

DIALLING IN THE LAW



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*A Comparative Assessment of
Jurisprudence on Internet Shutdowns*

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⁴ About CYRILLA: <https://cyrilla.org/en/page/jy0cpvu41mxklyye34joiggb9>

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Background

Government-mandated disruptions of internet access are becoming increasingly frequent around the world.⁶ Under the guise of a variety of reasons, most prominently including the safeguarding of public order and national security interests, restricting internet access has typically been used as a tool to quell dissent and organisation during key political moments such as protests, civil strife, anniversaries of key historical events or elections. This has been the recourse of governments across political systems⁷—democratically elected governments, authoritarian regimes and countries in transition have all been documented as shutting the internet down, even for months at a stretch.

Concerted international attention towards the severe harms caused by internet shutdowns is also emerging. The 2017 report by the United Nations Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression submitted to the United Nations Human Rights Council looks at illegal internet communication shutdowns.⁸ The report argues that states and governments are increasingly relying on telecommunications companies, internet service providers and other actors to cut access to the internet and monitor expression online. Given this environment, the report charts out a series of measures that the digital access industry can undertake to identify, prevent and mitigate risks to freedom of expression caused due to internet shutdowns. The report references Human Rights Council resolution 32/13 which unequivocally condemned measures that sought to intentionally prevent or disrupt access to or the dissemination of information online.⁹ The motivations of state actors to impose internet shutdowns also often thrives in legal vacuums.

As a result of legislative forbearance to address these, legal barriers challenging internet shutdowns have also increased recently, albeit with mixed results.¹⁰ Litigation has transcended national and continental borders—with cases being heard in India, Pakistan, Democratic Republic of Congo, Indonesia and Cameroon.¹¹ Many of these cases have been unsuccessful in restoring internet access, although there have been recent victories. Regardless of the outcome of these litigation processes, the discourse galvanised by these processes have been crucial in terms of bringing this issue to light on a global scale. Vibrant local and transnational advocacy groups working towards resisting internet shutdowns too have fostered and played a crucial role in achieving discursive and material gains¹² when penalties or restrictions evincing the harshness of the law are tempered or better clarified by court justices.

About this report

This report and the associated workbook seeks to contribute to the discourse in three ways. First, we hope to open an extensible documentation and overview of practices, experiences, and resources on the legitimisation of, and resistance to, state-backed internet shutdowns across the world. Second, we seek to enable and advance a collective understanding of emerging legal and jurisprudential frameworks being used to legitimise and resist internet shutdowns. Free and open access to such data would help human rights lawyers and civil society advocates to locate relevant jurisprudence and accordingly tailor strategies.

6 Access Now. (2020). Targeted, Cut Off, and Left in the Dark: The #KeepItOn Report on Internet Shutdowns in 2019. *Access Now*. <https://www.accessnow.org/cms/assets/uploads/2020/02/KeepItOn-2019-report-1.pdf>

7 Ibid.

8 United Nations. (2017). *Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression to the United Nations Human Rights Council*. United Nations. <https://www.undocs.org/A/HRC/35/22>

9 Resolution adopted by the Human Rights Council on 1 July 2016 - 32/13. The promotion, protection and enjoyment of human rights on the Internet

10 Access Now. (2019). Judges raise the gavel to #KeepItOn around the world. *Access Now*. <https://www.accessnow.org/judges-raise-the-gavel-to-keepiton-around-the-world/>

11 Ibid.

12 Keck, M., & Sikkink, K. (2019). Transnational advocacy network in international and regional politics. *International Social Science Journal* 65-76. <https://onlinelibrary.wiley.com/doi/epdf/10.1111/issj.12187>

Finally, by discussing case law, we hope to fill in the gaps in transnational legal and jurisprudential aspects on internet shutdowns globally.

