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RESEARCH TOPIC:

**A CRITIQUE OF THE ZIMBABWE INTERNET GOVERNANCE LEGAL
FRAMEWORK IN LIGHT OF THE 2019 INTERNET SHUTDOWNS**

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The undersigned certify that they have read, signed and recommended to the Midlands State University for acceptance, a research project entitled: **A CRITICAL ANALYSIS OF THE ZIMBABWE INTERNET GOVERNANCE LEGAL FRAMEWORK IN LIGHT OF THE 2019 INTERNET SHUTDOWNS**. The project was submitted by **SANDRA FUNGAI KABAYA**, Student Registration Number **R151285N**, in partial fulfillment of the requirements of a Bachelor of Laws (Honours) Degree in the Faculty of Law at **Midlands State University**.

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DECLARATION

I, **SANDRA FUNGAI KABAYA (R151285N)** do hereby declare that this dissertation entitled '**A CRITICAL ANALYSIS OF THE ZIMBABWE INTERNET GOVERNANCE LEGAL FRAMEWORK IN LIGHT OF THE 2019 INTERNET SHUTDOWNS**', is my own work and a result of my own investigation and research, save to the extent indicated in the references included in the body of the research, and that to the best of my knowledge, it has not been submitted either wholly or in part thereof for any other degree or examination at any other University.

.....

...../...../.....

Student's Signature

Date

DEDICATION

To my late brother, Nobert Kudzai Kabaya. Ordinary citizens who have been or will be affected by internet shutdowns or archaic internet governance laws, this dissertation is for you also.

ACKNOWLEDGEMENTS

My inmost appreciation goes to Lord Almighty, my family and to Ms F Chakauya, my supervisor. Well, **I am because you are!**

ACRONYMS

AU	African Union
CCK	Communication Commission of Kenya
GATS	General Agreement on Trade in Services
GC	General Comment
HH	High Court Harare
IGF	Internet Governance Forum
KHRC	Kenya Human Rights Commission
OECD	Organisation for Economic Cooperation and Development
OSCE	Organisation for Security and Cooperation in Europe
ICA	Interception of Communications Act
ICCPR	International Covenant on Civil and Political Rights
ICT	Information and Communication Technology
ISPs	Internet Service Providers
ITU	International Telecommunications Union
KICA	Kenya Information and Communications Act
MC	Media Centre
MISA	Media Institute of Southern Africa
OECD	Organisation for Economic Co-operation and Development

POTRAZ	Postal and Telecommunications Regulatory Authority of Zimbabwe
PTA	Postal and Telecommunications Act
UN	United Nations
UNHRC	United Nations Human Rights Commission
SA	South Africa
SADC	Southern African Development Community
WTO	World Trade Organisation
ZDI	Zimbabwe Democratic Institute
ZLR	Zimbabwe Law Reports
USA	United States of America

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CHAPTER ONE

1.1 Introduction

The significance of internet governance laws, frequently categorised as instruments regulating freedom of expression, must not be ignored.¹ While internet governance was not prioritised in the erstwhile epochs, it has lately gained more traction, largely due to technological advances that resulted in flagrant human rights violations.² Regrettably, this concept remains unexplored in Zimbabwe. Accordingly, this study aims to investigate the effects of Zimbabwe's internet governance laws on enjoyment of freedom of expression in light of the 2019 internet shutdowns. A comparison will be made between the internet governance laws in Zimbabwe and Kenya.

1.2. Background of Study

This study is impelled by the January 2019 Internet Shutdowns, following utilisation of social media platforms such as WhatsApp, Facebook and Twitter to protest, rebel and systematize anti-government actions.³ These internet shutdowns echo African governments' yearn to have restrictive internet governance laws that erode freedom of expression.⁴ Consequently, Zimbabwe is an individual replica of an Arab problem, the 2011 Arab Spring Revolts made possible by internet and social media.⁵

Besides, States are obliged to have laws that protect society from freedom of expression violations.⁶ In this respect, the Zimbabwean Constitution provides for

¹ J M Chenou 'Is Internet governance a democratic process? Multi-stakeholderism and transnational elites' <https://www.ecpr.eu/filestore/paperproposal/1526f449-d7a7-4bed-b09a-31957971ef6b.pdf> (Accessed 2 June 2019).

² M Mueller, A Schmidt & B Kuerbis 'Internet Security and Networked Governance in International Relations' (2013) Vol 15 *International Studies Review* 86-104.

³ 'Internet Shutdown Challenged' *Newsday* 19 January 2019.

⁴ 'Time is up: Uganda in court over internet shutdowns that violate human rights' 8 November 2018 <https://www.accessnow.org/uganda-in-court-over-internet-shutdowns/> (Accessed 2 June 2019).

⁵ P N Howard & M M Hussain *Democracy's Fourth Wave?: Digital Media and the Arab Spring* (2013) 35-36.

⁶ EU Guidelines on freedom of expression online and offline' https://ec.europa.eu/europeaid/sites/devco/files/170703_eidhr_guidelines_single_02_freedom_expression_on_off_0.pdf (Accessed 2 June 2019).

freedom of expression.⁷ Also, constituting part of Zimbabwe's internet governance laws⁸ is the Postal and Telecommunications Act (PTA)⁹ and the Interception of Communications Act (ICA).¹⁰ These statutes regulate freedom of expression online, a chief concern of this century, but do not seem to be sufficient to protect Zimbabweans¹¹ Against this backdrop; this research aims to give a critical analysis of Zimbabwe's Internet governance laws.

1.3. Problem Statement

It seems the Zimbabwean internet governance laws are unable to address the internet governance concept in a holistic manner that promotes freedom of expression. The ICA, a statute containing majority internet governance clauses, is not meticulously devised permitting unwarranted restrictions on freedom of expression contrary to international law. Given that most commercial transactions are conducted online; many are disinclined to engage with a nation that has insufficient internet governance laws.¹² On that basis, this study seeks to expose effects of Zimbabwe's inadequate internet governance laws on freedom of expression.

1.4. Research Objective

The study's chief objective is to explore the impact of laws regulating social media on users' rights in Zimbabwe.

⁷ Constitution of Zimbabwe Amendment (No 20), Act (2013).

⁸ ZDI 'Ordeals in 'the long-walk to Freedom': The State of Internet Governance in Zimbabwe' <http://www.kubatana.net/2017/12/05/ordeals-long-walk-freedom-state-internet-governance-zimbabwe/> (Accessed 6 June 2019).

⁹ PTA [Chapter 12:05].

¹⁰ ICA [Chapter 11:20].

¹¹ N Msonza 'State of Internet Freedom in Uganda 2016: Charting Patterns in the Strategies African Governments Use to Stifle Citizens' Digital Rights' http://www.cipesa.org/?wpfb_dl=235 (Accessed 1 October 2019)

¹² 'The 10th Internet Governance Forum (IGF): 'Evolution of Internet Governance: Empowering Sustainable Development 10-13 November 2015' https://www.intgovforum.org/cms/10th%20IGF%20Chairs%20Summary_Finalv2.pdf (Accessed 5 June 2019) ; OSCE 'Governing the Internet-Freedom and Regulation in the OSCE Region' 26 July 2007 <https://www.osce.org/fom/26169> (Accessed 5 June 2019)

The study's sub-objectives are as follows:

- (i) To examine the relevance of internet governance laws in light of international internet governance laws.
- (ii) To give a critical analysis on the repercussions of Zimbabwe's insufficient internet governance laws on freedom of expression.
- (iii) To compare Internet governance laws of Zimbabwe and Kenya
- (iv) To draw conclusions and make recommendations.

1.5. Research Methods

Desktop method will be used in this research, entailing utilisation of sources such as academic writings, websites and case authorities. Owing to deficient internet governance literature in Zimbabwe, reliance will be on international books and articles. Besides, this research will benefit from a comparative analysis with Kenya owing to its fêted reverence for internet governance laws.

