SYNOPSIS.....	14
CHAPTER 2.....	16
2.1 INTRODUCTION.....	16
2.2 WHY EXPRESSION ON THE INTERNET SHOULD BE FREE.....	17
2.2.1 THEORIES ON WHY FREEDOM OF EXPRESSION EXISTS.....	18
2.3 RELATIONSHIP BETWEEN THE INTERNET AND FREEDOM OF EXPRESSION	
20	
2.3.1 THE IMPACT OF INTERNET SHUTDOWNS ON FREE EXPRESSION	25
2.4 FREE EXPRESSION – AND THE BOUNDARIES OF FREE EXPRESSION	28
2.4.1 LEGALITY	29
2.4.2 PROPORTIONALITY	30
2.4.3 LEGITIMATE AIM.....	32
2.5 CONCLUSION.....	33
CHAPTER 3.....	35
3.1 INTRODUCTION.....	35
3.2 WHY THE INTERNET HAS BEEN SHUTDOWN IN ZIMBABWE.....	36
3.3 ZIMBABWE’S OBLIGATIONS UNDER INTERNATIONAL LAW ON FREE	
EXPRESSION.....	37
3.3.1 PRINCIPLES OF FREE EXPRESSION UNDER INTERNATIONAL LAW	37
3.3.2 REGIONAL PROTECTION OF THE RIGHT TO FREE EXPRESSION.....	41
3.4 CONSTITUTIONAL PROVISION OF THE RIGHT TO FREEDOM OF	
EXPRESSION.....	42
3.4.1 LIMITATION OF THE RIGHT TO FREEDOM OF EXPRESSION UNDER THE	
CONSTITUTION.....	43
3.5 LEGISLATIVE PROVISIONS UTILISED TO LIMIT THE RIGHT TO FREEDOM OF	
EXPRESSION AND SHUTDOWN THE INTERNET	46
3.5.1 THE INTERCEPTION OF COMMUNICATIONS ACT	46
3.6 JUSTIFICATIONS FOR THE IMPLEMENTATION OF INTERNET SHUTDOWNS.....	53
3.6.1 NATIONAL SECURITY AS A JUSTIFICATION.....	54
3.7 CONCLUSION.....	56
CHAPTER FOUR.....	58
4.1 INTRODUCTION.....	58
4.2 HISTORY OF INTERNET SHUTDOWNS IN PAKISTAN	59

4.3 THE LAW AND PROCEDURE GOVERNING INTERNET SHUTDOWNS IN PAKISTAN	62
4.3.1 FREEDOM OF EXPRESSION LAW IN PAKISTAN	63
4.3.2 THE LAW ON INTERNET SHUTDOWNS IN PAKISTAN	64
4.4 COURT DECISIONS ON THE LEGALITY OF INTERNET SHUTDOWNS IN PAKISTAN	69
4.5 CONCLUSION	72
CHAPTER FIVE	74
5.1 INTRODUCTION	74
5.2 SUMMATION OF OBSERVATIONS	74
5.2.1 THE NATURE AND SCOPE OF THE RIGHT TO FREEDOM OF EXPRESSION	74
5.2.2 THE LEGALITY OF INTERNET SHUTDOWNS IN ZIMBABWEAN LAW	75
5.2.3 PERSPECTIVE ON THE LEGALITY OF INTERNET SHUTDOWNS IN AN ALTERNATIVE JURISDICTION	77
5.3 RECOMMENDATIONS	78
5.3.1 ALIGNING LEGISLATION TO THE CONSTITUTION	78
5.3.2 REVIEW OF THE LAW AND POLICY ON NETWORK DISCONNECTIONS	78
5.3.3 ENSURING CONTINUED ACCESSIBILITY TO EMERGENCY SERVICES	79
5.3.4 ENACTING LEGISLATION THAT PROVIDES FOR INTERNET SHUTDOWNS IN ZIMBABWE	80
5.3.5 ENHANCING OVERSIGHT MECHANISMS	80
5.4 CONCLUSION	81
BIBLIOGRAPHY	82

ACRONYMS

ACHPR	African Charter on Human and Peoples Rights
ICCPR	International Covenant on Civil and Political Rights
ISP	Internet service provider
ITU	International Telecommunication Union
OAS	Organisation of American States
OSCE	Organisation of Security and Co-operation in Europe
PTA	Pakistan Telecommunication Authority
STOP	Shutdown Tracker Optimization Project
UDHR	Universal Declaration of Human Rights
UN	United Nations

CHAPTER ONE

1.1 INTRODUCTION

Rapid technological advancements have led to dependence on the internet for communications globally. Africa and Zimbabwe as a nation have not been the exception with the internet being a basic need for communications. The rise in Internet shutdowns comes as an increasing number of Africans are communicating via the Internet.¹ Internet shutdowns are defined as intentional disconnections of digital communications by government authorities.² Such shutdowns frequently include shutting down the Internet and mobile phone services as well. Zimbabwe has not deviated from the increasingly rampant norm of shutting down communications in order to stifle protests at the expense of the right to freedom of expression.

The Internet, social media, and search engines have drastically transformed expression, information, and communication. According to the latest statistics regarding Internet usage, at the present moment there approximately 3.5 billion people with internet connectivity, which constitutes about forty per cent of the world population, in contrast to just 1 per cent in 1995.³ With the ever-increasing number of persons that are becoming connected which persons depend on mobile and internet services for connectivity.⁴ Telecommunications have become a vital and indispensable

T Mukeredzi, "Uproar Over Internet Shutdowns: Governments Cite Incitements to Violence, Exam Cheating and Hate Speech, (2017), vol.10," *Africology: The Journal of Pan African Studies*, 5.

² B. Wagner, "Understanding Internet Shutdowns: A Case Study from Pakistan," (2018), *International Journal of Communication* 12.

³ B Wagner (n 2 above) 4.

⁴ B Wagner (n 2 above)4.

aspect of the economy.⁵ Internet shutdowns that are ordered by the government have become disruptive, inevitably defeating the purpose government shuts down communications in that they end up endangering the right to life which the government in most cases is seeking to protect.⁶ The impact of internet shutdowns on human rights on the right to freedom of expression cannot be understated.

Zimbabwe recently experienced an episode of internet shutdown in January 2019. The legality of this action by the government to shut down the internet is still a burning question that requires research into. During the internet shutdown period, multiple human rights violations occurred.⁷ Despite the restoration of normal service of the internet it is fundamental to explore the question of the internet disruptions due to the possibility of recurrence. The disruption of telecommunications services during this period has already been the part of court proceedings in the matter between *Zimbabwe Lawyers for Human Rights and ors v Minister of State in the President's Office for National Security*⁸ This case did not go into the merits of the legality or justifiability of internet shutdowns in Zimbabwe. This study seeks to clarify the accurate legal position.

Access to the internet in the modern day is intrinsic to the fulfilment and realisation of fundamental rights and freedoms as such the freedom of expression. By shutting down the internet the Zimbabwean government is inevitably curtailing human rights. The negative impact of internet shutdowns is felt across multiple sectors with the economy

⁵ B Wagner (n 2 above) 4.

⁶ L Purdon & A Ashraf, & B Wagner. "Security v Access: The Impact of Mobile Network Shutdowns, Case Study Telenor Pakistan," *Internet Policy Observatory Center for Global Communication Studies (CGCS)*.

⁷ Zimbabwe Human Rights NGO Forum, *On the days of darkness in Zimbabwe, an updated report on the Human Rights Violations Committed between 14 January 2019 to 5 February 2019*.

⁸ HC 265/19.

being the hardest hit. It is essential to analyse the legality of internet shutdowns in order to avoid possibilities of rights being infringed wantonly by the state apparatus. This study thus seeks to examine the legality of internet shutdowns in Zimbabwe and in so doing analyse the balance between national security and freedom of expression in the context of internet shutdowns.

1.2 BACKGROUND TO THE STUDY

With the increase of internet shutdowns, there has been an increased outcry on the justifiability and legality of internet shutdowns in modern society considering the immense implications on the economy and human rights. Such agitation and condemnation for internet shutdowns has been made without due consideration for the importance of the concept of national security. The concept of national security is provided for in Section 206 of the Constitution of Zimbabwe.⁹ The crucial element being that the national security objectives of Zimbabwe must reflect the resolve of Zimbabweans to live as equals in freedom, and harmony, free from fear and in prosperity.¹⁰

Governments who are responsible for shutting down the internet in respective countries at the expense of the right to freedom of expression mostly cite national security as the key reason for so doing. National Security as a concept must be pursued with the utmost respect for fundamental rights and freedoms and the democratic values and principles as enshrined in the constitution and with the utmost respect for the rule of law.¹¹ While the constitution also provides for the right to freedom

⁹ Constitution of Zimbabwe (Act 20 of 2013).

¹⁰ Section 206(1) of the Constitution of Zimbabwe.

¹¹ Section 206 (3) (a) and (b) of the Constitution of Zimbabwe.

of expression and freedom of the media.¹² What is therefore complicated is the striking of a balance between two competing interests which threaten to engulf one another.

Zimbabwe has had its share of Internet Shutdowns in the face of public protests. In Zimbabwe, the internet was partially shut down after a nationwide stay-away protest in July 2016 which was largely called for through WhatsApp, which is an instant messaging service that is popular communication tool utilised by most Zimbabweans with internet access.¹³ Notwithstanding its inability to access WhatsApp content, the government momentarily suspended access to its facilities and proceeded to issue a vaguely-worded caution.¹⁴ The warning was directed to users who were allegedly responsible for spreading malicious rumours online.¹⁵ The Zimbabwean government proceeded to shut down the internet by in January 2019 relying on the Interception of Communications Act which action was challenged in the High Court. The Court simply ruled on procedural issues without delving to the broader question of the legality of the internet shutdown in Zimbabwe.

The pertinent issue is whether internet shutdowns are legal in Zimbabwe as they constitute a limitation of fundamental rights while this can only be done in limited circumstances. A critical debate thereby ensues as to what manner of national security situation that would warrant the limitation of the right to freedom of expression of the citizenry. Despite there being a limitation clause of rights in the Constitution there are further internal limitations to the freedom of expression which exclude freedom

¹² Section 61 of the Constitution of Zimbabwe.

¹³ J Rydzak, *Disconnected: A Human Rights-Based Approach to Network Disruptions: For the Global Network Initiative* 9.

¹⁴ J Rydzak (n 13 above)9.

¹⁵ J Rydzak (n 13 above)9.

expression from the incitement to violence, advocacy of hatred or hate speech, malicious injury to a person's reputation or dignity or malicious or unwarranted breach of a person's right to privacy.¹⁶ It is critical to note that inasmuch as freedom of expression is crucial as a right the importance of national security as a concept cannot be understated. The freedom of expression when abused in volatile situations can threaten political stability, the security of life and property.

There are various human rights impacts of network disruptions or shutdowns, however, freedom of expression and elections-related impacts are the most frequently highlighted and well documented.¹⁷ The effect of network disruptions on free expression is most grave when the disruption coincides with restrictions on press and media freedoms. Disruptions are most impactful upon consideration of the expansion of digital media platforms and the fact that there is an ever-growing shift from traditional media to online media across the globe.¹⁸ Disruptions also frequently target and/or restrict other freedoms such as the freedoms of association and peaceful assembly. Disruption incidents are often justified by the fear of unchecked rumours and the capacity and possibility of online debate to incite violent protest in socially and politically sensitive moments.¹⁹ This, however, is not sufficient to devalue the importance of national security especially where there are attacks on state institutions and law and order are being fostered by the spread of information.

¹⁶ Section 61(5) (a-d) of the Constitution of Zimbabwe.

¹⁷ J Rydzak (n 13 above)11.

¹⁸ J Rydzak (n 13 above)11.

¹⁹ J Rydzak (n 13 above)11.

Apprehensions have been raised on the relationship between human rights and the internet, data processing and collection, communication disruptions, citizen surveillance and the rapid digitalisation of economies and societies.²⁰ The United Nations Human Rights Council (UNHRC) has passed a resolution reprimanding nations that thwart or disrupt online access and information, while also reiterating the importance of free expression and speech protections. The UNHRC stated that governments hide beneath the cover of threats to national security to validate shutting down the Internet.²¹ Mukeredzi argues that governments that have been accustomed to closed societies where information is centralised are of the view that connectivity is a threat rather than an opportunity.²² However, this is arguably not always the position as genuine concerns of national security emerge where enjoyment of freedoms threatens other interests.

The internet over time has evolved from being a basic communication tool, the Internet now enables individuals to exercise other rights, to associate, to communicate, to participate in political processes, even to pursue family life. However, it is a double-edged sword, being also used by online bullies, the commission of fraud, the commission of domestic and international crimes, planning insurgency, terror even for warfare, requiring the courts, police, intelligence services, military and the government to protect citizens.²³ What then becomes the subject of criticism is that the governments citing national security as a reason for the curtailment of rights such as

²⁰ E Sutherland "The Internet and human rights: access, shutdowns, and surveillance, Building a 21st Century Bill of Rights" *Institute for Advanced Legal Studies, University of London*, (2018).

²¹ T Mukeredzi, "Uproar Over Internet Shutdowns: Governments Cite Incitements to Violence, Exam Cheating and Hate Speech, vol.10," (2017) *Africology: The Journal of Pan African Studies*, 5.

²² T Mukeredzi (n 21 above) 6.

²³ E Sutherland (n 20 above) 6.

the freedom of expression through internet shutdowns is that the governments so doing rarely have in place a legal mechanism that legalises the limitation of said freedom. The absence of legal structures and known procedure to institute an internet shutdown and regulatory framework to balance government power thereby becomes a threat to the rule of law.

In 2008, the then Mubarak regime in Egypt began planning for the shutdown of Internet access in the event of political unrest. Its implementation in 2011 was to be a watershed, with other authoritarian governments following.²⁴ Internet shutdowns are easily detectable within a short period of time which in turn exposes the government to criticism.²⁵ However, the administrations concerned have shown themselves inured to protests, willing to persevere, either in silence or by offering justifications in terms of the threats to public order and citing the risk faced by the population from riots and communal violence.²⁶ Despite the presence of international pressure on governments that favour using internet shutdowns, this has made no discernible difference.²⁷ The argument that network disruptions have a devastating effect on the economy has been wasted on regimes more concerned with survival than with economic damage or hardship for citizens.²⁸ The lack of political will in administrations, courts and parliaments to uphold rights of communication and free speech is the central problem of continued disruptions. Continued disruptions globally highlight the deep-seated problems of authoritarianism.²⁹

²⁴ E Sutherland (n 20 above) 9.

²⁵ E Sutherland (n 20 above) 9.

²⁶ E Sutherland (n 20 above) 9.

²⁷ Mandate of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression Research Paper 1/2019 *Freedom of Expression and Elections in the Digital Age*.

²⁸ E Sutherland (n 20 above) 9.

²⁹ E Sutherland (n 20 above) 9.