While a lot of attention has been placed on the technological, sociological and international human rights aspects of internet shutdowns, their situatedness in domestic legal frameworks is relatively understudied. The report does not discuss the social, economic or political impacts of internet shutdowns but limits itself to looking at litigation challenging the internet shutdown. This report should be read with the accompanying workbook that delineates case and judgement details of legal challenges to internet shutdowns across the world.¹³

This workbook will be updated in line with subsequent developments and as we receive more information. An internet shutdown is defined as “an intentional disruption of internet-based communications, rendering them inaccessible or effectively unavailable, for a specific population, location, or mode of access, often to exert control over the flow of information.”¹⁴ Internet shutdowns have grave societal impacts, particularly on vulnerable populations who need access to internet based services and on civil society organisations using the internet to work. It also has grave economic costs. The Global Network Initiative attempted to estimate this cost and found that “the per day impact of a temporary shutdown of the Internet and all of its services would be on average \$23.6 million per 10 million population.”¹⁵

Governments use various methods to block access to internet or restrict access to specific websites.¹⁶ One method is URL- based blocking which prevents access to a list of pre-decided websites. A second method is called throttling which imposes severe limits on traffic to specific sites thereby giving the user an impression of slow service, thereby turning them away from the website. The final method, is asking telecom companies to shut down the internet entirely, thus preventing data access altogether.

Methodology and research limitations

This research initially involved desk research to procure judgement copies and study various aspects of available documentation relating to litigation on internet shutdowns to prepare the workbook, identify trends, and craft strategies for litigation concerning internet shutdowns globally. It is pertinent to note that the litigation being analysed pertains to instances of extreme network disruptions implemented by or upon the direction of state authorities. These are often referred to as internet shutdowns, network shutdowns, internet blackouts, and others.. An assessment of litigation concerning similarly egregious infractions on human and fundamental rights through tools such as censorship of content online, targeted website blocking/banning etc. is beyond the scope of this research.

The authors tried to source English language copies of the petitions filed and judgements/orders made for each instance of litigation on internet shutdowns anywhere in the world, but were not entirely successful. For some of the cases for which the authors were unable to source the primary documentation, secondary literature where the same was available was used and analysed. The researchers also included one case, that in the Karnataka High Court in India, where a petition challenging the internet shutdown in Kashmir was filed, but no judgement has been rendered yet.

Observations

Case background

Political climate

It is well-documented that governments around the world resort to shutting down the internet to prevent significant political uprisings.¹⁷ Litigation challenging internet shutdowns have therefore taken place in adverse political climates.

13 Rathi, A. & Basu, A. et.al. (2020). *Dialling in the Law (DITL) Workbook*. A workbook delineating case and judgement details of legal challenges to internet shutdowns across the world. <https://docs.google.com/spreadsheets/d/14s7JmGpAoVSTgltLOSnpTpskuUIFFx9MgwZMMn20nUc/edit?usp=sharing>

14 Internet Society. (2019). Policy Brief: Internet Shutdowns. *Internet Society*. https://www.internetsociety.org/policybriefs/internet-shutdowns#_edn3/

15 Delloitte LLP. (2016). The economic impact of disruptions to Internet connectivity: A report for Facebook. *Delloitte, LLP*. <https://globalnetworkinitiative.org/wp-content/uploads/2016/10/GNI-The-Economic-Impact-of-Disruptions-to-Internet-Connectivity.pdf>

16 Giles, C. (2019, 21 March). Africa Internet: How do governments shut it down? <https://www.bbc.com/news/world-africa-4773484>

17 Berhan Taye, B. (2019) The State of Internet Shutdowns Around the World; The 2018 #KeepItOn report. *Access Now*. <https://www.accessnow.org/cms/assets/uploads/2019/07/KeepItOn-2018-Report.pdf>

Some countries experiencing internet shutdowns are also faced with an erosion of the separation of powers by incumbent governments, calling into question the willingness and ability of courts to be a neutral arbiter.¹⁸ In some cases, such as Gaurav Sureshbhai Vyas and Murad Khazbiev, courts paid excessive deference to the discretion of the government while also hastily rushing to conclusions about the intentions of the protestors. However, the reality is quite the opposite—governments have used internet shutdowns to further their grip on democratic processes and unleash violence.¹⁹

In several cases, the internet shutdown was preceded and accompanied by the unleashing of severe state violence. Take the backdrop of ZLHR and MISA Zimbabwe. The directive shutting the internet down was prompted by public debates, discussions and protests in response to a 200% hike in fuel prices announced by the government of Emmerson Mnangagwa.²⁰ What ensued was Zimbabwe's security forces meting out violence at a scale unseen in at least a decade.²¹ The Zimbabwe Human Rights NGO Forum recorded 844 human rights violations in the first four 4 days of the strike.²²

These did not include hard-to-quantify violations such as those privacy invasions and derogation of informational freedoms. Similarly, the Indonesian government used excessive force against anti-racism protests in West Papua, which resulted in arrests and injuries of the protestors, as well as one person killed.²³ The government also ordered internet shutdowns and banned journalists from accessing the protests. Under the pretext of preventing the spread of false information, the Ministry of Communication and Informatics throttled and then blocked the internet in the provinces of Papua and West Papua.²⁴ Despite the adversity, the petitioners in both these cases

successfully challenged these shutdowns in both instances.