1.6. Delimitations

The chief focus of the writer will be on scope and relevance of Zimbabwe's internet governance laws. To tackle this, the study will examine Zimbabwe's 2019 internet shutdowns and implications of insufficient internet governance laws. Internet crimes will not, however, form component of this research and comparative analysis will be restricted to Kenya.

1.7. Significance of Study

This study is imperative as it centres on a germane contemporary phenomenon, targeting primarily Africans states whose internet governance laws have been sternly misplaced. Examining internet governance laws will assist those advocating for internet freedom to have a legal admiration of such laws. Perhaps, viciousness linked with insufficient internet governance laws will halt.

1.8. Chapter Synopsis

Chapter One

The aims, problem statement, research methodology, delimitations, background and relevance of study are identified in this Chapter.

Chapter Two

This Chapter concentrates on internet governance relevance in light of international internet governance laws.

Chapter Three

This Chapter proffers a critical analysis on repercussions of Zimbabwe's insufficient internet governance laws on freedom of expression.

Chapter Four

This Chapter compares internet governance laws of Zimbabwe and Kenya.

Chapter Five

This Chapter has the conclusion and recommendations.

CHAPTER TWO

2.1 Introduction

This Chapter examines the nature and importance of internet governance laws. In order to have a concrete background to discuss the effects of insufficient internet governance laws, this chapter examines regional and international internet governance laws.

2.2 Relevance of Internet Governance Laws

Following rise in ICTs, internet governance concerns have augmented.¹³ This is owing to an upsurge in internet usage to attain information,¹⁴ increased social media use to dent political rights¹⁵ and augmented fear of possible infringements.¹⁶ Consequently, unhindered internet access must be a goal for all,¹⁷ as the way ICTs are regulated inexorably affects lives.¹⁸

Conspicuously, internet users are ordinary citizens in a tenuous state, compared to governments that can embargo internet use without apprising users or following ideal procedures, a peril to freedom of expression. Yet, this does not connote that governments manipulate the internet but is a cue for vigilance in application of internet

¹³W H Dutton 'Multi-stakeholder Internet Governance?' 16 May 2015 <http://www.pubdocs.worldbank.org/en/591571452529901419/WDR16-BP-Multistakeholder-Dutton.pdf> (Accessed 8 June 2019).

¹⁴M Diomidous, K Chardalias, A Magita, P Koutonias, P Panagiotopoulou&J Mantas 'Social and Psychological Effects of the Internet Use' 2 February 2016 <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4789623/> (Accessed 8 June 2019).

¹⁵Z Beauchamp 'Social media is rotting democracy from within: How social platforms enable far-right politicians' campaigns to undermine democracy' 22 January 2019 <https://www.vox.com/policy-and-politics/2019/1/22/18177076/social-media-facebook-far-right-authoritarian-populism> (Accessed 20 August 2019).

¹⁶ L Rainie, J Anderson&J Albright 'The Future of Free Speech, Trolls, Anonymity and Fake News Online' 29 March 2017 <https://www.pewinternet.org/2017/03/29/the-future-of-free-speech-trolls-anonymity-and-fake-news-online/> (Accessed 20 August 2019).

¹⁷ N Jackson 'United Nations Declares Internet Access as a basic Human Right' 3 June 2011 <https://www.theatlantic.com/technology/archive/2011/06/united-nations-declares-internet-access-a-basic-human-right/239911/> (Accessed 20 August 2019).

¹⁸ P Elena *Frames and Connections in the Governance of Global Communications: A Network Study of the Internet Governance Forum* (2012) 9.

governance laws, as effectiveness of such laws rests on protecting citizens from those who try to stop their online communications.¹⁹

2.3 International Internet Governance Laws

2.3.1. International Covenant on Civil and Political Rights (ICCPR)²⁰

This Convention guarantees freedom of expression meaning freedom to obtain, gather and use information notwithstanding borders and through any medium of preference.²¹ This clause also applies to the internet, as it is a means of contemporary communication.²² However, it is subject to limitations; that is; measures undertaken must serve a valid purpose, must be necessary and legal.²³ However, these limitations must not be construed as enabling unjustifiable violations of international internet governance laws. Notably, the ICCPR has been devised to forecasts technological advances making it a good starting point for understanding key internet governance legal concepts.²⁴

2.3.2. Constitution of the International Telecommunication Union (ITU Constitution)²⁵

ITU is a cardinal organisation in the internet governance field²⁶ and has binding regulations.²⁷ A typical ITU provision confers rights to suspend communication appearing hazardous to state security.²⁸ Basically, this principle empowers governments to cut-off online communications. This is, however, only permissible if in conformity with

¹⁹ H Clahmann, P Otto, V Djordjevic & J Maire *Who governs the internet players and fields of action* (2017) 11.

²⁰ ICCPR 16 December 1966.

²¹ ICCPR (n 20 above) Article 19(2).

²² M K Land 'Toward an International Law of the Internet' (2013) Vol 54 *Harvard International Law Journal* 394-458.

²³ ICCPR (n 20 above) Article 19.

²⁴ M K Land (n 22 above) 394.

²⁵ 'ITU Constitution 2002' <https://www.itu.int/council/pd/constitution.html> (Accessed 17 August 2019).

²⁶ 'The ITU role in internet governance' <https://www.itu.int/itu-news/manager/display.asp?lang=en&year=2005&issue=07&ipage=itu-role&ext=html> (Accessed 17 August 2019).

²⁷ 'Regulatory Publications ITU 2019' <http://www.itu.int/pub/R-REG> (Accessed 19 August 2019).

²⁸ ITU Constitution (n 25 above) Article 34(2).

the three-part test,²⁹ an internationally passable basis for restricting speech,³⁰ which is a challenge in this century.³¹ It also condones measures restricting freedom of expression.³² Since it is binding, where a measure has been introduced by a Member State, it has a duty to enlighten others.³³

2.3.3. General Agreement on Trade in Services Annex on Telecommunications (GATS Annex on Telecommunications)³⁴

The Annex' chief rationale is to ensure public availability of telecommunications facilities³⁵ and to ensure that no measure may be imposed on networks other than required.³⁶ It endeavours to strike equilibrium between regulating online information and facilitating trade online.³⁷ An archetypal example is when a country limits online information flow; in a WTO dispute, this intervention constitutes an infringement if it is disproportionate to accomplishment of trade-related aims and if the policy is legitimate, it may conclude that there is no infringement.³⁸ Although, these initiatives can be implemented at national level, due to global interconnectivity, they may impinge on information flows across borders.³⁹

²⁹ 'Freedom Of Expression And The Telecommunications And Internet Access Sector Submission of ARTICLE 19: Global Campaign for Free Expression 2016' <http://www.ohchr.org/Documents/Issues/Expression/Telecommunications/Article19.pdf> (Accessed 2 June 2019).

³⁰ T Mendel 'Restricting Freedom of Expression: Standards and Principles Background Paper for Meetings Hosted by the UN Special Rapporteur on Freedom of Opinion and Expression' <http://www.law-democracy.org/wp-content/uploads/2010/07/10.03.Paper-on-Restrictions-on-FOE.pdf> (Accessed 2 June 2019).

³¹ E Sutherland 'The Internet and human rights: access, censorship, shutdowns, and surveillance' 11-12 June 2018 <http://hartworkshop2018.com/Ewan%20Sutherland.pdf> (Accessed 2 June 2019).

³² J C York 'Multi-stakeholder approach to internet governance' 6 December 2012 <https://www.aljazeera.com/indepth/opinion/2012/12/201212592631186992.html> (Accessed 2 June 2019).

³³ ITU Constitution (n 25 above) Article 35.

³⁴ GATS Annex on Telecommunications https://www.wto.org/english/res_e/publications_e/ai17_e/gats_anntelecommunications_jur.pdf (Accessed 2 June 2019).

³⁵ GATS Annex on Telecommunications (n 34 above) Article 4.

³⁶ GATS Annex on Telecommunications (n 34 above) Article 5e.