As early as 1946, at its very first session, the United Nations General Assembly adopted resolution 59(I), which states: "Freedom of information is a fundamental human right and ... the touchstone of all the freedoms to which the United Nations is consecrated"³⁰ In Article 19, the Universal Declaration of Human Rights proclaims, "Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers." The Internet is crucial to the exercise of free speech, expression and civil liberties in a networked society.³¹ While the Internet has become a fundamental and central element of the realisation of rights and freedoms the enjoyment of these rights would again be placed under jeopardy or threatened in situations where disruptions are frequent.

The need to strike a balance between national security and freedom of expression is clearly exhibited in that internet shutdowns and other internet restrictions by governments on their own populaces are widespread, with more than 60 documented shutdowns globally in the first nine months of 2017.³² These shutdowns were justified on grounds of either the preservation of "national security" or "public order."³³ These digital blackouts are particularly dangerous for human rights. For example, after both the bombing of the Istanbul airport in 2016 and the arrest of eleven lawmakers perceived to be sympathetic to the Kurds, the Turkish government disrupted

³⁰ A Callamard. "The Control of "Invasive" Ideas in a Digital Age. "(2017) Vol 184 *Social Research: An International Quarterly*, 28.

³¹ L I Oyieke, & A L Dick, & T Bothma. "Social Media Access and Participation in Established Democracies and Authoritarian States," (2013), No.47 *Innovation*,

³² T Piccone, "Democracy and Digital Technology," *Internet and Governance* (2018) *SUR* 27 - v.15 n.27, 11. 3.

³³T Piccone, (n 32 above) 4.

accessibility to social media sites and instant messaging services such as Facebook, WhatsApp, and Twitter in order to halt the circulation of news or photographs relating to these events. Piccone argues that these shutdowns did not restore order, but instead violated basic rights and triggered fear, anxiety and confusion among citizens.³⁴

Purdon assesses the impact of Internet shutdowns on human rights stating that that internet disruptions not only impede democratic governance by the suppression of free expression and even other government functions are incidentally affected.³⁵ The impact of a network disruption can even transcend to cause panic and raise public health concerns.³⁶ The author argues that the primary obligation of any government is to protect the safety and security of its citizens.³⁷ However, states have broader obligations to protect the whole spectrum of human rights.³⁸ Such suspension or disconnection of services is likely to adversely impact on freedom of expression, freedom of assembly and an array of other economic and social rights.³⁹ Conversely, it can be argued that the importance of national security cannot be shrugged off as it is critical. If social and political order were to degenerate into chaos such enjoyment of the right to freedom of expression would be curtailed as ancillary rights would be threatened.

The impact of network disruptions on freedom of expression is so severe that Special Rapporteurs on freedom of expression from the *United Nations* (UN), the *Organisation*

³⁴ T Piccone, (n 32 above) 4.

³⁵ L Purdon (n 6 above)10.

³⁶ L Purdon (n 6 above)10.

³⁷ L Purdon (n 6 above)10.

³⁸ L Purdon (n 6 above)10.

³⁹ L Purdon (n 6 above)10.

of American States (OAS), the African Commission on Human and People's Rights and the Representative on freedom of the media from the *Organisation of Security and Co-operation in Europe* (OSCE), have all determined in a Joint Declaration that cutting off access to the Internet "for entire populaces or sections of the public can never be defensible, including on public order or national security grounds."⁴⁰ Network disruptions constitute a perilous risk, not just to free expression, state or personal security or commercial operations, but it's consequences are far-reaching extending also to affecting the most vital of sustainable development challenges that confront all states.⁴¹

States are wary of the enhanced interconnectivity due to the fact that the internet ensures that there is augmented information transparency, enhanced ability to report on government excess behaviour and irregularities in real-time and that it offers mobilisation potential for government critiques.⁴² The maintenance of an open and free Internet is increasingly under attack, with many governments trying to control all or at least certain parts of it.⁴³ Freedom of expression enables or allows citizens to access or defend other rights. Similarly, the Internet enables citizens to participate in social, economic and political life.⁴⁴ There are trends that point to the decline of internet freedoms as regimes are seeking to regulate and control rapid flows of information on social media and instant message applications. The proliferation of efforts to stifle

⁴⁰L Purdon (n 6 above)10.

⁴¹L Purdon (n 6 above)10.

⁴² Y Turianskyi, "Balancing Cyber Security and Internet Freedom in Africa," *South African Institute of International Affairs Occasional Paper* 5.

⁴³Y Turianskyi (n 42 above) 5.

⁴⁴ I De Lanerolle, 'Internet freedom: Why access is becoming a human right', 2016, *The Conversation*, 1,.

dissent, and the ever-increasing surveillance of citizens, warrants research and advocacy on cyber policies.⁴⁵

The modern society has by and large transformed into the sociotechnical world, effects of communication disruptions are not exclusive to free expression, but rather incorporate all rights and all conceivable effects on human beings.⁴⁶ In the specific case of Internet shutdowns, freedom of assembly and freedom of movement are heavily affected.⁴⁷ By disrupting communications governments move the clock backwards by a generation to the pre-Information Age which comes at great cost to their countries' economic and social development.⁴⁸ Accordingly, the basis for the study into the legality of internet shutdowns becomes apparent.

1.3 PROBLEM STATEMENT

Internet Shutdowns constitute a limitation on the right to freedom of expression. The legality of internet shutdowns has been brought to question considering It is trite that such limitation should be well defined and set out in existing legalisation in accordance with the rule of law principle. Unfortunately, in practice governments have been overtaken by developments in the technological sector which has resulted in arbitrary limitation of rights through the use of archaic legislation. If this problem is not resolved, not only is a bad precedent set but there is danger of recurrence and a violation the right to freedom of expression. It is fundamental that the legality of internet shutdowns

⁴⁵ Y Turianskyi (n 42 above) 5.

⁴⁶ B Wagner (n 2 above)12.

⁴⁷ B Wagner (n 2 above)12.

⁴⁸ Social media threatens despotic governments and online activists pay the price Africa Conflict Monitor | In on Africa (Pty) Ltd May 2017 Edition.

be explored in order to allow for the certainty of the law and promote fundamental rights and freedoms.

1.4 RESEARCH QUESTIONS

1.4.1 MAIN RESEARCH QUESTION

The main research question this dissertation, seeks to answer is whether or not internet shutdowns are legal in Zimbabwe?

The following sub research questions stem from the main research question.

1.4.2 SUB RESEARCH QUESTIONS ‘

1. What is the nature and scope of freedom of expression in the context of internet shutdowns?
2. Are internet shutdowns legal in Zimbabwe in light of the right to freedom of expression?
3. What has been the international approach and best practices to internet shutdowns
4. What steps/reforms have to be taken in order to incorporate best practices of internet governance in Zimbabwe and to ensure the legality of internet shutdowns?

1.5 RESEARCH METHODOLOGY

This research is a purely desktop research, qualitative in nature and comprised of a review of existing literature. The research consists of a comprehensive analysis of literature. In so doing a doctrinal approach was employed. textbooks, journals,

statutes, articles, regional and international human rights instruments were reviewed and a comparative analysis with Pakistan which is a country that has experienced similar shutdowns was undertaken. Pakistan was selected as a comparator due to availability of legislation and written materials in English as such primary and secondary sources are easily accessible. Pakistan has also been selected due to the progressive decision by its High Court in 2018 on internet shutdowns. Other primary and secondary data is utilised including internet sources, newspaper articles, journal articles international instruments and textbooks

1.5 SIGNIFICANCE OF THE STUDY

The study is of great significance with the world becoming increasingly globalised through enhanced interconnectedness. Authoritarian governments, especially in Africa, have resorted to shutting down the internet to stifle dissent and protests under the pretext of national security. Since 2016 internet shutdowns have been on the rise, with Zimbabwe not being an exception to the norm. This study is therefore critical to research into the legality of internet shutdowns. The study into the legality of internet shutdowns is essential and important to all citizens of Zimbabwe who are the victims of internet shutdowns. The relevance of this study comes out in essence from the fact that internet shutdowns are used as an opportunity by governments to stamp down dissent as was in the case of Zimbabwe. It is therefore fundamental for the citizenry to be aware of the correct legal position to avoid recurrence of similar incidences.

1.6 LIMITATION OF STUDY

This research is limited to ascertaining the legality of internet shutdowns in Zimbabwe. The research is limited to an interrogation of freedom of expression and national security in the context of internet shutdowns and the notion of limitation of rights. The research is limited to an analysis of Zimbabwean laws and a comparative analysis with Pakistan.

1.7 CHAPTER SYNOPSIS

Chapter 1

This is the introductory chapter, which contains the introduction, the background to the study, problem statement, research objectives, research methodology, the literature review and the synopsis of chapters.

Chapter 2

Chapter 2 examines the theoretical underpinnings of freedom of expression and international best practices of internet governance regarding internet shutdowns.

Chapter 3

Chapter 3 will critique the legality of internet shutdowns in Zimbabwe in light of the right to freedom of expression

Chapter 4

Chapter 4 will be a comparative chapter. Comparing the international approach in balancing the two competing interests that is freedom of expression and national

security in the context of internet shutdowns with a comparison of the Zimbabwean approach and that of Pakistan.

Chapter 5

A summation and conclusion of observations providing recommendations/ steps of reform on how best practices of internet governance and legality of internet shutdowns may be achieved without infringing on fundamental human rights?

CHAPTER 2

2.1 INTRODUCTION

In implementing internet shutdowns, governments inevitably trample fundamental human rights and freedoms. The right to freedom of expression is one such core right that is violated during communication blackouts. The right to freedom of expression is inclusive of any method of expression, that is oral or written, including journalistic freedoms, notwithstanding of the form of journalism being print or online, and all manner of art.⁴⁹ Governments are notorious for implementing internet shutdowns in order to stifle dissent thereby negatively impacting upon freedom of expression.

This chapter examines the theoretical framework of the right to freedom of expression as related to internet shutdowns and in doing so exploring why expression should be free delving into the relationship between the internet and the exercise of the right to freedom of expression. This chapter also examines how the internet is a precursor for the enjoyment of other rights. The chapter analyses how the right to freedom of expression is captured in international law. This chapter lays out the international internet governance principles in relation to freedom of expression laying out the ideal. This chapter also dwells on the boundaries or limitations of the right to free expression and the subsequent requirements that have to be satisfied for a right to be limited.

This chapter surveys how the Internet has become a catalyst for persons all across the world to realise a comprehensive variety of human rights. The internet is a crucial

⁴⁹ W Benedek, & M C. Kettemann. *Freedom of Expression and the Internet*. Strasbourg: Council of Europe Publications, 2013. 23.

means by which freedom of expression can be exercised, and freedom of expression, in turn, is not only a human right by and of itself but also enables the enjoyment of other human rights, which include economic, social and cultural rights and civil and political rights, such as free expression, information and assembly.⁵⁰ Chapter two then concludes by laying a foundation for the analysis of whether internet shutdowns are legal in Zimbabwe.

2.2 WHY EXPRESSION ON THE INTERNET SHOULD BE FREE

Free expression or the right to freedom of expression is crucial in any democratic society. As such the citizenry should be afforded the opportunity to freely express themselves without any fears. Curtailing free expression hampers the ability of citizens to participate in governance consequently affecting access to information. The most immediate practice in controlling communication flows is to curtail access to information.⁵¹ This entails the disruption of internet services by the government with the most popular reason being to combat protests government. The almost complete Internet shutdown in Egypt and elsewhere in the Arab region has highlighted the vulnerability of Internet infrastructure and the capabilities of governments to interfere with online communication.⁵² Such interference in communications by government results in unjustified limitations on free expression.

The development of the internet's infrastructure has led to the expansion of the platforms for free expression. The internet offers a wider platform for interaction and

⁵⁰ W Benedek, & M C. Kettemann. (n 49 above) 80.

⁵¹ A Hintz. "Challenging the Digital Gatekeepers: International Policy Initiatives for Free Expression." *Journal of Information Policy* 2 (2012): 12

⁵² A Hintz. (n 51 above) 13.

communication. While it was never planned, the Internet now enables individuals to exercise other rights, to associate, to communicate, to participate in political processes, even to pursue family life.⁵³ It is trite that in modern society the internet has become a basic communication tool through which persons communicate ideas. Theories on why expression should be free have been developed over time. The right to freedom of expression is understood at its core to place upon a regime a negative duty, that such government should not penalise the exercise of civil liberties by its citizens.⁵⁴

2.2.1 THEORIES ON WHY FREEDOM OF EXPRESSION EXISTS

There is a theoretical basis for why expression should be free.⁵⁵ Various schools of thought have been deduced. Theories on why expression should be free can be categorised into categories such as political, administrative, philosophical and psychological theories. Scholars such as Emerson note that expression is fundamental in order to ensure self-fulfilment in individuals, to guarantee the attainment of truth, to ensure participation in decision-making, and to ensure the recognition of a balance between stability and change.⁵⁶ Larry goes a step further and groups the reasons preferred by Emerson terming these into one group of theories described as consequentialist theories of freedom of expression.⁵⁷

⁵³ Sutherland (n 20 above) 10.

⁵⁴ A, Larry. *“Is There a Right of Freedom of Expression?”* Cambridge University Press (2010) 38.

⁵⁵ Y M. Burns, “Freedom of Expression under the New Constitution.” vol. 30, no. 3, (1997), *The Comparative and International Law Journal of Southern Africa*, 264.

⁵⁶ TI Emerson 'Towards a general theory of the First Amendment' (1963) 72 *Yale Law Journal* 877.

⁵⁷ Larry (n 54 above) 150. Consequentialist theories of freedom of expression is a family of theories that attempt to justify a right of freedom of expression by pointing to various good consequences that such a right will bring about.

Bogen subscribes to the notion that free speech is necessary in a democratic society.⁵⁸ Bogen posits that substantively, the suppression of opinions is unlawful since it is inconsistent with the assumption that a democratic society bases its decisions on full, transparent and open discussion of all points of view.⁵⁹ The fact that there exists a supposition that in a democratic society all sides of the coin are taken into consideration, there should be therefore no reason for the government of the day to stifle freedom of expression.⁶⁰ Modern democratic government means a government of the people, by the people, and for the people.⁶¹ But there can be no government by the people if the people are oblivious of the issues to be resolved, the arguments for and against different solutions and the facts underlying those arguments.⁶² As such expression should be free and the citizens should be allowed to express themselves without restriction.

Larry identifies how free expression ties in with democracy observing that democratic government necessitates that the citizens who elect a government be in a position to assess its performance.⁶³ In order to adequately fulfil the former, the citizenry should have access to the information that has a bearing on the performance of the government, both past and future.⁶⁴ That informational requirement, in turn, requires that expression conveying such information not be suppressed by that very same

⁵⁸ D S Bogen, "The Origins of Freedom of Speech and Press" 42 1983 *Maryland Law Review*: 37.

⁵⁹ D S Bogen, (n 58 above) 37.

⁶⁰ D S Bogen, (n 58 above) 37.

⁶¹ *R v Shayler* [2003] 1 AC 247.

⁶² *R v Shayler* [2003] 1 AC 247.

⁶³ Larry (n 54 above) 150.

⁶⁴ Larry (n 54 above) 150.

government.⁶⁵ Free Expression is therefore material and essential in a democratic society with the resultant effect being that it's better for politics to thrive.