Petitioners

Who are the petitioners?

In most cases of internet shutdowns that have been challenged in a court of law, the petitioners have been public spirited lawyers, human rights groups, media persons and even law students. In several instances, petitioners and petitioner groups have been supported by different transnational efforts, bodies and coalitions. It is imperative for this support to continue as petitioners are often under-resourced and may face retaliation from the state.

Strikingly, in CM Pak, the appellant—CM Pak Limited—is a major Pakistan-based telecommunications service provider operating through a license granted by the Pakistan Telecommunication Authority.²⁵ The successful appeal was heard together with connected petitions by customers of licensed providers of telecommunication services such as CM Pak. CM Pak was arguing for the rights granted to it by the license - of being able to provide uninterrupted services to its customers. It should be noted that the appeal was filed by CM Pak only after the Islamabad High Court solicited responses for telecommunications providers while hearing a public interest petition.²⁶

Petitioners' arguments

Admissibility

It is pertinent to note that the Supreme Court of Pakistan in PTA, in April 2020, overturned CM Pak. Petitioners adopted a variety of arguments both on admissibility and the merits of each case. The first hurdle was admissibility and getting the

18 Ndifor, B. (2014). The Politicization of the Cameroon Judicial System. *Journal of Global Justice and Public Policy* Volume 1:1. https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3172973

19 Gohdes, A. (2015, 24 February). When Internet access becomes a weapon. <https://www.washingtonpost.com/news/monkey-cage/wp/2015/02/24/internet-access-as-a-weapon/?arc404=true>

20 BBC. (2019, 14 January). Zimbabwe protests after petrol and diesel price hike. *BBC*. <https://www.bbc.com/news/world-africa-46862194>

21 The Economist. (2019, 6 January). Zimbabwe sees its worst state violence in a decade. <https://www.economist.com/middle-east-and-africa/2019/01/26/zimbabwe-sees-its-worst-state-violence-in-a-decade>

22 Crisis Group. (2019, 19 January). Revolt and repression in Zimbabwe. <https://mg.co.za/article/2019-01-19-revolt-and-repression-in-zimbabwe/>

23 Lamb, K. (2019, 26 August). West Papua: thousands take to streets after week of violence. *The Guardian*. <https://www.theguardian.com/world/2019/aug/26/west-papua-thousands-expected-at-fresh-protests-after-week-of-violence>

24 Ibid.

25 CM Pak Limited v Pakistan Telecommunications Authority, Para 2.

26 Balooch H. (2018, 23 March). Reflections on the Pakistan Ruling Banning Network Shutdowns. *Institute for Human Rights and Business*. <https://www.ihrb.org/focus-areas/information-communication-technology/commentary-pakistan-network-shutdowns-illegal>

petition heard. In some jurisdictions such as India and Zimbabwe, public interest is an exception to, and relaxation of, the requirement of locus standi (the right to bring an action in court). In this case, any citizen can litigate the alleged violation of fundamental rights on behalf of disenfranchised groups. In jurisdictions where the requirement of locus standi is not relaxed, the petitioners have shown (largely successfully) that they have been personally impacted by the shutdowns and therefore have the right to pursue the claim. In *Murad Khazbiev*, the petitioner stated that he was a part of the protests that led up to the internet shutdown and as a result, the disruption of services was impacting his freedom of expression online. Similarly, in *Amnesty International Togo*, concerning the internet shutdown in Togo, the petitioners argued that they were journalists and human rights organisations that needed the internet to carry out their operations and also express themselves online and were thus directly impacted by the shutdown.

The exception was in *Global Concern Cameroon*, where the petition was rendered inadmissible due to a lack of locus standi, although the circumstances here were exceptional. While there were prima facie infringements of constitutional rights, Article 47 (2) of the Cameroon Constitution posed a challenge as it limits the right to approach the Constitutional Council to the “President of the Republic, the President of the National Assembly, the President of the Senate, one-third of the members of the National Assembly or one-third of the Senators, and Presidents of Regional Executives.”