³⁷ A D Mitchell & J Hepburn 'Don't Fence Me In: Reforming Trade and Investment Law to Better Facilitate Cross-Border Data Transfer' (2017) Vol 19 *Yale journal of Law and Technology* 182; GATS Annex of Telecommunications (n 35above) Article 6.

³⁸ S A Aaronson 'The Digital Trade Imbalance and Its Implications for Internet Governance' Paper Series No 25 http://www.cigionline.org/sites/default/files/gcig_no25_web_0.pdf (Accessed 2 June 2019).

³⁹ J P Meltzer 'The Internet, Cross-Border Data Flows and International Trade' 17 December 2014 <https://www.onlinelibrary.wiley.com/doi/full/10.1002/app5.60> (Accessed 2 June 2019).

2.3.4. OECD Principles for Internet Policy Making (OECD Principles for Internet)⁴⁰

These principles stress the necessity for constant information flow,⁴¹ since global economy relies on this⁴² and the need to promote cross-border services.⁴³ It also acknowledges internet governance multi-stakeholder involvement,⁴⁴ including participation of nongovernmental entities.⁴⁵ Moreover, these OECD principles are aimed at maintaining openness,⁴⁶ and urging governments to respect freedom of expression.⁴⁷ Some internet governance principles captured are:

a. Architectural principle

This principle states that there must be no undue impediment to internet access.⁴⁸ Put simply, internet access must be guaranteed whenever unless the restrictions are legal.

b. Openness principle

Internet openness allows free flow of information.⁴⁹ However, such must be within permissible limitations.⁵⁰ Consequently, internet governance laws must reflect the openness principle.⁵¹

⁴⁰ 'OECD Principles for Internet Policy Making 2014'
<http://www.oecd.org/internet/ieconomy/oecd-principles-for-internet-policy-making.pdf> (Accessed 2 June 2019).

⁴¹ OECD Principles for Internet (n 40 above) Introduction.

⁴² OECD Principles for Internet (n 40 above) Article 1.

⁴³ OECD Principles for Internet (n 40 above) Article 4.

⁴⁴ OECD Principles for Internet (n 40 above) Article 5.

⁴⁵ M Mueller *Networks and States - The Global Politics of Internet Governance* (2010) 12.

⁴⁶ OECD Principles for Internet (n 40 above) Article 8.

⁴⁷ OECD Principles for Internet (n 40 above) Article 14.

⁴⁸ L B. Solum & M Chung 'The Layers Principle: Internet Architecture and the Law' (2004) Vol 79 *Notre Dame Law Review* 815.

⁴⁹ OECD Principles for internet (n 40 above) Article 2; J West 'A Framework for Understanding Internet Openness Global Commission for internet governance' Paper Series: No. 35
https://www.cigionline.org/sites/default/files/gcig_no.35_web.pdf (Accessed 10 June 2019).

⁵⁰ S Box & J West 'Economic and Social Benefits of internet openness' 2 June 2016
[https://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DSTI/ICCP\(2015\)17/FINAL&docLanguage=En](https://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DSTI/ICCP(2015)17/FINAL&docLanguage=En) (Accessed 10 June 2019).

⁵¹ L DeNardis *Protocol Politics: The Globalization of Internet Governance* (2009) 1.

c. Internet Security

The declaration acknowledges Internet security as central to internet data flows.⁵² Internet security measure must enable efficient online flow of information without infringing rights.⁵³

2.4 Regional Internet Governance Laws

2.4.1 Declaration on Internet Governance and Development of Africa's Digital Economy (Declaration on Internet Governance)⁵⁴

This declaration makes reference to key internet governance principles, including accessibility, transparency, security and neutrality.⁵⁵ It is also committed to facilitating unparalleled Internet for all,⁵⁶ by encouraging online respect for freedom of expression.⁵⁷ Chief to this declaration is necessity in adopting domestic laws addressing internet as a prime objective.⁵⁸ Compliance with internet governance multi-stakeholder approach is also encapsulated in this declaration.⁵⁹ As the internet is borderless⁶⁰ and there are strong prospective violations of internet governance, this declaration is indispensable as it lays down clearer internet governance principles

⁵²N Mishra (2017) 'International trade, Internet governance and the shaping of the digital economy', ART Net Working Paper No.168 <https://www.unescap.org/resources/international-trade-internet-governance-and-shaping-digital-economy-awp-no-168> (Accessed 15 August 2019)

⁵³M Taddeo 'Cyber Security and Individual Rights, Striking the Right Balance' (2013) Vol 26(4) *Journal of Philosophy & Technology* 353-356.

⁵⁴Declaration on Internet Governance https://www.afigf.africa/sites/default/files/DeclarationonInternetGovernance_adopitedAUSummit2018.pdf (Accessed 15 August 2019).

⁵⁵ Declaration on Internet Governance (n 54 above) Preamble.

⁵⁶ Declaration on Internet Governance (n 54above) Article 4.

⁵⁷ Declaration on Internet Governance (n 54 above) Preamble.

⁵⁸ Declaration on Internet Governance (n 54 above) Article 14.

⁵⁹ Declaration on Internet Governance (n 54 above) Article 5

⁶⁰ B Maier 'How Has the Law Attempted to Tackle the Borderless Nature of the Internet?' (2010) Vol 18(2) *International Journal of Law and Information Technology* 142–175.

2.4.2. The African Declaration on Internet Rights and Freedoms (African declaration)⁶¹

This declaration is hinged on internationally recognised human rights treaties.⁶² It refers to chief internet governance principles, including openness,⁶³ universal access,⁶⁴ right to due process⁶⁵ and multi-stakeholder internet governance participation.⁶⁶

2.4.3. Joint Declaration on Freedom of Expression and the Internet.⁶⁷

This declaration acknowledges that online freedom of expression restriction is only acceptable if it complies with established international standards (the ‘three-part’ test).⁶⁸ Respecting freedom of expression online promotes universal access.⁶⁹ Pursuant to this convention, internet shutdowns can never be justified, including on grounds of national security or public order.⁷⁰ More specifically, such restrictions should only be made available if ordered by a court, taking into account the effect of this measure on the enjoyment of human rights.⁷¹

2.5 Conclusion

The relevance of internet governance laws and principles of such a framework have been highlighted in this Chapter. More importantly, countries are not expected to retain insufficient internet governance laws, as this may have negative effects for information exchange beyond borders, ultimately affecting international trade and business transactions leading to economic declines. The subsequent Chapter provides a critical analysis of the consequences of inadequate internet governance laws in Zimbabwe.

⁶¹The African Declaration on Internet Rights and Freedoms’
<https://africaninternetrights.org/articles/> (Accessed 15 August 2019).

⁶² African Declaration (n 61 above) preamble.

⁶³ African Declaration (n 61 above) Article 1.

⁶⁴ African Declaration (n 61 above) Article 2.

⁶⁵ African Declaration (n 61 above) Article 11.

⁶⁶ African Declaration (n 61 above) Article 12.

⁶⁷ Joint Declaration on Freedom of Expression and the Internet 1 June 2011
<https://www.osce.org/fom/78309?download=true> (Accessed 17 September 2019).

⁶⁸ Joint Declaration on Freedom of Expression and the Internet (n 67 above) Article 1(a).

⁶⁹ Joint Declaration on Freedom of Expression and the Internet (n67 above) Article 6(a).

⁷⁰ Joint Declaration on Freedom of Expression and the Internet (n 67 above) Article 6(b).

⁷¹ Joint Declaration on Freedom of Expression and the Internet (n 67 above) Article 6c.

CHAPTER THREE

3.1 Introduction

The preceding Chapter highlighted international internet governance laws and importance of internet governance. This chapter provides a critical analysis of Zimbabwe's internet governance laws in order to assess the compatibility of domestic internet governance laws with international internet governance laws.