2.3 RELATIONSHIP BETWEEN THE INTERNET AND FREEDOM OF EXPRESSION

Freedom of expression shares a symbiotic relationship with the Internet in modern-day society. Citizens have co-opted the internet to become an instrument through which free expression is enhanced in the digital age.⁶⁶ The internet broadens the accessibility dimension ensuring that there are innovative ways to communicate and distribute information.⁶⁷ The online propagation of data and opinions bears fewer limitations and confines of space or geographical boundaries, there are no limitations relating to time or format of dissemination.⁶⁸ A direct relationship can be drawn between access to the internet and freedom of expression. The internet provides a platform for the spread of information and opinion which is a core element of free expression. Resultantly, governments become threatened in when dissenting opinions are widespread through mediums that they have no control. The default response to stifle free expression has always been to shut down the medium through which dissenting voices are expressed which in turn is the internet.

The United Nations Special Rapporteur Frank La Rue has described the right to freedom of opinion and expression as a vital “enabler” of other rights through the Internet: “by acting as a catalyst for individuals to exercise their right to freedom of

⁶⁵ Larry (n 54 above) 150.

⁶⁶ J Cannataci, (etal). *Privacy, Free Expression and Transparency: Redefining Their New Boundaries in the Digital Age*. United Nations Educational, Scientific and Cultural Organization, 2016.

⁶⁷ J Cannataci, (n 66 above) 7.

⁶⁸ J Cannataci, (n 66 above) 7.

opinion and expression, the internet also enables the realisation of an assortment of other human rights".⁶⁹ The internet is therefore not just any other communication medium but it essentially allows the citizenry to realise their right to freedom of expression. The Special Rapporteur also took cognisance of the critical function of Internet access as a catalyst for realisation other human rights such as the right to health and right to access of information and as an important facilitator for change.⁷⁰ Governments fear change as such it is not difficult to comprehend why they are quick to shut down the conduit of free expression that is the internet in the face of critique or protest politics.

The relationship between the internet a free expression has become further exhibited in the modern era due to the development and expansion of social media platforms. Social media platforms, in particular, are perceived as a threat to regimes due to their logistical and organisational potential. It is evidently clear, that it is easier to organise a protest using social media as it is easy to share and spread information regarding the date and time or agenda of the protest or organised action. The Internet Society has identified that Internet access cannot be distinguished from the exercise of freedom of expression and opinion and the right to peaceful assembly.⁷¹ The internet thus poses a new threat to governments due to the fact that the state lacks direct control over the content.⁷²

⁶⁹ T. McGonagle & Y. Donders (Eds.), *The United Nations and Freedom of Expression and Information: Critical Perspectives* Cambridge University Press 56.

⁷⁰ W Benedek, & M C. Kettemann (n 49 above) 82.

⁷¹ Internet Shutdowns an Internet Society Public Policy Briefing: 14 November 2017, Internet Society UN.

⁷² J Rydzak (n 13 above) 11.

It is crucial to note that the right to freedom of expression is protected in various human rights instruments. This right is recognised in the Universal Declaration of Human Rights (UDHR) and echoed in the constitutions of numerous countries wherein internet shutdowns occur. The government of any given country is entrusted with the responsibility to respect and protect the common citizen's enjoyment of these rights. Respect for human rights is fundamental regardless of whether that right is being exercised online or offline. This position is reiterated by the United Nations Human Rights Council, which stated its position which position has been maintained to date that people should enjoy the same protections of these rights whether in online or offline contexts.⁷³ Individuals thereby enjoy a right to exercise their right to freedom of expression over modern mediums of communication such as the internet, in the same manner, they would in traditional methods of information dissemination.

The internet as a medium of communication allows both dissemination of information and consumption of information at the same time. In comprehending the right of free expression and opinion, the inherent nature and infrastructure of the internet should be taken into cognisance.⁷⁴ Unlike a traditional communication system that is a one-way street, and only permits consumption of information, the internet permits both, absorption and spread of information by the user. This characteristic is what makes the suspension of internet services a profound restriction on freedom of speech and expression.⁷⁵ Interference on internet accessibility is thus a grave violation on the fundamental right of free expression and the right to access information as the spread of online content and access of online content is hampered.

⁷³ Human Rights Council Resolution A/HRC/20/L.13 (2012): <http://tinyurl.com/y7aonaw5>

⁷⁴ M Choudhary & Sarath M S Analysing the Causes & Impacts of Internet Shutdowns, *Internet Shutdowns in India* 3.

⁷⁵ M Choudhary & Sarath M S (n 74 above) 3.

Confrontations between government and oppositional protestors result in governments shutting down internet access as has already been briefly discussed above. Shutting down of internet services constitutes a chill on the exercise of freedom of expression. Contingent upon on the user base in a given country, the internet through social media may be used as a cornerstone for protest mobilisation.⁷⁶ Various examples of protests in Egypt and Sudan provide more than circumstantial evidence that social media platforms are increasingly being used as a tool of collective action against governments. In cases where they do play a leading role, they are at least complementary to traditional forms of coordination and organisation.⁷⁷ The internet is thus a key platform for the expression of dissenting voices. This allows the populace, regardless of affiliations to voice out opinions more so, where the internet affords anonymity. Furthermore, due to the largely unpredictable dynamics of online movements, regimes ordinarily view communication via social media as a threat, even as governments' perceptions may not match reality.⁷⁸ Governments accordingly blow the impact of protests out of proportion in order to justify shutting down communications.

The relationship between the internet and free expression is particularly evident in that in each case where there has been the suspension of internet services the resultant effect has been a marked reduction in the visibility of opposition.⁷⁹ This is largely due to the fact that the ability to communicate criticisms against the government would have been severely curtailed. When intending to put a chill on freedom of expression

⁷⁶ J Rydzak (n 13 above) 12.

⁷⁷ J Rydzak (n 13 above) 11.

⁷⁸ O, Joon-Yeoul, & R A. Aukerman. "Freedom of Speech and Censorship in The Internet." no. 4 (2013) *International Journal of Management & Information Systems (IJMIS)* 17,

⁷⁹ J Rydzak (n 13 above) 11.

the government usually opts for a blanket approach to the restriction of internet services. Opting for such wholesale bans over more precise methods that can weed out individual promoters of mass violence jeopardises and threatens free expression on both contentious and everyday topics.⁸⁰ A blanket and comprehensive ban of the internet is indiscriminate failing to distinguish that there is still a need for rights to be exercised. The proliferation of Internet usage has also led to a backlash in terms of governmental control.⁸¹ States increasingly confine Internet access or monitor Internet use through sophisticated technologies and, fearing social and political activism, criminalise certain forms of expression and free speech.⁸² Free expression is thereby directly interconnected to the internet in modern society.

The internet has now become a critical element of free expression in the modern democratic society. For democracy to flourish, freedom of expression and access to a public forum that allows rational discourse is a necessity for every citizen.⁸³ It is, therefore, fundamental that there be measures put in place to protect the digital common space that is the internet platform. Limitations on free expression and access to information online are most frequently at the instigation of governments under the guise of security.⁸⁴ The government does not possess an internet kill switch nonetheless privately-owned telecommunications companies are often complicit, whether begrudgingly or as willing facilitators.⁸⁵ The suspension of internet services causes an overarching problem of a restriction on the right to free speech & expression

⁸⁰ J Rydzak (n 13 above) 11.

⁸¹ W Benedek, & M C. Kettemann (n 49 above) 12.

⁸² W Benedek, & M C. Kettemann (n 49 above) 12.

⁸³ W Benedek, & M C. Kettemann (n 49 above) 12.

⁸⁴ W Benedek, & M C. Kettemann (n 49 above) 12.

⁸⁵ W Benedek, & M C. Kettemann (n 49 above) 12.

as discussed above.⁸⁶ This right has been designated as a cornerstone for the democratic functioning of a country, and thus raises immense concern regarding the reasons for which some countries resort to such frequent shutdowns.⁸⁷ It is thus essential to note that restrictions on free expression through shutting down media of communication such as the internet does not constitute a limitation of just one right but extends to limiting other ancillary rights.

2.3.1 THE IMPACT OF INTERNET SHUTDOWNS ON FREE EXPRESSION

The internet is a conduit for the exercise of other rights and not just the right to freedom of expression. The Internet is a gateway for freedom of expression, assembly and association, education, health and access to information for closely four billion people living in every nation on the planet.⁸⁸ The Internet has also become a channel for delivering crucial public services from states to their citizens.⁸⁹ Conversely, online expression is increasingly censored and access to information restricted through throttling or blocking.⁹⁰ This has the effect of hampering the realisation of rights that have become contingent on the availability of the internet's infrastructure.

With the proliferation of internet access across the globe, nations have scrambled for ways to gain control over the digital space. The shutdown of Internet services in Arab countries in addition to other African nations as well as online filtering across the globe has demonstrated how states are attempting to obtain influence over the new virtual

⁸⁶ W Benedek, & M C. Kettemann (n 49 above) 12

⁸⁷ J Rydzak (n 11 above) 11.

⁸⁸ ARTICLE 19 *Public interest, private infrastructure: An analysis of the barriers and drivers for adopting human rights standards in the Internet infrastructure industry*, 2018, 10.

⁸⁹ A Hintz. (n 51 above) 14.

⁹⁰ ARTICLE 19 *Public interest, private infrastructure: An analysis of the barriers and drivers for adopting human rights standards in the Internet infrastructure industry*, 2018, 10.

landscapes and to expand territorial law into the previously non-territorial network.⁹¹ State actor actions have largely been reactionary with governments legislation being outdated and ill-equipped to deal with the rapidly evolving technological landscape. Governments have accordingly made use of archaic legal instruments with vast unjustified repercussions on fundamental rights and freedoms notably the right to freedom of expression.

Curtailment and disruptions of the internet frequently target and/or restrict freedoms of association and peaceful assembly.⁹² Internet shutdown incidents are often vindicated by fear of unverified rumours and the capacity of online debate to incite violent protest in socially and politically delicate moments.⁹³ Internet shutdowns lack refinement with no targeting system and can be labelled a weapon of mass destruction as their impact is felt by the entire cross-section of the population regardless of political affiliation including the government itself.⁹⁴ Internet shutdowns are a blunt instrument for interrupting the spread of disinformation online.⁹⁵ By disrupting communication services governments inevitably deny entire populations communication access tools during the time when population so requires it.⁹⁶ Connectivity is necessary for citizens to dispel rumours, check in with family members, or avoid dangerous areas.⁹⁷

Additionally, entire populations of cities or provinces in some cases of the entire country are deprived of their voice with numerous violations occurring during periods

⁹¹ A Hintz. (n 51 above) 14.

⁹² A Hintz. (n 51 above) 17.

⁹³ J Rydzak (n 11 above) 12.

⁹⁴ J Rydzak (n 11 above) 12.

⁹⁵ A Shahbaz *The Rise of Digital Authoritarianism Freedom on The Net 2018 Freedom House available at www.freedomhouse.org.*

⁹⁶ A Shahbaz (n 96 above) 4.

⁹⁷ A Shahbaz (n 96 above) 4.

of blackout. In actuality, internet shutdowns are the result of ineffective policymaking. Governments have failed to implement strategies to counter online manipulation which measures are not burdensome or place disproportionate limitations on the freedom of expression and access to information.⁹⁸ The negative effect on free expression is immense and as such internet shutdowns only serve to do more damage than good.

The impact of internet shutdowns transcends affecting just the right to freedom of expression. The regulating or obstruction of access to Internet inescapably shuts the avenues to millions of e-commerce platforms and prevents the proper functioning of business operations.⁹⁹ Primarily, such restrictions of internet access violate the human rights that the Internet has uniquely enabled that is freedom of expression, access to information, and privacy among other¹⁰⁰ The Inter-American Court of Human Rights: has taken the position that

“When an individual’s freedom of expression is unlawfully restricted, it is not only the right of that individual that is being violated, but also the right of all others to “receive” information and ideas... “¹⁰¹

This position is progressive in that it realises the interconnectedness of the right to freedom of expression with the right to access of information recognising that the impact on other human rights. For the average citizen, it is just as important to know the sentiments of others or to have access to information generally as is the very right to impart his own ideas.”¹⁰²

⁹⁸ A Shahbaz (n 96 above) 4.

⁹⁹ ARTICLE 19 Public interest, private infrastructure: An analysis of the barriers and drivers for adopting human rights standards in the Internet infrastructure industry, 2018, 6.

¹⁰⁰ ARTICLE 19 Public interest, private infrastructure: An analysis of the barriers and drivers for adopting human rights standards in the Internet infrastructure industry, 2018, 6.

¹⁰¹ E Howie Protecting the human right to freedom of expression in international law. (2018) Vol 20(1): *Int J Speech Lang Pathol*.

¹⁰² International Centre for Not-For-Profit Law *the Right to Freedom of Expression: Restrictions on a Foundational Right* Vol 6, Issue 1 Global Trends in Ngo Law <http://www.icnl.org>.

In summing up the negative consequences of internet shutdowns on free expression, the disruption of the internet which is a system that functions without boundaries with respect to dissemination and spread of information. Such deliberate disruption translates into an impediment for the exercise of various rights of an individual, including, the right of freedom of opinion & expression, the right to assemble and hold protests, among other rights.¹⁰³ Internet shutdowns are inimical and suppressive to freedom of expression and access to information rights.¹⁰⁴ They have an adverse effect on productivity, political participation, social inclusion and economic empowerment. Governments and security agencies should, therefore, avoid network shutdowns in all its forms.¹⁰⁵

2.4 FREE EXPRESSION – AND THE BOUNDARIES OF FREE EXPRESSION

The right to freedom of expression like any other right has limitations and is not absolute. It is trite that Internet Shutdowns limit such right. It is therefore essential to explore such conditions wherein such limitations or boundaries of free expression can be induced. Accordingly, Internet shutdowns, precisely those that incapacitate all means of communication, ought to be considered as potential Human Rights violations.¹⁰⁶ Although, rights such as the right to freedom of expression are not absolute and can be limited on exceptional grounds like the interest of national security and public order such limitations need to follow the three-part test laid out in Article

¹⁰³ M Choudhary & Sarath M S (n 74 above), 3.

¹⁰⁴ M Choudhary & Sarath M S (n 74 above), 3.

¹⁰⁵ African Freedom of Expression Exchange Internet Freedom in Africa: Baseline Report of eight countries 16.

¹⁰⁶ ISOC (2017) Internet Shutdowns, Internet Society Policy Briefing, 14 November 2017. Available at <https://www.Internetsociety.org/wp-content/uploads/2017/11/ISOC-PolicyBrief-Shutdowns-20171109.pdf> .