The petitioners creatively argued that this provision itself was unconstitutional and used the monist nature of Cameroon enshrined in Article 45 of the Cameroon Constitution which states that duly approved or ratified international treaties/agreements has an overriding effect over national laws, including the Constitution.

However, the Cameroon Constitutional Council stuck to the letter of the law and rendered the petition inadmissible. The petitioners tried to bring the same case to a lower court, to the Cameroon High Court, a year later but were similarly unsuccessful in having the petition admitted.

Arguments on merits

Arguments on merits advanced by petitioners can be classified into three buckets.

The first bucket was a procedural question on whether the appropriate legal provision was used by the government to order the shutdown. For example, in *Gaurav Sureshbhai Vyas*, it was argued by the petitioners that Section 144 of the Criminal Procedure Code (CrPC)²⁷ could not be used to shut down the internet and any power to do so, if any, was available only under Section 69A of the Information Technology Act (2002) (IT Act). The parameters listed in Section 69A form a much higher threshold than Section 144 CrPC. Similarly, in *Dhirendra Singh Rajpurohit*, the primary contention of the petitioner was that the Divisional Commissioner of Jodhpur had no authority to suspend the internet services in this manner. In *CM Pak*, the petitioner argued that the suspension of internet services could not be directed by the federal government (through the Telecommunications Authority) on the basis of a mere apprehension. They argued that Section 54(3) of the Pakistan Telecommunication (Reorganization) Act 1996 only allowed suspension of operations under the licenses granted by the Telecommunications Authority of Pakistan only upon the President of Pakistan exercising their power relating to the proclamation of an emergency through Part X of the Constitution. In *ZLHR and MISA Zimbabwe*, the petitioners had argued that the procedure for issuance of the warrant shutting internet services failed to comply with the provisions of the Interception of Communications Act.

The **second** bucket centred around the violations of fundamental rights. Most cases stressed the violations of two fundamental rights in particular—the freedom of speech and expression, and the right to equality. In a few cases, such as in *Zimbabwe and Pakistan*, the petitioners had also argued that right to peaceful association. In *Pakistan*, the petitioners argued that the suspension of the internet, in the manner that it was effected, resulted in violation of a range of fundamental rights enshrined in Pakistan’s Constitution including those of movement, assembly, trade, speech and life.

²⁷ Section 144 of the CrPC empowers an executive magistrate to issue orders in urgent cases of nuisance or apprehended danger. It is often used to prohibit assembly of one or more persons when unrest is anticipated.

In Anuradha Bhasin, too, unreasonable restrictions on the fundamental right to trade due to internet shutdowns was argued by the petitioners.

On freedom of expression, arguments hinged on the unreasonability and disproportionality of the degree of restrictions placed on individuals' speech and expression as a result of the indiscriminate internet shutdowns. The petitioners, Global Concern Cameroon, argued that the provisions in Cameroon's Constitution, read together with regional and international human rights instruments should compel the court to consider fundamental constitutional questions and examine whether "the extent to which executive intrusion into constitutional rights are permissible under Cameroon law; whether access to the Internet is relevant to the realization of constitutional rights in Cameroon; and whether the impugned actions constitute a violation constitutional rights." To bolster their point, a wide array of cases from regional human rights bodies such as the European Court of Human Rights (ECtHR) were cited, along with other international law provisions including Article 19 International Covenant on Civil and Political Rights and Article 19 of the Universal Declaration of Human Rights.

Further, while the petitioners recognised a wide array of statutes that allowed the state to take measures in the interest of law and order, none of them allowed for the internet to be completely shut down. They argued that a shutdown is not in line with the fundamental character of the note and even if a minority of the population have misused the internet, all citizens of Cameroon should not bear the burdens associated with the shutdown. Similarly, petitioners in Karnataka High Court argued that the restrictions imposed on the petitioner's rights were not reasonable and has been recognised by the Supreme Court of India. Citing precedent, they argued that the restrictions must be narrowly tailored and cannot be considered necessary when less restrictive alternatives are available.