3.2 Historical Overview of Internet Governance and Freedom of Expression in Zimbabwe

More than 26 years have passed since internet launch in Zimbabwe.⁷² The main suppliers are Econet, Net One, Telecel and Tel One while WhatsApp and Facebook are prevalent social platforms estimated at 12.1 000000⁷³ and 1.100 000⁷⁴ users correspondingly. *Albeit*, Zimbabwe has historically facilitated online communication, it has been experiencing hostilities with serious repercussions on freedom of expression. An archetypal example is the 2019 internet shutdowns, primarily motivated by security concerns.⁷⁵ *Albeit*, there is no specific national legislation intended solely at tackling internet governance in Zimbabwe, there are laws with an impact on freedom of expression and on online users, as will be conversed below.

3.3 Constitutional Scope of Internet Governance and Freedom of Expression

In this digital epoch, freedom of expression protection is fundamental,⁷⁶ as it is at the heart of most democratic nations,⁷⁷ while infringing it is synonymous with strangulating

⁷² MISA Zimbabwe 'Digital Rights Report 2017' <http://www.zimbabwe.misa.org/2018/05/15/misa-zimbabwe-digital-rights-report-2017-available-now/> (Accessed 10 June 2019).

⁷³ F Mudzingwa 'WhatsApp is still the Internet in Zimbabwe: Social media Accounts for over 35% of Mobile Internet data traffic' 5 October 2018 <http://www.techzim.co.zw/2018/10/whatsapp-is-still-the-internet-in-zimbabwe-social-media-accounts-for-over-35-of-mobile-internet-data-traffic/> (Accessed 20 June 2019).

⁷⁴ F Mudzingwa 'Global Report: There Are 1.2 Million Zimbabweans on Social Media' 16 April 2019 <https://www.techzim.co.zw/2019/04/global-report-there-are-12-million-zimbabweans-on-social-media/> (Accessed 10 July 2019).

⁷⁵ 'Internet Shutdowns negatively impacts on Zim Business' Zimbabwe Independent 25 January 2019.

⁷⁶ UNHRC 'General Comment No 34, Article 19, Freedoms of Opinion and Expression' 12 September 2011 <http://www.refworld.org/docid/4ed34b562.html> (Accessed 21 June 2019) ;

the spirit of humanity.⁷⁸ Given the importance of freedom of expression, Zimbabwe's Constitution as the country's supreme law⁷⁹ recognises freedom of expression as imperative⁸⁰ and technology as principal to development.⁸¹ Rights associated with freedom of expression are increasingly being realised online; including freedom to associate⁸², to demonstrate⁸³ as well as access to information⁸⁴ and political rights.⁸⁵ Additionally, this constitution recognises that the permeation of the Internet into many aspects of life means that it affects other rights, such as life⁸⁶, health⁸⁷ and education.⁸⁸ This is because information on these rights is easily accessed online.

Freedom of expression is not, however absolute,⁸⁹ as it excludes hatred or malevolent damage to human dignity.⁹⁰ Sadly, there is nowhere where these conditions are defined in this constitution, leaving room for neglect.⁹¹ Emergency laws are provided for, where appropriate, to restrict freedom of expression.⁹² This has implications on internet governance, with the view that anyone violating national security may not use freedom of expression as a defence. Such limitations remain legal for as long as they are fair

⁷⁷ *Woods and Others v Minister of Justice & Others* 1994 (2) ZLR 195 (S) ; *Cox v Louisiana* (2) 379 US 559 (1965) 574 ; *In re Munhumeso & Ors* 1994 (1)ZLR 49(S) at 56G-H ; *Indian Express Newspapers (Bombay) v Union of India* (1985) 2 SCR ; *Govt of the Republic of SA v Sunday Times Newspaper & Anor* 1995 (2) SA 221 (T) ; *Retail ; Mandela v Falati* 1995 (1) SA 251 (W) ; *Retrofit (Pvt) Ltd V PTC & Anor* 1995 (2) ZLR 199 (S) ; *S v Turrell&Ors*1973 (1) SA 248 (C).

⁷⁸ R Srivastava & N Shah 'India: Limited Access Restricting Expression' 28 October 2015 <https://www.apc.org/en/pubs/india-limited-access-restricting-expression> (Accessed 3 July 2019).

⁷⁹ Zimbabwean Constitution (n7 above) Section 2.

⁸⁰ Zimbabwean Constitution (n7 above) Section 61(1).

⁸¹ Zimbabwean Constitution (n7 above) Section 31.

⁸² Zimbabwean Constitution (n7 above) Section 58

⁸³ Zimbabwean Constitution (n7 above) Section 59

⁸⁴ Zimbabwean Constitution (n7 above) Section 62.

⁸⁵ Zimbabwean Constitution (n7 above) Section 67.

⁸⁶ Zimbabwean Constitution (n7 above) Section 48.

⁸⁷ Zimbabwean Constitution (n7 above) Section 76.

⁸⁸ Zimbabwean Constitution (n7 above) Section 75.

⁸⁹ B A Mutingwende 'A legal Analysis of Internet Shutdown in Zimbabwe 2019' 28 January 2019 <https://www.spiked.co.zw/a-legal-analysis-of-internet-shutdown-in-zimbabwe/> (Accessed 3 July 2019); *Law Society of Zimbabwe v Minister of Communications* SC 28/02.

⁹⁰ Zimbabwean Constitution (n7 above), Section 61(5).

⁹¹ ZDI & MC 'The Cybercrime and Cyber security Bill: Grave consequences on Internet Freedoms in Zimbabwe' http://www.kubatana.net/wp-content/uploads/2018/03/zdi_mc_cybercrime_bill_analysis.pdf (Accessed 3 July 2019).

⁹² Zimbabwean Constitution (n7 above) Section 87.

and necessary.⁹³ Simply put, it is appropriate to perform a compliance test; the three-part test,⁹⁴ being a standard test as set out in Chapter Two.

3.4 Legislation

3.4.1. Interception of Communications Act (ICA)

Albeit, this Act was initially drafted for telephone and mail services,⁹⁵ it extends to any form of communication that may be intercepted, including the internet. Of the various statutes which have an effect on internet governance, only the ICA contains all-embracing clauses. However, in terms of technological innovation, this Act is old⁹⁶ and has not been revised to comply with international standards.⁹⁷ The following issues hoist apprehension regarding internet governance:

(a) Warrants are controlled by the executive.

Applications for warrants are submitted to the Minister of Communication or any other Minister to whom the President may assign,⁹⁸ contrary to international laws stipulating that authorizations for intercepting communications should be issued by an independent judiciary.⁹⁹ This also contradicts the constitution, which stipulates that neither the government nor state may interfere with the judiciary.¹⁰⁰

The only supervision available under this Act comes from the Prosecutor General.¹⁰¹ However his authority is limited to future warrants and not to remedy the damage suffered. Thus, most powers rests not with the courts, as required by international law,

⁹³ Zimbabwean Constitution (n7 above) Section 86(2).

⁹⁴ ICCPR (n 20 above) Article 19.

⁹⁵ ICA (n 10 above).

⁹⁶ *Zim's ICT development lags behind'* The Zimbabwe Independent 21 December, 2007; N Ngwenya 'Surveillance under the garb of rule of law' <https://www.giswatch.org/en/country-report/communications-surveillance/zimbabwe> (Accessed 3 July 2019).

⁹⁸ ICA (n 10 above) Section 5(2).

⁹⁹ *Klass and Others v Germany* (1978) 2 EHRR 214; *Huvig v France* (1990) 12 EHRR 528.

¹⁰⁰ Zimbabwean Constitution (n7 above) Section 164(2)(a).

¹⁰¹ ICA (n 10 above) Section 19.

but on the Minister.¹⁰² Consequently, the government has too much power to disrupt social networks at any time it deems fit.¹⁰³ These broad grounds make internet governance illusory and incompatible with international standards, since discretion rests solely on the Minister alone.