19(3) of the ICCPR, including meeting the legality, proportionality and necessity criteria¹⁰⁷ In limiting the right to freedom of expression it is therefore essential that such limitation need be legal, proportional and necessary. Regardless, the principles for limitations remain the same, according to the principle “what applies offline, also applies online”.¹⁰⁸

2.4.1 LEGALITY

In order for there to be a valid or legal limitation of the right to freedom of expression, it is vital for that limitation to be legal and well set out in the law. The principle of legality underscores the concept of rule of law. This is that the law should be clear and non-retrospective. It must be unambiguously established by pre-existing law that the freedom of expression may be limited. The Government being the custodian of the law must observe a written law that is clear and unambiguous.¹⁰⁹ This is to allow certainty otherwise; the citizenry won't know when and how they might be accused of contravening the law. Such limitation of a right must be provided at law to align with the principles of predictability and transparency.¹¹⁰ The requirement that restrictions to rights be set out in the law demands not only that a codified law exists before a restriction is imposed, but also that the rule of law must be respected.¹¹¹ As such there

¹⁰⁷ ISOC (2017) Internet Shutdowns, Internet Society Policy Briefing, 14 November 2017. Available at <https://www.Internetsociety.org/wp-content/uploads/2017/11/ISOC-PolicyBrief-Shutdowns-20171109.pdf> .

¹⁰⁸ UN Human Rights Council (2012), Resolution A/HRC/20/8 on the promotion, protection and enjoyment of human rights on the Internet.

¹⁰⁹ UN Human Rights Council (2012), Resolution A/HRC/20/8 on the promotion, protection and enjoyment of human rights on the Internet.

¹¹⁰ S Elsayed-Ali, “Challenges to Freedom of Expression,” *International Law Programme Meeting Summary 4*.

¹¹¹S Elsayed-Ali (n 110 above) 4.

should be in existence a well-defined law that provides for the limitation of the right in question.

The requirement that a limitation be legal necessitates that the limitation must have a distinct legal basis.¹¹² A set of preconditions exist which must be met by the law limiting the said right that is such law should be publicly available.¹¹³ The law should also be satisfactorily precise to empower the citizenry to regulate behaviour.¹¹⁴ The limitation in question must not grant autonomous discretion upon the state to prevent the danger of exploitation and arbitrary and subjective exercise of discretion.¹¹⁵ The limitation of the right in question must provide adequate guidance to persons charged with their execution and observance to enable them to ascertain what sorts of expression are properly restricted and what sorts are not.¹¹⁶ The requirement that there be well set and defined laws in existence is meant to ensure the avoidance of unfettered and arbitrary regulation of rights by the state.

2.4.2 PROPORTIONALITY

There exists another criterion that has to be satisfied for there to be a validly legal limitation of rights which is that such limitation should be proportional. The proportionality in question is that there should be proportionality between end and means. The proportionality principle stresses that the means used by a state to restrict the exercise of a right must be relational or proportionate to the aim sought.¹¹⁷ When a government invokes a genuine ground for the limitation of the right to freedom of

¹¹² S Elsayed-Ali (n 110 above) 4.

¹¹³ I Maja, Limitation of human rights in international law and the Zimbabwean Constitution (2016) *The Zimbabwe Electronic Law Journal* 3

¹¹⁴ I Maja (n 113 above) 3.

¹¹⁵ I Maja (n 113 above) 3.

¹¹⁶ UNHRC General Comment 34.

¹¹⁷ I Maja (n 113 above) 5.

expression, the state is duty-bound to demonstrate in a precise and individualized fashion the precise nature of the threat.¹¹⁸ The state should furthermore show the necessity and proportionality of the precise action taken, in essence by founding a direct and immediate nexus between the expression and the threat.¹¹⁹ As such any limitation of the right should be appropriate to achieve the protective function. It should be the least invasive or intrusive instrument and must be proportional to the interest to be protected.¹²⁰

There are various considerations required to be taken into account to validate that the means used by a state to restrict a right is proportional to the aim sought. In essence the proportionality requirement for the justifiability of limitations includes aspects of suitability, subsidiarity and proportionality.¹²¹ Suitability necessitates that the limitation should in principle lead to the legitimate aim which is sought after by the state.¹²² Ultimately proportionality demands that a reasonable relationship between the infringement and the legitimate aim be in existence.¹²³ This is primarily meant to ensure that the government does not use a hammer where a scalpel is required. Naturally, it follows that a where there is greater infringement and limitation on the rights of the citizens a heftier legitimate aim should have been the goal.¹²⁴ The subsidiary test reviews whether there are other alternative and less restrictive or intrusive means to reach the legitimate aim.¹²⁵ As such the proportionality requirement requires that the

¹¹⁸ paragraph 35 Note 4, UNHRC General Comment No. 34.

¹¹⁹ paragraph 35 Note 4, UNHRC General Comment No. 34.

¹²⁰ General Comment No.27 on Article 12, Official Records of the General Assembly Fifty Fifth Session Supplement No 40. (A/55/40 (Vol1))

¹²¹ I Maja (n 113 above) 5.

¹²² I Maja (n 113 above) 5.

¹²³ I Maja (n 113 above) 6.

¹²⁴ I Maja (n 113 above) 5.

¹²⁵ I Maja (n 113 above) 5.

limitation to the right must be necessary and also the least restrictive means to achieve the respective objective. Where there could have been other less intrusive options government is bound to utilise such options.

2.4.3 LEGITIMATE AIM

It is also essential that when the right to freedom of expression is being limited such limitation should be necessary or serving a legitimate aim. In order to arrive at the legitimate aim being sought by the government, it is essential to ask what problem is sought to be addressed by the limitation of the right. A legitimate aim being pursued may refer to the interests of the State and the rights of its citizens.¹²⁶ Such legitimate examples of legitimate aims that are relied on by states to justify the limitation of rights include respect for the rights and reputations of others, respect for public morals; protection of public order and promoting the general welfare in a democratic society.¹²⁷ Any one of the above are legitimate aims that can be raised by states to justify a limitation of the right to freedom of expression but however, it should be borne in mind that such limitation has to also satisfy the other two requirements.

Such limitation of the right to freedom of expression must, therefore, pursue at least one of the purposes envisaged in Article 19 of the ICCPR, that is to protect the rights or reputation of others, or to protect national security or public order, health or morality.¹²⁸ It is critical to note that there has been little to perceived success or

¹²⁶ I Maja (n 113 above) 5.

¹²⁷ I Maja (n 113 above) 5.

¹²⁸ Internet Shutdowns an Internet Society Public Policy Briefing: 2017, Internet Society UN.

effectiveness of internet shutdowns especially in cases where they are meant to restore public order.¹²⁹ In the majority of cases mostly negative consequences have ensued.¹³⁰ Additionally, Internet shutdowns tend to attract negative international attention and create political pressure on countries that undertake them.¹³¹ This relates to the so-called “Streisand effect”, where the attempt to gagging free expression voices or concealing information results in the unintended consequence of bringing more attention to them.¹³² Because freedom of expression is a right that must be upheld as much as possible, any restrictions should be applied only when really necessary and serving a legitimate aim.

2.5 CONCLUSION

The right to freedom of expression is a fundamental right that is core to the functional democratic society. The respect of these rights by governments is fundamental and critical. Respect of the right to freedom of expression transcends to new forms of communication that are being developed including internet-based forms of communications. This is premised on the basis that offline rights are the same as online rights.

The above discussion has discussed the ideal position, nature, scope and content of the right to freedom of expression as provided for in international law instruments and as an online right it is clear that any such restrictions to the right need to be provided

¹²⁹ Internet Shutdowns an Internet Society Public Policy Briefing: 2017, Internet Society UN.

¹³⁰ Internet Shutdowns an Internet Society Public Policy Briefing: 2017, Internet Society UN.

¹³¹ Internet Shutdowns an Internet Society Public Policy Briefing: 2017, Internet Society UN.

¹³² Internet Shutdowns an Internet Society Public Policy Briefing: 2017, Internet Society UN.

for by law, in the pursuit of a legitimate aim, and they must be necessary and proportional to the aim pursued.

Governments have genuine concerns and duties to safeguard public order and national security for their citizens. Accordingly, any measure that confines free expression or association in order to advance the above-stated purposes must be extraordinary, be grounded in law and be strictly necessary and proportional to achieve a legitimate aim.¹³³ As such Chapter 3 picks up from this ideal analysing whether Zimbabwe's internet shutdown of 2019 was legal.

¹³³ Internet Shutdowns an Internet Society Public Policy Briefing: 14 November 2017, Internet Society UN

CHAPTER 3

3.1 INTRODUCTION

This chapter analyses the legality of the internet in order to do this it is essential to establish why the internet has been shut down in Zimbabwe. It is further, essential to examine the right to freedom of expression as contained in international instruments. This Chapter traces constitutional provisions on the right to freedom of expression which is a fundamental right that is limited when internet shutdowns are implemented. An analysis of legislative provisions which have been relied on by the state when enacting internet shutdowns is also contained in this chapter. It is essential to examine the legislation which the government seeks to rely on in the limitation of fundamental rights and freedoms in order to ascertain the legality of internet shutdowns in Zimbabwe.

The Chapter examines principles of free expression as defined under international law as part of Zimbabwe's obligations under international law which principles are binding on Zimbabwe. In doing so there is an interrogation of the online right to freedom of expression and doctrine of prior restraint which is a fundamental principle on the suppression of online communications. In the same vein, Zimbabwe's regional obligations are also explored albeit in brief to consolidate Zimbabwe's obligation towards the respect of the right to freedom of expression.

Zimbabwe has an obligation to also respect the right to freedom of expression as envisaged within its Constitution. This obligation is explored together with the limitations as provided therein in the context of internet shutdowns. The Chapter also

examines the legislative provisions that the Zimbabwean government has utilised to institute internet shutdowns showing how those provisions have constituted a limit on the right to freedom of expression. An examination of the constitutional soundness or legality of these provisions is conducted in order to assess the legality of internet shutdowns in Zimbabwe. Justifications for the shutting down of the internet particularly national security justifications are examined in order to determine if they have a place in Zimbabwe's legal framework. In essence, the chapter seeks to clarify the legal framework around the shutting down of the internet in Zimbabwe.

3.2 WHY THE INTERNET HAS BEEN SHUTDOWN IN ZIMBABWE

There have been at least two instances of recorded deliberate internet shutdowns since the adoption of the 2013 Constitution in Zimbabwe. The Shutdown Tracker Optimization Project (STOP), part of Access Now's #KeepItOn Campaign, defines an internet shutdown as

“an intentional disruption of internet or electronic communications, rendering them inaccessible or effectively unusable, for a specific population or within a location, often to exert control over the flow of information.”¹³⁴

Zimbabwe's internet shutdowns have been implemented with the intention to exert control over the flow of information.

On the 15th January 2019, the second day of a nationwide stay-away protest that was called by the Zimbabwe Congress of Trade Unions (ZCTU) and other civil society organisations, the Zimbabwean Government in response terminated internet

¹³⁴ “Disabling Human Rights Online: The Implications of Internet Shutdowns in Africa.” *ALT Advisory | Question Convention*, 2017. Available at <https://altadvisory.africa/2017/10/16/disabling-human-rights-online-the-implications-of-internet-shutdowns-in-africa/>. (accessed 19.07.19).

connectivity and services across the nation through government directives.¹³⁵ Econet, the country's major mobile telecommunications operator and Internet service provider [ISP], issued the following statement to its subscribers:

*"Further to a warrant issued by the Minister of State in the President's Office for National Security through the Director-General of the President's Department acting in terms of the Interception of Communications Act, internet services are currently suspended across all networks and internet service providers. We are obliged to act when directed to do so and the matter is beyond our control."*¹³⁶

3.3 ZIMBABWE'S OBLIGATIONS UNDER INTERNATIONAL LAW ON FREE EXPRESSION

The right to freedom of expression is provided for in various international law instruments. Most domestic law instruments draw the phrasing of their constitutional right to free expression from international law instruments. It is essential to interrogate how the right to freedom of expression is framed in international law which frames the ideal situation which every nation should aspire to adopt.

3.3.1 PRINCIPLES OF FREE EXPRESSION UNDER INTERNATIONAL LAW

The Universal Declaration of Human Rights (UDHR) makes provision of the right to freedom of expression. It provides as follows

"Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions with-out interference and to seek, receive and impart information and ideas through any media and regardless of frontiers."¹³⁷

¹³⁵ <http://kubatana.net/2019/01/31/internet-shutdown-high-courts-ruling-21st-january-court-watch-1-2019/> (accessed 10 June 2019).

¹³⁶ Econet Statement to Subscribers.

¹³⁷ UN General Assembly, "Universal Declaration of Human Rights," 217 (III) A (Paris, 1948).

This provision having been adopted in 1948 should be lauded as progressive and forward looking. Article 19 of the UDHR identifies that free expression and opinion are rights that should be observed without interference. What is most commendable is that the provision was drafted in such a manner that is accommodative of modern forms of communication such as this the internet. This is particularly evident in that the provision provides that the right includes the ability to seek, receive and impart information and ideas through any media and regardless of frontiers. The inclusiveness of this provision of the internet and any other modes of communication that can be developed in the future is laudable. It is further essential to note that, even though the UNDHR is not a binding treaty, there is a recommendatory resolution adopted by the UN General Assembly that, due to time and universal acceptance the UNDHR has attained the status of customary international law¹³⁸

The International Covenant on Civil and Political Rights (ICCPR) which is a multilateral treaty entered into force in 1976 and elaborated civil and political rights. This treaty further elaborated the right to freedom of expression expanding on right by placing responsibilities and obligations on the rights holder. The ICCPR recognises that everyone has the right to hold opinions without interference.¹³⁹ Similar to the UDHR the ICCPR recognises that the right to freedom of expression should include the freedom to pursue, obtain and communicate information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.¹⁴⁰ This again is commendable in that it recognises all

¹³⁸ J Cannataci, (n 66 above) 45.

¹³⁹ Article 19(1) of the *International Covenant on Civil and Political Rights*, 16 December 1966, United Nations, Treaty Series.

¹⁴⁰ Article 19(2) of the ICCPR.

frontiers and media of choice of the right holder thereby recognising expression even through online media.

The ICCPR goes further to acknowledge that rights have obligations and limitations in particular that the right to freedom of expression carries special obligations and responsibilities.¹⁴¹ The ICCPR recognises that even though there are certain restrictions to the right to freedom of expression such limitations of rights should be provided by law and necessary.¹⁴² Such control or restriction of rights should be essential to guarantee the respect of the rights or reputations of others and also for the preservation of national security or of public order (*ordre public*), or of public health or morals.¹⁴³ The ICCPR thus sets confines for the limitation of the right to freedom of expression a step further than the UNHR.

3.3.1.1 THE ONLINE RIGHT TO FREEDOM OF EXPRESSION

The UN Human Rights Committee (UNHRC), as a treaty monitoring body for the ICCPR, provided interpretations of Article 19 in General Comments.¹⁴⁴ The Committee has expounded on the meaning of the right of freedom of expression, requiring state parties to the ICCPR to contemplate the import of freedom of expression in developments in telecommunications like the internet and other electronic means of communication.¹⁴⁵ The Committee further adopted a resolution that in strong wording indicts unequivocally the deliberate use of internet disruptions to prevent or disrupt access to or distribution of information online.¹⁴⁶ The Committee labels such conduct

¹⁴¹ Article 19(3) of the ICCPR.

¹⁴² Article 19(3) of the ICCPR.