On the right to equality, petitioners alleged that targeted internet shutdowns in certain areas were designed by the government to target certain communities, usually communities that were protesting against the government to enforce

their rights. For example, the petitioners in Global Concern Cameroon argued that the geographical scope of the internet shutdown was designed to discriminate against the English speaking (Anglophone) Cameroonians. They argued that the burden of proof was on the respondents (authorities) to justify this discrimination.

To underscore the disproportionate restrictions on fundamental rights, a variety of arguments were adduced. Several petitioners focussed on the peaceful nature of the protests. In Amnesty International Togo, petitioners argued that the protests were based on constitutional reform and were met with brute force and other forms of crackdown through measures such as imprisonment by state authorities. A similar point was made by the petitioners in Murad Khazbiev.

Another way of expressing the illegitimacy of the restriction on freedom of speech and expression was, as in the ZLHR and MISA Zimbabwe, reading an internet shutdown as ultra vires of the law that the government used to pass the order.

In this case, Section 6 of the Interception of Communications Act (Zimbabwe Act) did not authorise a blanket ban or suspension, only the targeted interception of communications, thereby making a suspension of internet services ultra vires the Zimbabwe Act. Petitioners in Banashree Gogoi also made a similar argument. The petitioners argued that Section 5(2) of the Indian Telegraph Act, 1885 (Telegraph Act)²⁸ does not provide for the prohibition or suspension of internet services in their entirety. Additionally, the justification under the Telegraph Act does not include the phrase 'law and order' and therefore, cannot form the basis for imposing shutdowns. Further, they argued that the continued suspension without review or producing any evidence of misuse of internet services violated Section 5(2) of the Telegraph Act.²⁹

Further, it was argued in a few cases that a preemptive shutdown was unconstitutional. For example, petitioners in CM Pak argued that the Telecommunications (Reorganisation) Act of 1996 empower the Federal Government or the Authority to direct the blocking of cellular mobile operations on the basis of mere apprehension.

²⁸ Indian Telegraph Act.(1885). <https://dot.gov.in/sites/default/files/Indian%20Telegraph%20Act%201885.pdf?download=1>

²⁹ Section 5(2) of the Telegraph Act provides for lawful interception of communications by the Indian state, only in the interests of, the sovereignty, and integrity of India, the security of the state, friendly relations with foreign states or public order or for preventing incitement to the commission of an offence.

It was argued that the suspension of telecommunication licenses could only be effected upon a “proclamation of emergency by the President” (as used in section 54 of the Act of 1996 read with Part X of the Constitution of Pakistan). Since no such proclamation preceded the directive suspending internet services, the directive was argued to be unlawful.

The **third** bucket of argumentation on merits centred around the economic impact of the shutdowns. Both actual and estimated impacts were provided by the petitioners. In Amnesty International Togo, the petitioners argued that they could not carry out daily work and the shutdown may have cost the Togolese economy up to USD 1,800,000—a figure arrived by relying on empirical evidence from UN Special Rapporteur on Promotion and Protection of the Right to Freedom of Opinion and Expression.³⁰ The petitioners before the Constitutional Council of Cameroon made a similar empirical claim, although the method of calculation was not produced in the petition. In ZLHR and MISA Zimbabwe, while actual or estimated impacts were not provided by petitioners, the impact on individual businesses, internet banking and inward remittances was a key argument placed before the court.

Respondents

Who are the respondents?

The respondents in all jurisdictions included the state, often through agencies, ministries or departments of the government responsible for implementing or ordering the shutdown. As the state is responsible for upholding fundamental rights, state agencies must be included as respondents in these litigations.

In certain cases, such as in ZLHR and MISA Zimbabwe, telecommunications companies were also added as respondents for having implemented the shutdown.

Respondents’ arguments

A common strategy adopted by respondents was to argue for rendering the petition inadmissible. They focused on the locus standi of the petitioners in jurisdictions where public interest litigation

has not yet been judicially recognized. In Amnesty International Togo, the respondents argued that the human rights organizations did not have locus standi as they were not natural persons nor victims. They also argued that the eighth petitioner—a journalist and activist—had failed to show why they had been individually impacted.

On merits, the respondents (authorities) used three key strategies to respond to the petition, as we describe below.