(b) Lack of transparency

It is not a requirement to publish reports on warrants under this Act.¹⁰⁴ Although the Act facilitates appeals on a decision once notified of a warrant, there are no requirements for such information to be made public. This is contrary to international law, particularly, the openness principle. Such a loophole exposes deficiencies in Zimbabwe's internet governance laws.¹⁰⁵ If internet governance problems are resolved, imperative public policy issues of this century will be addressed.¹⁰⁶

(c) Failure to clearly state the period for warrant renewals.

The Act does not specify number of times warrants may be extended,¹⁰⁷ except for a good cause requirement.¹⁰⁸ This gap may result in abuse by any Applicant where they may continue to monitor and intercept individual's communication for an indefinite period.

3.4.2 Postal and Telecommunications Act (PTA)¹⁰⁹

This is a very old ICT regulation Act. Such use of archaic internet governance laws is an obstacle to enjoyment of freedom of expression as provided for in international

¹⁰² O F Ngwende 'Interception of communication in Zimbabwe, a comparative analysis' (2017) Vol 23(1) *Imperial Journal of Interdisciplinary Research* 852.

¹⁰³ 'Court Watch 1/2019-The Internet shutdown: The High Court's Ruling of 21st January' 31 January 2019 <https://www.veritaszim.net/node/3397> (Accessed 3 July 2019).

¹⁰⁴ ICA (n10) above) Section 6(1).

¹⁰⁵ O F Ngwende 'The Interception of Communications laws in Zimbabwe: Assessing the impact on the Fundamental Right to privacy' (2017) Vol 3 *Imperial Journal of Interdisciplinary Research* 819-827.

¹⁰⁶ D Laura *The Global War for Internet Governance* (2014) 1.

¹⁰⁷ ICA (n10) above) Section 7(1).

¹⁰⁸ ICA (n10) above) Section 7.

¹⁰⁹ PTA (n 9 above).

law.¹¹⁰ In the context of internet governance, this Act has serious shortcomings. First of all, administration of this Act is subject to POTRAZ, which is not independent.¹¹¹ A further shortcoming is that the Act forbids sending threatening and grossly offensive messages.¹¹² These are prone to subjective definitions that can easily be manipulated to thrash internet freedoms, as opinions or criticism may be labelled false or threatening.¹¹³

3.4.3 Cybercrime and Cyber Security Bill¹¹⁴

This is yet another restrictive manoeuvre for internet freedoms.¹¹⁵ Despite that it has not been implemented; the writer believes this bill would be excessive. The main problem is that the Minister of State Security controls the internet,¹¹⁶ continuing a pattern in which the internet is in the executive's hands contrary to international law. More so, the Bill criminalises internet interference¹¹⁷ with the exception that, if it is authorised by law, service providers and state agents may carry out all forbidden acts online, including blocking authorised computer use.¹¹⁸ Critics describe it as an attempt to violate citizens' rights,¹¹⁹ while quiet about safeguarding citizen's liberties.¹²⁰ If this bill is intended to protect society, it is fine, but if to persecute, it will face unexpected forms of resistance.¹²¹

¹¹⁰ M N Momen 'Myth and Reality of Freedom of Expression on the Internet' (2019) 12 June 2019 <https://www.tandfonline.com/doi/abs/10.1080/01900692.2019.1628055> (Accessed 3 July 2019).

¹¹¹ Unpublished: S Maponga 'An analysis of POTRAZ in light of international best practices' Unpublished LLB Dissertation, Midlands State University, (2016) 24.

¹¹² PTA n 9 above) Section 88.

¹¹³ ZDI & MC (2018) (n 91 above).

¹¹⁴ Cybercrime and Cyber security Bill 2017

<http://www.ictministry.gov.zw/sites/default/files/downloads/Cybercrime%20and%20Cybersecurity%20Bill%202017%20Third%20draft.%20with%20CN%27s%20additions%20Printed%20for%20CHAIRMAN%20%26%20MINISTER%20dd%209%20June%202017%20-%20MICTPCS%20comments-4.pdf> (Accessed 19 July 2019).

¹¹⁵ ZDI & MC (n 91 above).

¹¹⁶ ZDI & MC (n91 above).

¹¹⁷ Cybercrime and Cyber Security Bill (n 114 above) Section 9.

¹¹⁸ Cybercrime and Cyber Security Bill (n 114 above) Section 8(e-g).

¹¹⁹ S Ndema 'Majority of Zimbabweans want the governments out of private communications religious speech' 5 October 2017 <https://www.afrobarometer.org/publications/ad165-majority-zimbabweans-want-government-out-private-communications-religious-speech> (Accessed 19 July 2019).

¹²⁰ ZDI & MC (n114 above).

¹²¹ 'Artists and Cybercrime bill' Daily News 10 October 2016.

3.5 Implications of Inadequate Internet Governance Laws

Although there is a domestic internet governance framework, there is much to be said about the consequences of such a framework's inadequacy as will be discussed below.

Inadequate internet governance laws are a direct tool for stifling human rights, although they claim to protect the public.¹²² Zimbabwe has had a fair share of these implications. Popular among all these are the 2019 internet shutdowns, which were subject to public scrutiny as they were driven by the governments' desire to suppress the uprisings.¹²³

The net effect was that ordinary citizens were unable to access social media platforms.¹²⁴ Since the internet and economic growth are intertwined,¹²⁵ these shutdowns had impacts on business because operators could not access their bank accounts or conduct local and international transactions.¹²⁶ Lives were also at risk because telemedicine and financial services relying on internet-based communication were affected.¹²⁷

In fact, this was an unwavering interference with freedom of expression and related rights, including freedom of conscience and political rights¹²⁸ bearing in mind that online interaction is essential in this internet age, since it is indispensable for the realisation of rights¹²⁹ and has potential to address socio-economic gaps.¹³⁰ Although it can be claimed that shutting down of a single network in the midst of a public protest may have an impact on only a few individuals, the scope of the constraint on freedom of expression violates the principle of proportionality.¹³¹

¹²²N Yanshuo 'Cleaning Cyberspace' 29 June 2017

http://www.bjreview.com/Nation/201706/t20170626_800099012.html (Accessed 27 July 2019).

¹²³'Legality of Zim's internet shutdown' The Zimbabwe Independent 18 January 2019.

¹²⁴'Ed sued over internet blackout' Daily News 19 January 2019.

¹²⁵R J Domanski, *Who Governs the Internet? A Political Architecture* (2015) 3.

¹²⁶'Internet Shutdown Challenged' Newsday Zimbabwe 19 January 2019.

¹²⁷'Digital Rights Lessons from Zimbabwe's Internet Shutdown' Newsday 28 March 2019.

¹²⁸Zimbabwean Constitution (n 7 above) Section 67.

¹²⁹B Skepys 'Is there a human right to internet' (2012) Vol 5 *Journal of Politics and Law* 15-29.

¹³⁰Y J Lim & S E Sexton 'Internet as a human right: A practical legal Framework to address the unique nature of the medium and to promote development' (2012) Vol 7 *Washington Journal of law, technology & Arts* 298.

¹³¹D Kaye 'Primer on Internet shutdowns and the law'

Albeit, some claim that this was intended to preserve national security, such an aim must reflect Zimbabweans desire to live without fear and must be achieved with the utmost respect for fundamental rights and the rule of law.¹³² Even if some argue that restriction of internet freedoms maintains order, rather there is need to protect freedoms or order will be undermined.¹³³ Notably, the 2019 MISA Judgment¹³⁴ was a disappointment to many as it did not capture how these internet shutdowns and the ICA were incompatible with human rights, particularly freedom of expression¹³⁵

What seems appealing is that in implementing internet shutdowns, individuals aim to cripple political views, but ultimately disrupt part of their economy.¹³⁶ This is demonstrated by the world economy, which lost USD\$2, 4 000000000 due to deliberate internet disruptions.¹³⁷ Internet damage to world economy is even estimated as exceeding one trillion yearly¹³⁸ and in Zimbabwe, it is USD\$5 000000 diurnal in direct costs,¹³⁹ added to lost opportunities and damage to country's reputation, a reputation made popular because of the 'open for business' mantra.¹⁴⁰

In the same vein, internet governance laws pigeonholed as inadequate thwart information flow imperative to facilitate trade between Zimbabwe and other countries.¹⁴¹ Derisory protection may also lead to consumer confidence diminution owing to

https://www.ohchr.org/Documents/Issues/Expression/Telecommunications/AccessPart_I.docx (Accessed 2 July 2019).