¹⁴³ Article 19(3) of the ICCPR.

¹⁴⁴ General Comment 34 (UNHRC/GC34).

¹⁴⁵ J Cannataci, (n 66 above) 47.

¹⁴⁶ Human Rights Council resolution A/HRC/32/L.2.

a violation of international human rights law and advocates for the cessation and refrainment of usage of such measures by states.¹⁴⁷

The resolution also sustains the position that people have rights when they are offline these are the same rights that should be protected offline and in particular the right to freedom of expression.¹⁴⁸ The resolutions and general comments by the UNHRC reinforce the fact that the right to freedom of expression extends to expressions made online and condemns measures that are disruptive of the exercise of such right such as network disruptions. The Committee further reaffirms that rights protected offline are similar to online rights as such deserve similar respect and reverence.

In terms of the ICCPR, in order to limit a right, any limitation must be prescribed by law; seek to achieve a legitimate aim, and the limitation must be necessary to the prescribed purpose.¹⁴⁹ It is difficult to conceptualise how an indiscriminate network disruption satisfies the prerequisite of seeking to accomplish a legitimate aim and how it is necessary for a prescribed purpose.¹⁵⁰ The effect of the shutdown is basically too broad and disproportionate conceivably legitimately restricting violent protest or terrorist activity but equally preventing vendors from receiving mobile money or placing electronic orders with suppliers.¹⁵¹

¹⁴⁷Human Rights Council resolution A/HRC/32/L.2.

¹⁴⁸ J Rydzak (n 11 above) 11.

see also articles 19–22 of the Universal Declaration of Human Rights (UDHR) and the International Covenant on Civil and Political Rights (ICCPR).

¹⁴⁹ Article 18 (3) of the ICCPR.

¹⁵⁰<https://altadvisory.africa/2017/10/16/disabling-human-rights-online-the-implications-of-internet-shutdowns-in-africa/> (accessed 05 August 2019).

¹⁵¹ Disabling Human Rights Online: The Implications of Internet Shutdowns in Africa." *ALT Advisory | Question Convention*, 2017. Available at <https://altadvisory.africa/2017/10/16/disabling-human-rights-online-the-implications-of-internet-shutdowns-in-africa/>. (accessed 19 July 19).

3.3.1.2 THE DOCTRINE OF PRIOR RESTRAINT / PRIOR CENSORSHIP

This is a doctrine that restricts limitations on the right to free expression. The presumption against prior censorship basically entails that government should not suppress information before it has been published.¹⁵² Essentially where there is information that threatens incitement of violence or the disruption of public order such information should not be restrained or restricted because of its potential. What this means basically is that the state should wait until such information has been published then penalise it where justified. This principle is consolidated In the Johannesburg Principles on National Security, Freedom of Expression and Access.¹⁵³ Principle 23 of the Principles on National Security, Freedom of Expression and Access provides that prior restraint cannot be used to limit the right to free expression. Prior restraint can only be used when a state of emergency has been declared. In essence, this means that where not state of public emergency has been declared the Government is not a liberty to institute an internet shutdown.

3.3.2 REGIONAL PROTECTION OF THE RIGHT TO FREE EXPRESSION

The African Charter on Human and Peoples Rights (ACHPR) is no exception and provides for the right to freedom of expression. It provides that every individual shall have the right to receive information.¹⁵⁴ The Charter further goes on to stipulate that every individual shall have the right to express and disseminate his opinions within the

¹⁵² T Walton (etal) Navigating Litigation during Internet Shutdowns in Southern Africa *Southern Africa (2019) Litigation Centre* 22 25.

¹⁵³ 1996.

¹⁵⁴ Article 9(1) of the *African Charter on Human and Peoples' Rights ("Banjul Charter")*, 27 June 1981, CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982),.

law.¹⁵⁵ This provision only goes as much as granting the individual right to freedom of expression within the confines of the law without specifically which stipulating limitations. The right places a duty upon the right holder to exercise their rights within the law, anything outside the law thereby becomes unenforceable.

3.4 CONSTITUTIONAL PROVISION OF THE RIGHT TO FREEDOM OF EXPRESSION

The right to freedom of expression is constitutionally guaranteed in Zimbabwe's Constitution.¹⁵⁶ The Constitution guarantees every inhabitant of Zimbabwe the right to freedom of expression which right is inclusive of freedoms to seek, receive and communicate ideas and any other information.¹⁵⁷ Every person in Zimbabwe is thus guaranteed of the freedom and ability to pursue, communicate ideas and any other such information. As already alluded to in earlier chapters the right to freedom of expression is the bedrock of any democratic society. It is trite that in modern-day society, the internet has become an enabler and a medium for the realisation of the right to freedom of expression.

The Zimbabwean Supreme Court sitting as the Constitutional Court in 2000 had the opportunity to examine the scope and content of the right to freedom of expression in the case of *Chavunduka & Anor v Minister of Home Affairs & Anor*.¹⁵⁸ The court in this matter was faced with the constitutionality of a provision that criminalised lying about security forces. The Court proceeded to strike this provision down and so doing

¹⁵⁵ Article 9(2) of the ACHPR.

¹⁵⁶ Section 61 of the Constitution of Zimbabwe.

¹⁵⁷ Section 61 of the Constitution of Zimbabwe.

¹⁵⁸ *Chavunduka & Anor v Minister of Home Affairs & Anor* 2000(1) ZLR 552(S).

enunciated critical principles on the right to freedom of expression. The Court held that the right to freedom of expression should be accorded a benevolent and purposive interpretation.¹⁵⁹ The court in interpreting section 20 of the previous constitution which provided for the right to freedom of expression held that the objectives of free expression are to enable an individual to obtain self-fulfilment, to assist in truth discovery and participation. The Court reiterated the three-part test of limiting rights and went on to hold that the State cannot disrupt the enjoyment of fundamental human rights and freedoms under the guise of upholding public order or preserving public safety.

Like any other right, this right is not absolute and is subject to limitations. The general principles of limitation of rights have already been alluded to in the preceding chapter. It is therefore essential to examine how the constitution provides for the limitation of the right to freedom of expression.

3.4.1 LIMITATION OF THE RIGHT TO FREEDOM OF EXPRESSION UNDER THE CONSTITUTION

The Constitution of Zimbabwe recognises that the right to freedom of expression is subject to limitations resonating with the international conceptions of the right to freedom of expression as contained in the ICCPR. The right to freedom of expression does not extend to incitement of violence or to hate speech.¹⁶⁰ The Constitution expressly limits the right to freedom of expression acknowledging that freedom of expression and freedom of the media excludes incitement to violence; advocacy of

¹⁵⁹ *Chavunduka & Anor v Minister of Home Affairs & Anor* 2000(1) ZLR 552(S).

¹⁶⁰ Section 61 (5) of the Constitution of Zimbabwe.

hatred or hate speech; malicious injury to a person's reputation or dignity; or malicious or unwarranted breach of a person's right to privacy.¹⁶¹ In essence when exercising, one's right to freedom of expression one should exercise this right within the confines of the Constitution that is without impinging on the above restrictions.

The Constitution makes it a requirement that fundamental rights and freedoms must be exercised reasonably and with due regard for the rights and freedoms of other persons.¹⁶² Persons in their exercise of the right to freedom of expression online should do so with utmost recognition of the rights of other persons. Apart from specifying limitations to the right to freedom of expression, the Constitution further recognises the limitation of all rights and freedoms. The limitation of the right is only legal if it is there based on a law of general application and that law should be fair, reasonable, necessary and justifiable in a democratic society based on openness, justice, human dignity, equality and freedom.¹⁶³ This shows that the Constitution does not just allow the unqualified and unjustified limitation of rights.

The Constitution provides for factors that should be considered in limiting rights. It is essential to take into account the nature of the right or freedom concerned; in this case, being the right to freedom of expression which has always been described as the bedrock of contemporary democracy.¹⁶⁴ A consideration of the purpose of the limitation is vital in determining the justifiability of the limitation in question that is, in particular, whether it is necessary in the interests of defence, public safety, public order, public morality, public health, regional or town planning or the general public

¹⁶¹ Section 61(5) of the Constitution of Zimbabwe.

¹⁶² Section 86(1) of the Constitution of Zimbabwe.

¹⁶³ Section 86(2) of the Constitution of Zimbabwe.

¹⁶⁴ Section 86(2)(a) of the Constitution of Zimbabwe.

interest.¹⁶⁵ The nature and extent of the limitation is also factored in together with the need to ensure that the enjoyment of rights and freedoms by persons is not prejudicial to the rights and freedoms of others.¹⁶⁶

Additionally, the constitution requires factoring in of the connexion between the restriction and its purpose, principally whether such restriction levies a greater restriction on the right or freedom concerned than is necessary to accomplish its purpose.¹⁶⁷ Tied to the above is an analysis of whether there are any less restrictive means of accomplishing the purpose of the limitation.¹⁶⁸ An examination of all the above factors should be evident in a proposed limitation of rights that is through a law of general application. As such the right to freedom of expression cannot be limited on a whim without a sound legal basis. The factors set in place by the Constitution resonate with the three-part test for limitation of rights as discussed in the preceding chapter. There should be in place a law of general application that unambiguously sets out the limitation. The limitation should conform to the above factors. Internet shutdowns constitute a limitation of the right to freedom of expression as such as examination of the legislation the government relied on to institute an internet shutdown in order to ascertain the legality of the shutdown.

¹⁶⁵ Section 86(2)(b) of the Constitution of Zimbabwe.

¹⁶⁶ Section 86(2)(c) & (d) of the Constitution of Zimbabwe.

¹⁶⁷ Section 86(2)(e) of the Constitution of Zimbabwe.

¹⁶⁸ Section 86(2)(f) of the Constitution of Zimbabwe.

3.5 LEGISLATIVE PROVISIONS UTILISED TO LIMIT THE RIGHT TO FREEDOM OF EXPRESSION AND SHUTDOWN THE INTERNET

3.5.1 THE INTERCEPTION OF COMMUNICATIONS ACT¹⁶⁹

The government in instituting internet shutdowns relied on the Interception of Communications Act. The government's argument being that the Act allowed the shutting down of the internet. The preamble of the Act denotes the purpose of the Act and it is clear from the preamble that the purpose of the Act is not to impinge or hamper communications. The preamble of the Interception Act provides as that this is

“AN ACT to provide for the lawful interception and monitoring of certain communications in the course of their transmission through a telecommunication, postal or any other related service or system in Zimbabwe; to provide for the establishment of a monitoring centre; and to provide for any other matters connected with or incidental to the foregoing”¹⁷⁰

The keywords to be drawn here are the “lawful interception and monitoring of communications” and the provision of monitoring centre”.¹⁷¹ The key expose of the fact that this Act does not satisfy the legality requirement that requires internet shutdowns to be legal is the fact that shutting down entire communication systems is not an objective of the Act and cannot be in any way regarded as incidental to the two aims of the Act.

The Act allows certain individuals in Government to make an application to the minister in charge of the Act to issue a warrant of interception and also, to issue a directive which scope of powers will be discussed below. It is, however, essential to establish who the Minister assigned to the Act is to determine whether the Internet Shutdown in

¹⁶⁹ Chapter 11:20.

¹⁷⁰ Preamble of the Interception of Communications Act [Chapter 11:20].

¹⁷¹ Internet Shutdown Constitution Watch 2/2019 *Veritas* 3.

January 2019 was procedurally instituted by the appropriate person. The Minister who the President assigns the administration of the Interception act is authorised to issue interception warrants and to also issue directives to service providers. In January 2019 the Minister of State for National Security in the President's office issued out warrants and directives that purported to authorise the total shutting down of the internet in Zimbabwe. The Interception Act was once under the purview of the Minister of Transport and Communications; however, the President is empowered to assign the administration of the Act to some other minister or even reserve such administration to himself.¹⁷²

The President has chosen to reserve the administration of the Interception Act under his purview.¹⁷³ This accordingly means that the President takes over the role of the Minister under the Interception Act and is responsible for carrying out the role of the Minister in the Act. The Minister of State Security instead of the President is the one who issued directives and warrants in January 2019 contrary to the fact that the President was the one who was supposed to carry out those functions if indeed the provisions could legally limit the right to freedom of expression by ordering an internet shutdown.

In the case of *ZLHR and MISA Zimbabwe v Minister of State for National Security and Others*,¹⁷⁴ the minister of state security argued that the President had assigned the administration of the Act to her on a temporary basis although this appeared to be an afterthought. In that case which sought the restoration of internet services counsel for

¹⁷² Section 104 (1) of the Constitution of Zimbabwe also Internet Shutdown Constitution Watch 2/2019 *Veritas* 3.

¹⁷³ Assignment of Functions (His Excellency the President of the Republic of Zimbabwe) Notice, SI 212 of 2018.

¹⁷⁴ *ZLHR and MISA Zimbabwe v Minister of State for National Security and Others* HC 265/19.

the Applicants raised a preliminary point that the Minister had no authority as the Interception Act was solely under the purview of the President. The Court accordingly ruled in favour of the Applicants making a finding that the Minister of State Security had no authority to accordingly issue warrants or directives shutting down the internet as the Interception Act was not under the purview of that Minister.

The court in the case of *ZLHR and MISA Zimbabwe v Minister of State for National Security and Others* did not decide and rule on the merits of the case. The Court merely ruled on a procedural point and did not delve into the legality or illegality thereof of internet shutdowns in Zimbabwe. As such a provisional order was granted ordering mobile ISP's that is Econet, NetOne, Telecel and all other holders of telecommunications licences to unreservedly resume full and unobstructed internet services to all subscribers.¹⁷⁵ The court is still yet to rule on the legality of internet shutdowns. It is therefore essential to conduct an analysis of the legislative provisions and scope of powers of the Interception Act to ascertain the substantive legality and constitutionality of the provisions and whether internet shutdowns are legal in Zimbabwe inasmuch as they are a limitation of the right to freedom of expression.

3.5.1.1 INTERCEPTION WARRANTS UNDER THE INTERCEPTION OF COMMUNICATIONS ACT

The Minister under the Interception Act is authorised to issue warrants authorising the interception of communications. Section 5 of the act authorises the Chief of Defence Intelligence or his or her nominee; the Director-General of the President's department responsible for national security or his or her nominee; the Commissioner of the Zimbabwe Republic Police or his or her nominee and the Commissioner-General of

¹⁷⁵ *ZLHR and MISA Zimbabwe v Minister of State for National Security and Others* HC 265/19.

the Zimbabwe Revenue Authority or his or her nominee to make an application for the lawful interception of any communications.¹⁷⁶ The Act recognises the scope of an interception warrant, in that, an application in terms of Act should contain information the person or customer if known, whose communication is required to be intercepted. An internet shutdown constitutes a blanket ban of all communications it is thus difficult to conceive a scenario where section 5 would apply to the Interception Act. A reading of the context of section 5 clearly points towards the interception of an individual or groups communications for the purpose of monitoring such communications and not to obstruct such communications.