¹³² Zimbabwean Constitution (n 7 above) Section 206.

¹³³ UN 'Curtailling Freedom Does Not Preserve Order, But Undermines It, Secretary General tells Conference on Internet Security Forum' 29 April 2014 <http://www.un.org/press/en/2014/sqsm15808.doc.htm> (Accessed 2 July 2019).

¹³⁴ *Zimbabwe Lawyers for Human Rights & Anor v Minister of State in the President's Office for National Security & Others* HH 265/19.

¹³⁵ 'Court Watch 1/2019-The Internet shutdown: The High Court's Ruling of 21st January' <https://www.veritaszim.net/node/3397> (Accessed 2 July 2019).

¹³⁶ 'Internet Shutdowns as major constraints for digital political activism in the Horn of Africa' 4 May 2017 <https://www.life-peace.org/hab/internet-shutdowns-as-major-constraints-for-digital-political-activism-in-the-horn-of-africa/> (Accessed 26 July 2019).

¹³⁷ D M West 'Internet shutdowns cost countries 2.4 billion last year' October 2016 <https://www.brookings.edu/wp-content/uploads/2016/10/intenet-shutdowns-v-3.pdf> (Accessed 13 July 2019).

¹³⁸ R K Knake *Internet Governance in an Age of Cyber Insecurity* (2010) 82.

¹³⁹ M Sibanda 'Zimbabwe: Gvt Hurts Own Economy with Internet Shutdown' 16 January 2019 <https://www.allafrica.com/stories/201901160644.html> (Accessed 16 July 2019).

¹⁴⁰ 'Internet shutdown negatively impacts on Zim businesses' The Zimbabwe Independent 25 January 2019.

¹⁴¹ 'Internet shutdown draconian' Daily News 17 January 2019.

trepidation induced by supposition that expression may be restricted and will consequently become a business hurdle.¹⁴² Notably, even if the internet does not equate to democracy, its impact on obliteration of democracy is beyond doubt.¹⁴³

Importantly, inadequacy of internet governance laws diminishes investment prospects, as no serious investor will invest in a country that completely blocks the internet.¹⁴⁴ It is thus indispensable to have laws protecting internet users from state meddling, since internet governance is necessary in facilitating free flow of information.¹⁴⁵ Incontrovertibly, Internet governance should be premised on governance rather than on governments.¹⁴⁶ Internet governance laws, which have proved incapable of safeguarding freedom of expression online,¹⁴⁷ should therefore be revised even if there is much to be done.¹⁴⁸ The harm caused by restrictions in this digital era really needs to be understood and solved.¹⁴⁹

3.6 Conclusion

In précis, the following issues were discussed in this Chapter; that Zimbabwe is a nation that has made efforts to govern the internet; yet, after careful inspection, Zimbabwe's internet governance laws are insufficient. This inadequacy has serious repercussions not only on freedom of expression, but also on economic development. Thirdly in light of international law, especially the three-part test and principles set out in Chapter two, the

¹⁴²Policy Brief: Internet Shutdowns' 13 November 2017

<https://www.internetsociety.org/policybriefs/internet-shutdowns> (Accessed 16 July 2019).

¹⁴³ D Joyce 'Internet Freedom and Human Rights' (2015) Vol 26 *European Journal of internal law* 493-514.

¹⁴⁴ N Matshazi 'Digital Rights Lessons From Zimbabwe's Internet Shutdown' 20 February 2019 <http://www.zimbabwe.misa.org/2019/02/20/digital-rights-lessons-from-zimbabwes-internet-shutdown/> (Accessed 16 September 2019).

¹⁴⁵ G Nolasco 'Freedom of Expression on the Internet and the Law in Tanzania' (2016) Vol 46 *Journal of Law, Policy and Globalization* 29-39.

¹⁴⁶ L DeNardis *The Global War for Internet Governance* (2014) 11.

¹⁴⁷ J Bader 'To Sign or Not to Sign. Hegemony, Global Internet Governance, and the International Telecommunication Regulations' (2019) Vol 15 *Foreign Policy Analysis Journal* 244-262.

¹⁴⁸ A Sears (2015) 'Protecting Freedom of Expression over the Internet: An International Approach' (2015) Vol 5 *Notre Dame Journal of International & Comparative law* 200.

¹⁴⁹*Okoiti v Communications Authority of Kenya* Constitution Petition 53 of 2007 <http://www.kenyalaw.org/caselaw/cases/view/151117/> (Accessed 20 September 2019) ; *Kenya Human Rights Commission v Communications Authority of Kenya* Constitutional Petition 86 of 2017 <http://kenyalaw.org/caselaw/cases/view/151191/> (Accessed 15 October 2019).

measures; primarily internet shutdowns and the domestic legal framework, predominantly ICA have failed to comply with internationally recognised principles.

CHAPTER FOUR

4.1 Introduction

The prior Chapter dealt with Zimbabwe's internet governance laws and how they do not comply with global benchmarks. The Chapter also exposed negative effects of such inadequacy on freedom of expression, international trade and investment. This Chapter presents a comparative study between Zimbabwe and Kenya's internet governance laws. Focus is on importance, adequacy and challenges of internet governance and freedom of expression in Kenya juxtaposed with the Zimbabwean position as assessed in the previous Chapter. Accordingly, this Chapter enlightens Zimbabwe on how to learn from Kenya about implementation of robust internet governance laws.

4.2. Overview of Freedom of Expression and Internet Governance in Kenya

Kenya is considered a key participant in internet governance.¹⁵⁰ ICTs in Kenya account for a quarter of the country's GDP,¹⁵¹ as they aid investment opportunities and economic growth.¹⁵² The economic blueprint vision 2030¹⁵³ and the Kenya ICT Policy¹⁵⁴ provide guidance on improving livelihoods through provision of ICT services.¹⁵⁵

¹⁵⁰ D Souter & M K Makau 'Internet Governance in Kenya – An assessment for the internet society' https://www.researchictafrica.net/multistake/Souter_Kerretts-Makau_2012_-_Internet_governance_in_Kenya_-_an_assessment_for_the_Internet_Society.pdf (Accessed 20 June 2019).

¹⁵¹ A Munyua 'Exploring the multi stakeholder experience in Kenya' (2016) Vo 1 *Journal of Cyber Policy* 206-221.

¹⁵² T M Waema 'Understanding what is happening in Kenya A supply and Demand side Analysis of the ICT sector' (2012) Policy Paper 9 https://www.researchictafrica.net/publications/Evidence_for_ICT_Policy_Action/Policy_Paper_9_Understanding_what_is_happening_in_ICT_in_Kenya.pdf (Accessed 23 June 2019).

¹⁵³ M N Ndung'u , C Lewis & O Mothobi 'After Access The State of ICT in Kenya' Policy Paper No.9, Series5 <https://www.researchictafrica.net/2019/07/08/after-access-the-state-of-ict-in-kenya/> (Accessed 3 June 2019) ; Kenya Vision 2030(Popular Version) <https://www.vision2030.go.ke/publication/kenya-vision-2030-popular-version/> (Accessed 23 July 2019).

¹⁵⁴ 'National Information & Communications Technology (ICT) Policy' https://www.researchictafrica.net/countries/kenya/National_ICT_Policy_2006.pdf (Accessed 3 August 2019).

¹⁵⁵ B Piper, E Jepkemei, D Kwayumba & K Kibukho 'Kenya's ICT policy in Practice. The effectiveness of Tablets and E readers in improving student outcomes' (2015) Vol 2 *Forum for International research in Education* 3-18.