The Act defines intercept in relation to any communication which is sent by means of a telecommunication system or radiocommunication system, as a means to listen to, record, or copy, whether in whole or in part that communication and communications by post as a means to read or copy the contents, whether in whole or in part.¹⁷⁷ It is further clear that the scope of interception envisioned by the drafters and lawmakers does not extend to blanket shutdowns of communications. It is clear that sections 5, 6 and 7 of the Interception Act are limited in scope only pertaining to the interception of communications which clearly does not include impeding telecommunications, shutting down communication systems and the internet infrastructure.

The scope of a warrant is specifically defined by the Act and it does not canvas blocking communications. It only permits the “interception” of communications and this is strictly well-defined in the piece of legislation.¹⁷⁸ The limited nature of the warrants

¹⁷⁶ Section 5(1) of the Interception of Communications Act.

¹⁷⁷ Section 2 of the Interception of Communications Act.

¹⁷⁸AMagaisa <https://www.theindependent.co.zw/2019/01/18/legality-of-zims-internet-shutdown/> Posted on January 18, 2019 by The Independent.

is just to let the government eavesdrop and tap into communications of its citizens where such snooping is justified. As such the implementation of an Internet Shutdown which constitutes a limitation of the right to freedom of expression becomes an illegal act. This is due to the fact that internet shutdowns fail to satisfy the legality requirement.

3.5.1.2 DIRECTIVES BY THE MINISTER UNDER THE INTERCEPTION ACT

The Act empowers the minister when he receives an application for a warrant to instead issue a directive to a telecommunications service provider, not concerning any interception or monitoring of communications.¹⁷⁹ When the internet was shut down in January 2019 some of the ISP's referred to "directives" that ordered a shutdown of telecommunication services.¹⁸⁰ The Minister of State in the President's office sought to rely on section 6(2) arguing that the scope of the provision is wide enough to grant powers to shut down the internet. An analysis of the provision in its context of the act would be at most an unjustifiable stretch. This provision fails to satisfy the requirements of a limitation of the right. This section cannot be construed as impliedly giving the minister such drastic power.¹⁸¹ Construing this section to mean that the Minister responsible for the Act could accordingly issue a directive to shut down telecommunications would be to effectively grant him power far exceeding those that the Act expressly gives under the warrant.¹⁸² There is nothing in the context of the Act to suggest that the Minister has the authority to shut down communications and such power is not even conceptualised in the long title of the Act.

¹⁷⁹ Section 6(2) of the Interception of Communications Act.

¹⁸⁰ Internet Shutdown Constitution Watch 2/2019 *Veritas* 3.

¹⁸¹ Internet Shutdown Constitution Watch 2/2019 *Veritas* 3.

¹⁸² Internet Shutdown Constitution Watch 2/2019 *Veritas* 3.

Purporting to grant the minister more intrusive and extensive powers by such a vague provision is clearly moving out of the scope of the Interception Act. In its most less invasive form, the meaning of section 6(2) of the Interception Act would be that the Minister instead of issuing an interception warrant should instead issue a directive that is less intrusive. Such directive could include ordering the telecommunications service provider to disclose material information of the communications that is who the interception target has been communicating with, how often and at which times. An ordinary reading of the Act without stretching it for ulterior motives such as the Minister did in January 2019 clearly shows that internet shutdowns cannot be justified through the use of the Interception Act. The Act clearly does not empower the Government to shut down the internet or any part of it.

The Zimbabwe Supreme Court had a chance to deliberate on another similar provision in 2003 which provision seemed to legalise the shutting down of communications and held such provision to be unconstitutional in the case of *The Law Society of Zimbabwe v Minister of Transport and Communications and Another*.¹⁸³ The section has since now been repealed section of the Postal and Telecommunications Act.¹⁸⁴ Section 98 (2) of the Postal and Telecommunications Act which section is now repealed provided in part that

“If, in the opinion of the President it is necessary in the interests of national security or the maintenance of law and order, he may give a direction that ...
 (c) any cellular telecommunication or telecommunication service established, maintained or worked by a cellular telecommunication or telecommunication licensee or any class of such services shall be suspended or that such service shall be suspended in respect of a person named in the direction.”

¹⁸³ *Law Society of Zimbabwe v Minister of Transport and Communications and Another* (28/02) ZWSC 12 (2004).

¹⁸⁴ Postal and Telecommunications Act Chapter 12:05.

The above provision together with an almost similar section 103 of the Postal and Telecommunications act was repealed after the court held the provisions to be unconstitutional. The law society in this matter had brought a case against the government averring that sections 98(2) and section 103 of the Postal and Telecommunications Act threatened the rights of its members to freedom of expression. The provision allowed for the detention and interception of postal packages and disposal in any such manner the President would deem or see fit. The government sought to argue that this provision was justifiable in a democratic society. In reaching its judgement the Court deliberated on the fact the two sections granted the President unfettered power only in the interests of national security to conduct restrictive actions based on his opinion only which opinion could be unreasonable.

The Court opined that the above provision lacked legal soundness and could not stand the test of constitutionality. The court lamented the structuring of the provisions which failed to provide statutory mechanisms to control or limit the exercise of power by the President.¹⁸⁵ The provisions were also criticised in that they did not inform or guide the citizen on conduct he should not do or avoid which conduct might lead to the exercise of the powers by the President.¹⁸⁶ The court held that due to the absence of control mechanisms and restrictions on the powers of the President the provisions authorising the suspension of communications of an individual were not justifiable in a democratic society.¹⁸⁷ The court further held that the provisions were so vague to the extent that

¹⁸⁵ *Law Society of Zimbabwe v Minister of Transport and Communications and Another* (28/02) ZWSC 12 (2004).

¹⁸⁶ *Law Society of Zimbabwe v Minister of Transport and Communications and Another* (28/02) ZWSC 12 (2004).

¹⁸⁷ *Law Society of Zimbabwe v Minister of Transport and Communications and Another* (28/02) ZWSC 12 (2004).

the citizen would not be in a position to regulate his conduct in such a way to avoid the interruption of his communications as such did not satisfy the legality requirement.

3.6 JUSTIFICATIONS FOR THE IMPLEMENTATION OF INTERNET SHUTDOWNS

States on occasion face existential threats to their wellbeing that could in instances be classified as threats to the national security of the state and Zimbabwe is no exception.

¹⁸⁸ When the internet was shut down in Zimbabwe in January 2019 the government's argument was that social media platforms were being utilised to incite violence and destabilise the Constitutional order of the country. It was the Government's assertion that the internet was being used to mobilise citizens into an organised violent protest that was resulting in the destruction of both private and state property. While the state is clearly allowed to limit rights in the interests of national security, it is not empowered to just limit rights where there is no established legal basis. The state's conduct is confined to the four corners of its legal framework.

While international law recognises that there are threats which a nation may face which are critical such as national security wherein the integrity of the nation is threatened which justify the departure from the norm. The ICCPR, however, makes it conditional upon there being a public emergency that has been publicly declared.¹⁸⁹

The Human Rights Committee has further explained this to mean that there should be a situation that threatens the life of the state and the state must have declared a state

¹⁸⁸ T Walton (n 152 above) 22.

¹⁸⁹ Article 4 of the ICCPR states that *"In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin"*

of public emergency.¹⁹⁰ In the absence of these prerequisites, the state cannot escape its obligations under the ICCPR. Accordingly, Zimbabwe as a nation cannot justify internet shutdowns under the guise there was a situation that threatened the life of the nation without there have been declared a state of emergency.¹⁹¹ This principle consolidates the rule of legality for all restrictions on fundamental human rights.¹⁹²

3.6.1 NATIONAL SECURITY AS A JUSTIFICATION

The Zimbabwean Constitution provides for national security.¹⁹³ The Constitution requires Zimbabwe's national security objectives to reflect the resolve of Zimbabweans to co-exist as equals in liberty, free from any fear, in prosperity and in peace and harmony.¹⁹⁴ These principles should be reflected whenever Zimbabwe seeks to promote national security. When read in the context of internet shutdowns, it is arguable that internet shutdowns run counter to these principles as they actually serve to instil more fear in the populace. Internet shutdowns also in a way hampers the prosperity of the people as businesses come to standstill. The Constitution qualifies the protection of national security requiring that it in the quest to achieve national security, the state should do so with the utmost observance of fundamental constitutional rights and freedoms and democratic values and principles and respect for the rule of law.

¹⁹⁰ R Burchill, "When does an emergency threaten the life of the Nation? Derogations from Human Rights obligations and the War on International Terrorism" (2005) 8.1 *Yearbook of New Zealand Jurisprudence*.

¹⁹¹ General Comment 34 CCPR/C/GC/34.

¹⁹² T Walton (n 152 above) 22.

¹⁹³ T Walton (n 152 above) 22.

¹⁹⁴ T Walton (n 152 above) 22.

The Constitution of the International Telecommunication Union (ITU) provides that member states have the right to sever private telecommunications which appear dangerous to the security of the nation, or which contravene laws, public order or decency.¹⁹⁵ The ITU however, qualifies this authority to that it should be exercised within the confines of national law. Where such authority to sever communications on the basis of national security is absent the powers of the state to act legally become severely limited. While national security is a fundamental aspect of the preservation its importance cannot be justified at the expense of the rule of law.

In the Johannesburg Principles on National Security, Freedom of Expression and Access provides that no restriction can be imposed on the right to free expression on the basis of national security except where the purported restriction is prescribed by law.¹⁹⁶ Such restriction should be necessary in a democratic society and seeking to protect a legitimate national security interest.¹⁹⁷ The principles place the onus of demonstrating the validity of the restriction on the government.

The principles recognise that the expression may threaten national security if the nature of the expression is intended to incite imminent violence. Furthermore, free expression can be a threat if it is likely to incite such violence and where there is a direct and immediate connection between the expression and the likelihood of occurrence of such violence.¹⁹⁸ As such any expression is that is deemed to be violent poses a potential threat to national security. The principles categorically provide that

¹⁹⁵ Article 34/181 of International Telecommunication Union Constitution.

¹⁹⁶ Principle 1 (d) of the Johannesburg Principles on National Security, Freedom of Expression and Access.

¹⁹⁷ Principle 1 (d) of the Johannesburg Principles on National Security, Freedom of Expression and Access.

¹⁹⁸ Principle 6 (a)-(c) of the Johannesburg Principles on National Security, Freedom of Expression and Access.

peaceful expression is protected expression that cannot be subjected to any limitations or penalties.¹⁹⁹ This basically translates to that the government has no justification whatsoever to blockade accessibility to the internet where there is peaceful expression of opinions even in protest. The principles, however, reiterate the test of the justifiability of state action as set out under international law.

Accordingly, while restrictions on rights are permissible on the grounds of national security and preservation of public order the restrictions, must be narrow, proportionate, and not a defeat to the ability to exercise one's right altogether.²⁰⁰ National security is a paramount aspect of the preservation of the state. The state, however, should at all times operate within the confines of the law. It is against this benchmark that the conduct of the Zimbabwean government is measured. While in 2016 when the first recorded shutdown was implemented there was no violence or any threats of it the justifiability of the internet shutdown at the time becomes questionable. The 2019 internet shutdown is examined against this yardstick that while events that occurred might have constituted a threat to national security the key question is still relevant of whether internet shutdowns in Zimbabwe are prescribed by law, are justifiable in a democratic society and whether they were implemented with the protection of a legitimate national interest in mind.

3.7 CONCLUSION

An analysis of the legislation used by the Zimbabwean government as authority for instituting internet shutdowns has shown that there is little or nothing in any of the

¹⁹⁹ Principle 7 of the Johannesburg Principles on National Security, Freedom of Expression and Access.

²⁰⁰ T Walton (n 152 above) 22.

pieces of legislation of Zimbabwe that authorises the shutting down of the internet. It is clear that this legislation cannot be termed a law of general application that could be utilised to limit the right of freedom of expression. The right to freedom of expression is not only provided for in domestic legislation but is also contained in international human rights instruments. The right to freedom of expression though limitable, doing so through internet shutdowns appears to have no basis in Zimbabwean law.

The Chapter examined how the Government of Zimbabwe sought to limit the right to freedom of expression by shutting down the internet in Zimbabwe through the Interception Act. An examination of the scope and powers of the Interception Act is apparent and it is clear that it is difficult to envisage a situation where the legislature intended to give the Minister such widespread powers to institute internet shutdowns. The preservation of national security is one of the reasons that nations use to justify the shutting down of communications. It is acknowledged that while national security is fundamentally crucial for the government it is subject to qualifications and should not be utilised in a manner that is *ultra vires* the law of the national.

The constitutional conception of the right to freedom of expression was discussed together with the possible limitations to the rights as a way to assess the constitutional validity of internet shutdowns using the Constitution as a yardstick. It is essential to examine the Pakistani perspective in the following chapter in order to determine how an alternative jurisdiction has approached the issue of internet shutdowns.

CHAPTER FOUR

4.1 INTRODUCTION

This is a comparative chapter that seeks to examine the approach of other jurisdictions to internet shutdowns, in particular, the approach of Pakistan. The Chapter examines Pakistan's rationale for instituting internet shutdowns in a bid to reconcile and understand why nations implement internet shutdowns. The Chapter juxtaposes the incidences of internet shutdowns in Pakistan tracing the common rationale why Government implements internet shutdown in the nation.

Internet Shutdowns are a common phenomenon in Pakistan as such it is an apt comparator. The Chapter makes use of the comparative methodology. It is critical to lay down a background as to why internet shutdowns are a primary tool that has been employed by the Pakistani government. This is fundamental in order to bring internet shutdowns into context and perspective and enhance understanding as to why Zimbabwe has resorted to using internet shutdowns as a means of ensuring the preservation of national security.

Chapter four examines the law and procedure in Pakistan for instituting internet shutdowns juxtaposing it with the Zimbabwean context. The Chapter seeks to examine principles and draw differences and similarities between the two jurisdictions of Zimbabwe and Pakistan. The Pakistani court system has also had an opportunity to deliberate on the legality of internet shutdowns in its jurisdiction and this court decision is explored in this chapter.

4.2 HISTORY OF INTERNET SHUTDOWNS IN PAKISTAN

There have been numerous internet shutdowns in Pakistan in the period between 2012-2019. The origins of internet shutdowns in Pakistan seem to stem from military operations and antiterrorist initiatives dating back to 2005 when the first internet shutdown was recorded in Balochistan a province of Pakistan.²⁰¹ The rise in the prevalence of internet shutdowns in Pakistan, however, can be observed post-2012.²⁰² One such internet shutdown incident occurred on the 14th of August 2014 having been ordered by the Interior Ministry. The Shutdown would go on to extend over a period of three days wherein citizens lost not only internet connectivity but basic telecommunications services including the inability to reach out to emergency services like hospitals or the police. Such manner of internet blackouts in Pakistan not only enhanced the vulnerability of citizens in terms of their personal security and wellbeing but the effects thereof transcend to economic consequences.²⁰³

Pakistan being in the middle east has faced multiple threats from terrorist insurgents and other external threats. In order to deal with these national security challenges, the Pakistani Government has resorted to ordering telecommunication companies to suspend internet connectivity where there is a threat to national security.²⁰⁴ Despite the validity of the government's security concerns on the threat of terrorism and violence the rate at which the Government has been resorting to internet shutdowns to the extent that they have become a usual occurrence and as a regular tool is alarming.²⁰⁵ Purdon argues that the Pakistani government should rather not resort to

²⁰¹ B Wagner (n 2 above)2.