Undeniably, when historians write an African digital story, Kenya is likely to be at the forefront of the continents ICT revolution.¹⁵⁶

This reputation is premised on numerous factors. Central to these factors is that Kenya launched the first IGFs, providing a model that is followed by other States and has assisted in stimulating the development of IGFs elsewhere enhancing Kenya's profile in international Internet governance activity.¹⁵⁷ Last but not least, Kenyan progressive internet governance laws have intrigued over fourteen millions users who use the internet mainly to communicate and search for information.¹⁵⁸ All these reasons provide useful yardsticks for evaluating internet governance activities in other countries on the continent, including Zimbabwe, the country under study.

4.3 Constitutional Freedom of Expression and Internet Governance in Kenya

The Constitution of Kenya (Kenyan Constitution) being the supreme law,¹⁵⁹ acknowledges ICTs as an efficient means of ensuring active citizen engagement in life-forming choices.¹⁶⁰ Freedom of expression in Kenya, as in Zimbabwe includes freedom to find, obtain and share information.¹⁶¹

Apparently, Kenyan constitutional provisions on freedom of expression have striking similarities with Zimbabwean provisions. The only distinction, contrary to Zimbabwean position is that the Kenyan Constitution provides clearer definitions of significant terms of internet governance such as hate speech.¹⁶² This conspicuous difference ensures

¹⁵⁶ A Van Der Spuy 'What if we all governed the Internet Advancing Multi stakeholder participation in internet governance' (2017) 25.

¹⁵⁷ D Souter & K Makau (n 150 above).

¹⁵⁸ Julisha: Kenya ICT Market Survey Report 2011' 8 May 2012 <https://www.sites.google.com/a/ict.go.ke/tandaa/activities/julishakenyaictmarketsurvey2011> (Accessed 25 June 2019).

¹⁵⁹ 'Kenyan Constitution 2010' <http://www.kenyalaw.org/kl/index.php?id=398> (Accessed 17 July 2019)

¹⁶⁰ N Salome 'Has Kenya's ICT revolution triggered more citizen participation?' 30 November 2016 <https://www.makingallvoicescount.org/publication/kenyas-ict-revolution-triggered-citizen-participation/> (Accessed 17 July 2019).

¹⁶¹ Unpublished: E K Morusoi 'The right to freedom of expression and its role in political transformation in Kenya' Unpublished LLD thesis University of Pretoria, 2016 6; Kenyan Constitution (n 154 above) Article 33;

¹⁶² Article 33(2) d of the Kenyan Constitution states that 'the right to freedom of expression does not extend to advocacy of hatred that constitutes ethnic incitement, vilification of others or incitement to cause harm or is based on and ground of discrimination.'

that freedom of expression is not abused. The Kenyan Constitution can therefore be commended for this progressive stunt.

4.4. Legislation

4.4.1. Kenya Information and Communications Act (KICA)¹⁶³

This Act establishes key internet governance authorities responsible for fulfilling Kenya's obligations under any international treaty.¹⁶⁴ Some key stakeholders will be discussed below.

4.4.1.1. Minister of ICT

The Minister's power is limited to issuing and publishing internet governance policy guidelines in the Gazette.¹⁶⁵ Disparate with Zimbabwe, such publication enables one to firmly say that Kenya complies with international internet governance ideals of transparency and openness. Importantly, the Minister implements ICT policy¹⁶⁶ and engages in internet policy discussions.¹⁶⁷ This Act, contrary to Zimbabwean laws, should be commended as the Minister does not have broad and undefined powers.

4.4.1.2. The CCK

The CCK is responsible for deployment of internet infrastructure and regulation of ISPs.¹⁶⁸ One notable success of the CCK is that it espoused multi-stakeholder approach and stakeholder engagement in promulgation of internet governance laws.¹⁶⁹ The authority is also involved in international internet policy negotiations on behalf of Kenya,

¹⁶³ KICA (Chapter 411A).

¹⁶⁴ KICA (n 163 above) Section 5.

¹⁶⁵ KICA (n 163 above) Section 5 A.

¹⁶⁶ 'The Kenya National ICT Master Plan 2014-2017'

<https://www.kenet.or.ke/sites/default/files/Final%20ICT%20Masterplan%20Apr%202014.pdf> (Accessed 25 June 2019).

¹⁶⁷ KHRC 'Mapping ICT/Internet Environment: The Internet legislative and Policy Environment in Kenya' <http://www.file:///C:/Users/student/Favorites/Downloads/TheICTLegislativeandPolicyEnnvironmentinKenya.pdf> (Accessed 12 July 2019).

¹⁶⁸ 'CCK Consultative Paper No 4/09 Stakeholders feedback on the consultative paper on the establishment of a Universal Service Fund' <https://ca.go.ke/wp-content/uploads/2018/03/Analysis-of-Responses-on-the-establishment-of-a-Universal-Service-Fund.pdf> (Accessed 12 July 2019).

¹⁶⁹ KHRC (n 167 above).

for instance as a key point of interaction between Kenya and ITU,¹⁷⁰ making it the most relevant authority, since it influences policy direction.¹⁷¹

The Act also requires this authority to be independent.¹⁷² Chief to note is the board members appointment process,¹⁷³ where a selection committee (representatives of the government, private sector and civil society) must recruit members of the board.¹⁷⁴ This makes the regulator more independent from government and is consistent with international internet governance principle of transparency, a stance that can be applauded contrary to Zimbabwe, which leaves no room for public input. Thus, worth celebrating is that the KICA represents a noteworthy step towards cyberspace regulation. On the other hand, the situation has been trivialized, or there has been lack of political will to enact specific laws on internet governance in Zimbabwe

4.4.2. Kenya Computer Misuse and Cybercrimes Act

Kenya has recently transformed its bill into a Computer Misuse and Cyber Crimes Act, adding to its robust laws in combating internet governance problems.¹⁷⁵ This is a major step contrary to Zimbabwe, which has made assertions in previous years that it has prepared draft cyberspace bills, but nothing palpable has emerged from that.¹⁷⁶ Consequently, Zimbabwe has inadequate laws to deal with social media issues.¹⁷⁷

This Act may be celebrated as it seeks to safeguard freedom of expression and other human rights.¹⁷⁸ Put simply, it seeks to improve Cyber issues in Kenya,¹⁷⁹ as it also

¹⁷⁰ KHRC (n 167 above).

¹⁷¹ KHRC (n 167 above).

¹⁷² KICA (n 163 above) Section 5 B ; 'Kenya Country Report Freedom on the Internet 2018' <https://www.freedomhouse.org/report/freedom-net/2018/kenya> (Accessed 12 July 2019).

¹⁷³ KICA (n 163 above) Section 6.

¹⁷⁴ 'ICT in governance in Kenya-Policies and Practice' <https://cipesa.org/2015/10/ict-in-governance-in-kenya-policies-and-practice/>(Accessed 24 September 2019).

¹⁷⁵ 'Kenya: The Computer Misuse and Cyber Crimes Act' 26 November 2018 <https://www.roedl.com/insights/kenya-computer-misuse-cybercrime-act> (Accessed 23 July 2019).

¹⁷⁶ 'Zim needs fresh cyber-bullying laws' Daily News 25 August 2014.

¹⁷⁷ V Langa 'Potraz targets Baba Jukwa' 26 August, 2014 <https://www.southerneye.co.zw/2014/08/26/potraz-targets-baba-jukwas/> (Accessed 11 September 2019).

¹⁷⁸ 'Kenya: The Computer Misuse and Cyber Crimes Act' (n 175 above).