²⁰² B Wagner (n 2 above)2.

²⁰³ B Wagner (n 2 above)2.

²⁰⁴ L Purdon (n 4 above)10.

²⁰⁵ L Purdon (n 4 above)10.

internet shutdowns as the default mechanism to ensure the preservation of national security and public order but should rather aim to use other investigative approaches to combat threats to the government.²⁰⁶

Prior to 2009, the process for shutting down mobile networks in Pakistan was shrouded in mystery and uncertain among mobile network operators to the extent that any part of the government or its law enforcement agency could order mobile network operators to shut down communications.²⁰⁷ There was no central authority responsible for the management of these shutdown requests thereby rendering the whole system chaotic with limited accountability mechanism. In 2009 the Pakistani Ministry of Information and Technology issued a directive in order to formalise the process of ordering Internet Shutdowns in order to establish a standard operating procedure for ordering internet shutdowns. In respect to the existence of uncertainty, the same could be said for Zimbabwe which lacks a clear-cut well-defined process and procedure for instituting internet shutdowns of which the legality is questionable.

The established policy by the Government necessitated that mobile network shutdown requests should be flighted through the Pakistan Telecommunications Authority (PTA).²⁰⁸ This was implemented with the view to enhance accountability and such that mobile network operators are sure of the authenticity of the shutdown order. As such law enforcement agencies in Pakistan are authorised to issue a request for the shutdown of the Internet to the PTA. The number and identity of the agencies which can request an order for internet shutdowns, however, is kept under wraps. Due to this secrecy the PTA, may not even be aware which agency has ordered an internet

²⁰⁶ L Purdon (n 4 above)10.

²⁰⁷ L Purdon (n 4 above)10.

²⁰⁸ L Purdon (n 4 above)10.

shutdown. Although it is termed a request for the shutdown of telecommunications, a mobile network operator is not at liberty to deny the request. The mobile network operator is duty-bound to grant that request and this condition is inscribed within the operator's licence. The *PTA* Director General of Enforcement is thereby the only person with the exclusive mandate to communicate a shutdown order to mobile network operators.²⁰⁹ Contrary to the position in Zimbabwe the telecommunications regulatory body that is POTRAZ is not involved at all in the ordering of telecommunications shutdowns. The Zimbabwean purported position is that internet shutdowns can be ordered by the minister in charge of telecommunications.

Internet Shutdowns in Pakistan usually specify the geographical area and the period or extension of time.²¹⁰ Wagner has observed that there are patterns in the manner shutdowns of the internet have been executed.²¹¹ When classified in terms of duration these can be grouped into short term internet shutdowns that is, those which extend up to one week and long-term internet shutdowns which are those that extend over several weeks or months.²¹² Short term internet shutdowns are more common as they usually occur during celebrations that is during public and religious holidays. In contrast to Zimbabwe wherein the most common cause of recorded internet shutdowns has been to quell protests and stifle dissent.

Long term internet shutdowns in Pakistan take place over prolonged periods of time sometimes extending over weeks or months. These types of internet shutdowns are usually exclusive to remote areas or tribal regions like Balochistan. The Government of Pakistan on the 15th of March 2017 ordered the suspension of mobile networks

²⁰⁹ L Purdon (n 4 above)26.

²¹⁰ L Purdon (n 4 above)26.

²¹¹ B Wagner (n 2 above)13.

²¹² B Wagner (n 2 above)13.

including the internet without any explanation which shutdown went on to extend over a period of over four months.²¹³ This being one of the few examples wherein the internet has been shut down in Pakistan there have been various other instances. It is essential to examine the Pakistani legal framework in order to find out how internet shutdowns have been implemented and to obtain a grounded analysis of whether internet shutdowns can be justifiable in modern-day society.

4.3 THE LAW AND PROCEDURE GOVERNING INTERNET SHUTDOWNS IN PAKISTAN

The political context of Pakistan is critical to understanding why internet shutdowns are a common occurrence in Pakistan. In Pakistan, the civilian government is often dominated by the military which has considerable and formidable authority and thus greater influence on the day to day running's of the nation.²¹⁴ As such the law governing internet shutdowns should be analysed within the framework of fact that the military and ancillary agencies of government wield a considerable degree of power over the civilian government. In Zimbabwe, it should also be borne in mind that when the internet was shut down the military was heavily involved in efforts to quell protests. This comes amidst the background of a government that has been accused of having strong ties to the military with Zimbabwe's current vice president being a retired military general.

²¹³ B Wagner (n 2 above)2.

²¹⁴ B Wagner (n 2 above)2.

4.3.1 FREEDOM OF EXPRESSION LAW IN PAKISTAN

The Pakistani Constitution provides for freedom of speech, guaranteeing the right of every citizen to freedom of expression and free speech which also encompasses the freedom of the press.²¹⁵ Like Zimbabwe, the Pakistani Constitution recognises that the right to freedom of speech can be limited through reasonable limitations. Such limitations should be provided for by the law with the interest of the glory of Islam or the integrity and such limitation can be for the security or defence of Pakistan or any of its regions. Further limitations are recognised such as the interest of public order, decency, the commission or incitement of violence morality or contempt of court.²¹⁶ What is key is the fact limitations of rights should be prescribed at law and where such prescription is absent an act that purports to limit rights becomes *ultra vires* the constitution and incidentally unconstitutional.

Imam discusses the online right to freedom of expression and the consequences thereof. It can be noted that although Article 19 of the Constitution of Pakistan consolidates the rights to freedom of speech and the right to information there is an absence of legislation that regulates the online content and information published on the internet.²¹⁷ In this regard, Zimbabwe is similar to Pakistan having failed to keep up with the global technological wave and implement legislation that regulates online conduct. Resultantly, legislation which is not intended to limit the online freedom of expression is arm twisted to suit the regulatory aim of the government. Both

²¹⁵ Article 19 of the Pakistani Constitution.

²¹⁶ Article 19 of the Pakistani Constitution.

²¹⁷ A H Imam, Free Speech on the Internet and Its Limits in Pakistan, (2012), *LUMS Initiative on Internet and Society*, Lahore.

governments are quick to cite that rights have limitations but without the express legal provisions that provide for such limitations.

4.3.2 THE LAW ON INTERNET SHUTDOWNS IN PAKISTAN

The relevant piece of legislation to internet shutdowns is that of the Pakistan Telecommunication (Reorganization) Act 1996. This is the Act that the Pakistani Government has repeatedly relied on to justify the shutting down of the internet. The Act grants powers to the federal government to have preference and precedence over the telecommunications system of Pakistan over the rights of any licence holder or ISP.²¹⁸ This authority is qualified to times of war and hostilities only and such can be by a foreign power or an internal aggressor or when it is essential for defence or security. It can be argued that instances of terrorist activities do grant the government the authority to exercise preference to exercise authority over mobile communications however, this power is further qualified as discussed below. From the Zimbabwean perspective, there is no clear legislation that provisions for the shutting of communications as is with Pakistan.

The Pakistan Telecommunication (Reorganization) Act, makes it conditional that the President should make a proclamation of an emergency before the Federal Government can suspend or modify the licences issued under the Act.²¹⁹ From a reading of the act, a proclamation of emergency is necessary before the Government can suspend the operation or functions of a licence holder or mobile network operator.²²⁰ The federal government is duty-bound to compensate the licence holder for losses suffered as a result of the suspension however in practice the Government

²¹⁸ Section 54 (2) of the Pakistan Telecommunication (Reorganization) Act.

²¹⁹ Section 54(3) Of Pakistan Telecommunication (Reorganization) Act.

²²⁰ Section 54(3) Of Pakistan Telecommunication (Reorganization) Act.

of Pakistan has not been forthcoming with no compensation being paid for services affected.²²¹ Unlike the law in Zimbabwe, in Pakistani law, there is a clear recognition that services can be suspended and communications suspended where good cause is shown and the necessary requirements have been fulfilled.

Various companies have, however, challenged the use by government of section 53(3) in the institution of internet shutdowns.²²² The basis of the argument being that the declaration of internet shutdowns can only be declared when the President of Pakistan has declared a state of emergency.²²³ Without such declaration or proclamation of emergency, a network shutdown order incidentally becomes void of any legal basis.²²⁴ The various court challenges that have been brought in Pakistan will be discussed in detail in the next section.

What is evidently clear is that the right to freedom of expression is guaranteed in the Pakistani Constitution though subject to limitations which should be specified by the law. Purdon asserts that under the telecommunications law of Pakistan the authority of government to shut down the internet is not clearly defined and the specific circumstances under which they can be implemented.²²⁵ The way the provision is coined leads to a danger of manipulation by Government as any situation could be interpreted to be a threat to national security or defence. More so given that government is not duty-bound to account to anyone or explain the nature of the security threat. This compounds the problem in that it becomes difficult to carry out the

²²¹ Section 54(3) Of Pakistan Telecommunication (Reorganization) Act.

²²² L Purdon (n 4 above)32.

²²³ B Wagner (n 2 above)2.

²²⁴ L Purdon (n 4 above)32.

²²⁵ L Purdon (n 4 above)32.

proportionality and necessity tests in order to assess the justifiability of the limitation of the right to freedom of expression in Pakistan.²²⁶

As has already been discussed above that the Pakistani government has a strong influence of the military not so much different from that of the current Zimbabwean government which was brought into power through a military ushered transition. Accordingly, there is a politically powerful military force that has been responsible for regular coups.²²⁷ In practice, Internet shutdowns in Pakistan, therefore, stem from the military and other national security agencies of government which are communicated to the National Crises Management Cell which is a component of the interior ministry a liaison office between the military and civilian agencies.²²⁸ The National Crises Management Cell upon receipt of such request then makes a determination on the shutdown sought.²²⁹

The decisions of the National Crises Management Cell are communicated to the Pakistan Telecommunication Authority (PTA). The PTA is similar to Zimbabwe's Postal and Telecommunications Regulatory Authority of Zimbabwe (POTRAZ). Pakistan's PTA is tasked with regulatory powers in the arena of telecommunications policy including the licencing and enforcing shutdown of communications.²³⁰ Upon the PTA receiving a directive ordering the shutting down of communications it cannot question the nature of the order and is duty-bound to enforce the directive to shut down communications.²³¹ The PTA can penalise network

²²⁶ L Purdon (n 4 above)32.

²²⁷ B Wagner (n 2 above) 2.

²²⁸ B Wagner (n 2 above)2.

²²⁹ B Wagner (n 2 above)2.

²³⁰ B Wagner (n 2 above)10

²³¹ B Wagner (n above) .10

operators who fail to comply with directives to shut down the internet through fines or possibly even withdrawal of a telecommunications licence.²³²

Due to the fact that internet shutdowns in Pakistan are mostly treated as matters of national security, there is a reluctance among civilian politicians and their parties to challenge or question internet shutdowns. This has led to the point where internet shutdowns have almost become the norm rather than the exception. It is necessary to note that in Pakistan internet shutdowns are often implemented as a precaution where there is no emergency in clear contravention of the doctrine of prior restraint.²³³ In this regard, Pakistan is found wanting as curtailing freedoms on the basis of probabilities or possibilities is unwarranted conduct by the government.

The balance between national security and human rights in Pakistan is clearly tilted in favour of the preservation and promotion of national security. The value placed on national security resultantly means that human rights such as the freedom of expression are given lesser respect in Pakistan. This is particularly evident in that the National Crises Management Cell has no interaction with the public and its determinations that there is a security threat that warrants a shutdown cannot be challenged or contested. As has already been alluded to above because everything is shrouded in secrecy it becomes very difficult to assess whether there is really a security threat in existence and the carrying out of a test for proportionality or necessity becomes a challenge. Secrecy is a major challenge as also exhibited by the fact that in the Zimbabwean situation in January 2019 it is the ISP's who took it upon themselves to inform the public rather than the Government. The procedural elements

²³² section 54 of the 1996 Pakistan Telecommunications (Re-organization) Act.

²³³ B Wagner (n 2 above) .2

of instituting an internet shutdown are not established in statute and accordingly, there is really no formal process but however what has been established through practice over time.²³⁴

The fact that there is no procedure for review or appeal of such decisions that relate to national security in respect of internet shutdowns has led to a situation where there is no accountability. Citizens and service providers are therefore at the mercy of government with no legal recourse, which government does not always pursue an agenda of the common good. The fact that there is also ambiguity over which institution or agent of government is responsible for ordering the shutdown of communications renders accountability defunct.²³⁵ The government does not always have the preservation of national security and defence at its core and this has been exhibited in Pakistan where various shutdowns were implemented wherein the government felt threatened by large opposition political gatherings or rallies. This has been common in the Pakistan capital, Islamabad and the Rawalpindi region which have undergone communication blackouts for several days. The self-preservation nature of politicians who are endowed with such blanket powers is evident wherein the internet has been shut down not so much for preventing violence but for the sake suppression of political opponents during mass rallies and demonstrations.²³⁶ The next segment analyses how the Pakistani Courts have interpreted the legality of internet shutdowns in light of the overarching need to balance the right to freedom of expression and national security.

²³⁴ B Wagner (n 2 above) .10

²³⁵ B Wagner (n 2 above) .10

²³⁶ B Wagner (n 2 above) .13

4.4 COURT DECISIONS ON THE LEGALITY OF INTERNET SHUTDOWNS IN PAKISTAN

Citizens and mobile network operators have not stood and done nothing in the face of such unjust use of the law which has seen internet shutdowns being used in Pakistan repeatedly. Internet Shutdowns have been the subject of dispute with the government being taken to court to evaluate the legality of internet shutdowns in Pakistan. A varied number of petitions contesting the legality of internet shutdowns have been filed in Pakistan.

The *locus classicus* on internet shutdowns in Pakistan is the case of *CM Pak Limited v. Pakistan Telecommunication Authority*²³⁷. The Appellant in the case was a duly registered mobile network operator in Pakistan and the Respondent the regulatory authority for telecommunications in Pakistan. The adjudication of the case was combined with other petitions that had been filed by other customers of the Petitioner. The basis of the challenge was that the Appellant was challenging the legality of directions to shutdown communications for its customers. The basis of the Petition was that the Respondent was compelling the Appellant to shut down and suspend services to its customers on the basis of mere apprehensions that something unfortunate might occur which is a manner of prior restraint. The petition raised the issue that the suspension of internet services was a breach of fundamental rights set out in the Pakistani Constitution which rights include the right to freedom of

²³⁷ FAO No. 42 of 2016

expression.²³⁸ The Petitioner also raised the issue that they caused a breach of its contractual obligation to provide uninterrupted internet service to customers.²³⁹

The case sought to interpret section 54 of the Pakistan Telecommunication (Reorganization) Act, which has already been discussed above. It was Appellants case together with other petitioners that under Section 54(3) of the Pakistan Telecommunication (Reorganization) Act internet shutdowns and suspension of network services was only permissible under the licenses if the President was to proclaim a state of emergency as required by part X of the Constitution. The Respondent, however, was of the view that the Federal Government had the authority to issue directives on the suspension of telecommunications services where there were national concerns of defence and security basing on 8(2)(c) read together with Section 54(2) of the Pakistan Telecommunication (Reorganization) Act. The Court was therefore tasked with the determination as to the extent of the powers that the Federal Government could exercise in relation to the issuing of directive ordering the shutdown of internet services.