¹⁷⁹ M Muendo 'Kenya's New Cybercrime law opens the door to privacy violations' 29 May 2018 <http://www.theconversation.com/kenyas-new-cybercrime-law-opens-the-door-to-privacy-violations-censorship-97271> (Accessed 11 September 2019).

establishes the National Computer and Cybercrime Coordination Committee, whose mandate includes assessment of cyber incidents threatening Kenyan cyberspace.¹⁸⁰

Conspicuously, these statutes can be applauded for granting empowered individuals power to seek warrants through court orders contrary to Zimbabwean ICA, which confers wide powers on the executive in violation of international law. Kenya's specification reflects Kenya's commitment to universal collaboration in combating freedom of expression online violations.

4.5 Conclusion

Conclusively, Kenya has comprehensive internet governance laws which, in the writer's view, deal passably with internet governance problems compared to Zimbabwe. This is attributable to that Kenya's policy implementation by internet governance stakeholders is transparent and the presence of separate departments overseeing the internet governance field allows for checks and balances. Furthermore, Kenyan Internet Governance Authority is an independent entity, leaving no doubt as to government aptitude to impede internet governance. Nonetheless, it is submitted that Zimbabwe must emulate the Kenyan position, primarily the KICA, in order to comply with the adequacy standard in international law. Several issues hang in the balance if Zimbabwe chooses to continue with internet governance laws as they stand. The goal is to find where Zimbabwe can learn and improve; accordingly, the next chapter will focus on recommendations.

¹⁸⁰Kenya: The Computer Misuse and Cybercrimes Act (n 175 above).

CHAPTER FIVE

5.1. Introduction

This is the last Chapter, and at the core of this Chapter are recommendations from a scrutiny of internet governance laws in erstwhile Chapters. What can be construed from the above-mentioned Chapters is a legal conclusion that not only contributes to current internet governance issues, but also to future issues.

5.2. Chapter Overview

Chapter One presented the legal problem and elucidated the background to this research. Chapter Two outlined significance and scope of internet governance and freedom of expression in international law. In view of the 2019 internet shutdowns, the third Chapter focused on internet governance and freedom of expression in Zimbabwe. This Chapter also exposed the effects of Zimbabwe's inadequate internet governance laws on freedom of expression, foreign direct investment and international trade. Chapter 4 compared Zimbabwe's internet governance laws with Kenya.

5.3 Findings

The writer noted:

That internet governance is vital since it enables free flow of information.¹⁸¹ That archaic internet governance laws thwart freedom of expression.¹⁸² That executive involvement in internet governance is inexorably detrimental to internet governance principles.¹⁸³ That permitting freedom of expression violations by arbitrary interventions, such as internet shutdown, contributes to pandemonium and may affect international trade.¹⁸⁴ That currently Zimbabwean internet governance laws are not sufficient to regulate the entire sector.¹⁸⁵

¹⁸¹ See Para 3.5 on page 18 of the study.

¹⁸² See Para 3.4.2 on page 14 of the study.

¹⁸³ See Para 3.4.3 on page 17 of the study.

¹⁸⁴ See Para 3.5 on page 17 of the study.

¹⁸⁵ See Para 3.6 on page 18 of the study.

5.4 Recommendations

The writer recommends:

5.4.1 Specific Legislation

Zimbabwe needs specific internet governance laws, since the present does not address internet governance problems.¹⁸⁶ These laws must be consistent with international internet governance laws. Apt laws will solve internet governance problems.¹⁸⁷

5.4.2 Internet Governance Policy

Zimbabwe must have clear internet governance policies upholding internet governance principles including openness and transparency. This is to help individuals understand revolving internet governance policy issues¹⁸⁸ as well as assist society to engage meaningfully in shaping the future of Internet governance.¹⁸⁹

5.4.3 Internet Governance Authority

There must be an independent Internet Governance Authority in compliance with international and regional internet governance laws in order to limit government's influence which may undermine its authority.

5.4.4. Relevant internet governance stakeholders

Stakeholders are at the heart of an internet governance legal framework.¹⁹⁰ Zimbabwe, like Kenya, needs to involve numerous internet governance stakeholders for a

¹⁸⁶ 'State of Internet freedom in Zimbabwe' https://www.cipesa.org/?wpfb_dl=231 (Accessed 1 July 2019).

¹⁸⁷ A Callamard 'Are courts re-inventing Internet regulation?' (2017) Vol 31 *International Review of Law, Computers & Technology* 323-339.

¹⁸⁸ OECD 'Internet policy and governance' 18 December 2017

<http://www.oecd.org/sti/ieconomy/internet-policy-and-governance.htm> (Accessed 1 August 2019).

¹⁸⁹ 'Our Shared Digital Future Building an Inclusive, Trustworthy and Sustainable Digital Society' 10 December 2018 <http://www.weforum.org/reports/our-shared-digital-future-building-an-inclusive-trustworthy-and-sustainable-digital-society> (Accessed 1 August 2019).

¹⁹⁰ E Calandro 'Stakeholders involvement and participation in the internet governance Ecosystem: African perspective' <https://www.semanticscholar.org/paper/Stakeholders'-Involvement-and-Participation-in-the-Calandro/378ff77201f29507637501050e20dfef63c21e79> (Accessed 1 August 2019).

participatory internet governance system.¹⁹¹ In so doing, they must circumvent having concentrated power in the executive to resolve the intricate nature of internet governance.¹⁹²

5.4.5. Internet shutdowns

Zimbabwe must ensure internet shutdowns are within defined legal principles and must comply with the three-tier test of proportionality, legality and necessity, in line with the ICCPR, signed and ratified by Zimbabwe

5.4.6. ISPs

ISPs in Zimbabwe should espouse clear mechanisms to manage internet shutdown orders and government requests. This can be accomplished by advising users about internet shutdown possibilities and engaging them in discussions on how to stop these shutdowns.¹⁹³ Disclosures are essential as they provide information to enable differentiation between typical Internet glitches and government sanctioned mayhems.¹⁹⁴

5.4.7. Internet orders

Any Internet governance order must be overtly accessible.¹⁹⁵ For instance, when faced with government demands that violate human rights, ISPs should interpret such

¹⁹¹ APC 'Enhancing cooperation among stakeholders in internet governance' May 2012 <https://www.apc.org/en/pubs/enhancing-cooperation-among-stakeholders-internet>(Accessed 1 August 2019).

¹⁹² J Kulesza *International Internet Law*, 2012(xiv)

¹⁹³ 'Policy Brief: Internet Shutdowns' 13 November 2017 <https://www.internetsociety.org/policybriefs/internet-shutdowns>(Accessed 1 July 2019).

¹⁹⁴ 'Building trust between the State and Citizens A policy brief on internet shutdowns and elections in Kenya' https://www.kictanet.or.ke/wp-content/uploads/2017/09/Kenya_Policy_Brief_On_Internet_Shutdowns.pdf(Accessed 1 July 2019).

¹⁹⁵ 'The court must decide the greater legal issues regarding internet shutdowns, Veritas Lawyers agrees with our earlier position' 31 January 2019 <https://www.techzim.co.zw/2019/01/the-court-must-decide-on-the-greater-legal-issuesregarding-internet-shutdown-veritas-lawyers-agrees-with-our-earlier-position/>(Accessed 1 July 2019).

requests narrowly,¹⁹⁶ request a court order before government requests are met and communicate risks associated with government demands.¹⁹⁷

5.4.8. Judiciary internet governance familiarisation

The judiciary needs to appreciate current internet governance issues so that they are better placed to adjudicate fairly when such cases are brought before them. If the judiciary continues to interpret internet governance issues through inadequate laws, even the dead will be disconsolate.

5.5 Conclusion

In summation, it is clear that Zimbabwe is facing stern consequences of freedom of expression online violations, which is a clear call for Zimbabwe to enact internet governance laws consistent with international law. This would eradicate some problems of inadequate internet governance laws, not only to open up investment and international trade but also to safeguard freedom of expression.

¹⁹⁶ OHCHR 'Global network Initiative' 1 April 2014 <https://www.ohchr.org/Documents/Issues/Privacy/GlobalNetworkInitiative.pdf>.

¹⁹⁷ K Kittichaisaree 'Public international law of cyberspace' (2017) 335-356.

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