The Court seized with the matter delved into an analysis of whether section 54(2) could be used to authorise the Federal Government to suspend internet services. Section 54(2) states that

“during war or hostilities against Pakistan by a foreign power or internal aggression or for the defense or security of Pakistan, the Federal Government

²³⁸ Internet Shutdowns contravened Articles 10-A, 9, 15, 16, 17, 18, 19 and 19-A of the Pakistan Constitution

²³⁹<https://globalfreedomofexpression.columbia.edu/cases/cm-pak-limited-v-pakistan-telecommunication-authority/>

shall have preference and priority in telecommunication systems over any licensee”²⁴⁰

The Court held that the section could only be applicable in limited eventualities which included where there was a war, hostilities against the nation by a foreign power, during scenarios of internal aggression and the defence of the security of Pakistan as a nation.²⁴¹ The Court categorically ruled out the fact that the provision could be used under instances of public safety or the mere apprehension that a series of unfortunate events could occur.²⁴² The Court did not decide this case on the basis of rights violations but rather chose a statutory interpretation route. The same can be said for the Zimbabwean Courts in the case of *ZLHR and MISA Zimbabwe v Minister of State for National Security and Other* wherein the Court avoided the issue of rights but rather settled the matter on procedural issues. The rationale of the Pakistani High Court, however, reiterated the view of international law that a purported limitation should be provided at law and should not be a mere limitation at the whim of the government.

The Court held that under the Telecommunications Act of Pakistan the power to suspend communications, incidental services and operations is only covered in Section 54(3) of the Telecommunications Act and this can only be invoked in situations wherein the President of Pakistan makes a proclamation of an emergency as provided for under the Constitution. Outside of a declaration by the President of Pakistan of a state of emergency, an order for the shutdown of the internet is null and void.²⁴³ The Court further ruled that the state could not just order the suspension of communications because of fear or belief that there could be a danger to public safety

²⁴⁰ Section 52(2) of the Pakistan Telecommunication (Reorganization) Act.

²⁴¹ *CM Pak Limited v. Pakistan Telecommunication Authority* FAO No. 42 of 2016

²⁴² *CM Pak Limited v. Pakistan Telecommunication Authority* FAO No. 42 of 2016

²⁴³ Proclamations of state of emergency are declared under Part X of the Constitution that is Articles 232 to 237

or under national security except under the provisions of Section 54(3) of the Constitution.

The net effect of the high court decision on the right to freedom of expression was to affirm that the right to freedom of expression and other rights by upholding that fundamental rights could only be limitable to the extent of issuing internet shutdowns for national security purposes only in limited circumstances and when the President of Pakistan has declared a state of emergency. The Courts finding is of immense value to this study in that it promotes principles of international law on the limitation of rights. The Pakistani High Court's decision together with the Zimbabwe High Court's decision shows that the Court to uphold the legality of an internet shutdown both substantive and procedural elements should be satisfied. The reasoning of the Court resonates with international law principles on the limitation of rights which appear common throughout nations as is also reflected in Zimbabwe's constitution.

4.5 CONCLUSION

The background to Pakistan's usage of internet shutdowns has been clearly elaborated and the fact that its roots lie in the fact that Pakistan's civilian government has little influence over the decisions of the military. The use of internet shutdowns in Pakistan is a clear military tool that is meant to ensure communications breakdown during military operations. It is not surprising that when the internet was shut down in Zimbabwe the military was conducting an operation to attempt to quell protests. It has been shown how Zimbabwe's current government has strong ties to the military as Zimbabwe's vice president is a former army general.

Pakistan's law and procedure on the shutting of the internet has been clearly elucidated with differences and similarities being apparent. It is clear how both countries have a clear right to freedom of expression that is constitutionally entrenched and how such rights are limitable. What is evident is that in both countries procedures that satisfy the limiting of rights were not satisfied. Purporting to limit the rights of citizens through internet shutdowns without the appropriate legislation in place or compliance with the existing legislation serves only to be an illegality that is not only apprehensible but has no place in a constitutional democracy.

This Chapter has shown that Zimbabwe's and Pakistan's legal systems bear similarities. It is clear that internet shutdowns are common to both nations with Pakistan having more frequent and repeated internet disruptions due to the manner in which the government interpreted its legislation. It is, however, apparent that where national security is used as justification for the shutting down of the internet it is absolutely necessary that such be done within the confines and four corners of the law of the given country.

CHAPTER FIVE

5.1 INTRODUCTION

This is a concluding chapter that seeks to consolidate the various arguments that have been raised in the preceding chapters and an evaluation of the answers to the research questions. The Chapter sums up arguments and provides a conclusive deduction based on the analysis done on whether indeed internet shutdowns are legal in Zimbabwe. Recommendations are posited herein and discussed on what could be the way forward for Zimbabwe as regards balancing the interests between the promotion of human rights and the justifiable limitations such as national security.

5.2 SUMMATION OF OBSERVATIONS

5.2.1 THE NATURE AND SCOPE OF THE RIGHT TO FREEDOM OF EXPRESSION

The scope and nature of the right to freedom of expression has been clearly elaborated in Chapter two showing how the right to freedom of expression is an essential pillar of any given democratic society. The right to freedom of expression is one of the fundamental rights that are the first to be affected when internet access is intentionally disrupted by governments. The adverse effect of internet disruptions on various rights and the economy has been established to be a common cause. Like any other right, it has been clearly elaborated that the right to freedom of expression is subject to limitations and constraints. Such limitation should be legal, proportional and seek to serve a legitimate aim. Internet shutdowns as mechanisms of limiting rights should,

therefore, conform to the set requirements for limiting rights. As such the legality of internet shutdowns should be assessed from this context.

5.2.2 THE LEGALITY OF INTERNET SHUTDOWNS IN ZIMBABWEAN LAW

Legally, an internet shutdown, without due legislative or judicial process compliant with the requirements to limit rights, may constitute a direct violation of, among others, the right to freedom of expression, freedom of association and peaceful assembly, and the right to access information.²⁴⁴ As has been shown above in Zimbabwe there is an absence of specific provisions that legally provide for the scope and powers that authorise a blanket shutdown of internet access of citizen. The Interception of Communications Act fails to meet the threshold of a law of general application which is a prerequisite when limiting human rights as provided for in the Constitution.

Reliance on the issuance of directives to blockade internet access is manifestly unconstitutional and therefore illegal. This due to the fact that this is as a purported limitation of right fails to satisfy the requirements of a valid limitation of the right. Shutting down the internet for the entire population of can hardly be termed a fair limitation that is reasonable, necessary and justifiable in a democratic society based on openness, justice, human dignity, equity and freedom.²⁴⁵ The ramifications of the internet shutdown far outweigh the justifications for it. Total Internet blackouts to quell protests are tantamount to use of a hammer where a surgical blade could have been

²⁴⁴ Disabling Human Rights Online: The Implications of Internet Shutdowns in Africa.” *ALT Advisory | Question Convention*, 2017. Available at <https://altadvisory.africa/2017/10/16/disabling-human-rights-online-the-implications-of-internet-shutdowns-in-africa/>. (accessed 19.07.19)

²⁴⁵ Section 86 (2) of the Zimbabwean Constitution

utilised. The illegality of internet shutdowns in Zimbabwe is immediately exposed in that there is no law of general application that allows the implementation of such.

Internet shutdowns carry grave ramifications on the right to freedom of expression. The Interception of Communications Act fails to satisfy the threshold of a law of general application that can adequately limit the right to freedom of expression. Rather than always achieve the intended purpose, internet shutdowns disrupt the free flow of information and create a cover of darkness that shields human rights abuses from public scrutiny.²⁴⁶ Resultantly shutdowns cut off access to critical information, e-commerce and emergency services plunging causing fear in the populace.²⁴⁷ Politically, internet shutdowns may prevent opposition political parties from engaging their support base, unable to access state-controlled means of communication.²⁴⁸

A competent Zimbabwean Court is still yet to rule on the substantive legality of internet shutdowns in Zimbabwe. However, it is clear that no legislation clearly provides for this power in Zimbabwe. The argument by the Government that the Interception Act provides for this power is not only inconsistent with the scope of the Act but also inconsistent with the limitations provided for in the Constitution and international best standards for the limitation of internet freedoms particularly the right to freedom of expression. Having failed the legality test, Internet shutdowns can hardly satisfy the proportionality test as they affect even persons who may be non-participants in any

²⁴⁶ #KeepItOn Fighting Internet Shutdowns around the World: Internet Shutdown in Zimbabwe

²⁴⁷ #KeepItOn Fighting Internet Shutdowns around the World: Internet Shutdown in Zimbabwe

²⁴⁸ Disabling Human Rights Online: The Implications of Internet Shutdowns in Africa." *ALT Advisory | Question Convention*, 2017. Available at <https://altadvisory.africa/2017/10/16/disabling-human-rights-online-the-implications-of-internet-shutdowns-in-africa/>. (accessed 19.07.19)

violent protest or whatever activity Government intends to stop. In any event, the Government is in a position of power to utilise other less invasive control measures. Implementation of internet shutdowns fails to satisfy the three-part test of limiting the right to freedom of expression and any other constitutional right. It is therefore clear that Internet Shutdowns in Zimbabwe are illegal and void and carry no legal foundation.

5.2.3 PERSPECTIVE ON THE LEGALITY OF INTERNET SHUTDOWNS IN AN ALTERNATIVE JURISDICTION

The study also made use of a comparative model assessing the nature of internet shutdowns with that of the Pakistani jurisdiction. Observations of similarities were made with key issues emerging that Zimbabwe and Pakistan share an almost similar phrasing of the right to freedom of expression although the Pakistani Constitution in limiting rights is reflective of an emphasis on defence and security which is a regional issue. The Pakistani legal system also expressly recognises the authority of Government to suspend telecommunications in circumstances where the President has made a declaration of a state of emergency. Contrary to this the Zimbabwean legal system has shown that internet shutdowns are a foreign aspect that is not recognised in the legislation of the country. It is clear that from the Pakistani comparison internet shutdowns should be implemented within clear and well-defined confines of the law. There should be express law that gives the state the power to engage internet disruptions and it should not just be on the basis of state fears or apprehension of unfortunate events. Recommendations can be drawn, and such are discussed in greater detail below.

5.3 RECOMMENDATIONS

It is clear that the government policy and legislation relating to internet shutdowns in Zimbabwe should be reviewed and measures put in place to ensure that there is a respect for human rights both in the international sphere and domestic sphere.

5.3.1 ALIGNING LEGISLATION TO THE CONSTITUTION

Since the adoption of the new Constitution, there has been very little alignment of certain pieces of legislation which have not been prioritised by the government. It is essential that the government embarks on an alignment process to align Zimbabwe's legislation with the current Constitution such that key limitations to rights are expressed clearly and well-defined setting out the law clearly in an unambiguous manner. Where the law seeks to limit certain right, such limitation should be established in a constitutional manner.

5.3.2 REVIEW OF THE LAW AND POLICY ON NETWORK DISCONNECTIONS

It is common cause that the net effect of internet shutdowns is devastating to both the economy and to human rights. It is essential that the Government should review and assess its policy of resorting to internet shutdowns. The blanket effect of internet shutdowns is unacceptable and detrimental to the country's international image. It is essential for the government to examine whether shutting down the is the most effective response to threats of national security or any other threat. The use of internet shutdowns usually amounts to use of a hammer where there is need of a scalpel. The

Zimbabwean government should explore targeted responses to security threats rather than rendering the whole nation incommunicado. Accordingly, the government should engage telecommunications operators, civil society and the citizens in order to obtain an alternative to the shutting down of communications.

The need for a review of the law is further apparent in that the Interception of Communications Act which government relies on to shut down the internet predates the proliferation of internet access in Zimbabwe. There is, therefore, a need to review the Interception Act and conform it to modern standards that factor in developments in technology and services while expressly providing for the law on internet shutdowns if need be.

5.3.3 ENSURING CONTINUED ACCESSIBILITY TO EMERGENCY SERVICES

Loss of access to emergency services is an inevitable consequence of the loss of internet connectivity and telecommunications. There is a need to ensure that connectivity to emergency services remains available even during internet shutdowns. If the government is to enact specific legislation that authorises internet shutdowns there is need a need to ensure accessibility to critical services otherwise the resultant effect would cause an even more serious threat to human life than the one seeking to be quelled.

5.3.4 ENACTING LEGISLATION THAT PROVIDES FOR INTERNET SHUTDOWNS IN ZIMBABWE

If the Zimbabwean government wants to continue making use of internet shutdowns there should be an enactment of legislation that provides expressly and explicitly for the shutdown and suspension of the internet in a clear, concise and transparent manner. The government is duty-bound to ensure that there clear-cut legislation to ensure that citizens regulate their conduct. This is a fundamental rule of law principle. By enacting legislation, the government ensures that there is respect for the rule of law. The legislation should be premised on Zimbabwe's human rights obligations in order to ensure a balance between national security concerns and fundamental rights and obligations such as the right to freedom of expression. Shutting down the internet is ordinarily under the purview of the executive and in order to ensure continued respect for the separation of powers doctrine and a balance of power executive order. It is paramount that any law that authorises the shutting down of the internet should be subject to parliamentary review and judicial oversight.

5.3.5 ENHANCING OVERSIGHT MECHANISMS

There is a need for the development of an oversight mechanism or judicial review system that looks at the conduct of government and its security agencies that are responsible for instituting internet shutdown mechanisms. This is in order to enhance transparency and curb the abuse of state power. This ensures that there is accountability as internet shutdowns would become a matter of public record and information made available. When state action is shrouded in secrecy it is manifestly

difficult to assess the legality of conduct as there would be no way to test whether such action is necessary or proportional. Judicial oversight ensures internet shutdowns be reviewed before or after their occurrence to ensure compliance with the law and whether human rights concerns have been addressed. The oversight body can be empowered with a reporting mechanism to ensure that the public confidence in the government is not undermined. This again is consistent with the rule of law. The lack of an oversight mechanism would render the citizens vulnerable to state exploitation of their rights with no recourse.

5.4 CONCLUSION

Having analysed the legislative provisions that the Government argued granted powers there is an absence of provisions that even subtly or remotely suggest that the legislature intended for the minister to have unlimited powers such as to authorise a total or even partial internet shutdown under the Interception of Communications Act. Blocking the entire internet is so extreme as it has far-reaching economic, social and political effects.²⁴⁹ Implementation of the internet shutdowns fails to satisfy the requirements for limiting the right to freedom of expression as set out in international law instruments. Accordingly, it can be concluded that Internet Shutdowns in Zimbabwe have no legal basis.

²⁴⁹ M T Majome January 19, 2019 <https://www.newsday.co.zw/2019/01/legality-of-blocking-the-internet-simplified/>

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