The **first** strategy was to cast aspersions on the nature and intentions of the protesters, thereby illustrating the necessity of disrupting internet access to prevent the protesters from communicating with each other. It was argued across cases that the protests were already or were in danger of turning violent in the short run. For example, in Amnesty International Togo, the government of Togo alleged that there had been a loss of life as a result of the protests and that the situation was drifting into civil war. In the same case, the government of Togo also cast aspersions on the motivations of the protesters, claiming that they were sparked by opposition parties while the government had sought inclusive dialogue and even sought to amend the Constitution in Parliament, which according to the government was the root cause of the protests.

Similarly, in Jammu and Kashmir, in Anuradha Bhasin, the respondents argued that the usage of social media and mass communication could potentially be used as a means to incite violence, especially from outside the country. They further argued that this danger is compounded by the presence of fake news and images that further instigate such violence, as well as the purchase of weapons on the dark web. The respondents in Murad Khazbiev went so far as to delegitimize the respondents’ claims by alleging that the protesters were engaging in “terrorist” and “diversionary” activities.

In PTA, the Supreme Court of Pakistan acknowledged that a legitimate need for suspending cellular services was felt by law enforcement agencies due to their prior experience of terrorist activities at similar events. This had prompted the suspension directives (which included religious processions, national parades and protests).

³⁰ United Nations. (2017). *Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression to the United Nations Human Rights Council*. United Nations. <https://www.undocs.org/A/HRC/35/22>

The **second** strategy was to illustrate the least restrictive scope of the internet shutdown. In Gaurav Sureshbhai Vyas, the State of Gujarat in India argued that only mobile internet was blocked which meant that people could still access the internet through certain wi-fi or broadband services.

Finally, several respondents argued that the existing domestic legal framework vested the authority in question with the power to order the shutdown. For example, in Banashree Gogoi, the respondents argued that the notifications issued under section 5(2) of the Indian Telegraph Act of 1885 are sufficient justification for the suspension of internet services. The state further argued that there was a review meeting conducted by relevant state authorities where inputs from various intelligence agencies were considered, and the decision to continue the internet shutdown and blocking of bulk SMS was taken. Similarly, the respondents in CM Pak argued that the federal government is vested with the jurisdiction to issue policy directives regarding the closure of internet services due to national security concerns as provided under section 8(2)(c) read with section 54 (2) of the Pakistan Telecommunications (Reorganisation) Act of 1996.

Judgement

Admissibility

Often petitions are dismissed by courts due to them being rendered inadmissible. This may be for a variety of reasons including the lack of locus standi on part of the petitioners, improper forum for redress or lack of a judicial remedy available in the said case.

In several common law jurisdictions that relax the doctrine of locus standi in public interest including India and Zimbabwe, admissibility was not a challenge. In other jurisdictions, courts did examine the locus standi of the petitioner to determine whether it was admissible.

For example, in Amnesty International Togo, it was held that in order for an application to succeed, status of victim or indirect victim needs to be established.³¹ The court acknowledged that the applicants were non-governmental organisations seeking to protect human rights, and therefore, not being able to use the internet has negative repercussions on their functioning.³² Further, citing authority (Dexter Oil v Republic of Liberia)³³ the Court clarified that non-natural persons can enjoy freedom of expression and can initiate action. Therefore, it held that human rights organisations can also be victims of state action and as their daily functioning was impaired by the internet shutdown, they had locus standi.

In the Cameroon case, where a statutory provision was a bar to admissibility, the court chose to opt for the narrow textual reading.³⁴ The Constitutional Council adopted a textual reading of Article 47(2)³⁵ of the Constitution which circumscribes the right to approach the Constitutional Council to a limited number of political functionaries and therefore the independent lawyers and civil society activists which approached in this case did not have the right to approach this court.

Reference to domestic law

Procedural questions

In many instances of successful internet shutdown litigation, courts have favourably looked at petitioners' arguments showing irregular procedural norms and improper usage of domestic statutes by authorities in order to enforce internet shutdowns. Several cases show that, at times, technical and legal questions have played an equal, if not more, role in informing courts' decisions in determining the lawfulness of internet shutdowns.

In Zimbabwe, in the ZLHR and MISA Zimbabwe case, the High Court of Zimbabwe set aside the directive issued by the authority that had passed the directive of Minister of State in the President's Office Responsible for National Security. The High Court took cognizance of the petitioners' argument

³¹ Amnesty International Togo & Ors v The Togolese Republic, Paras 26-36

³² Ibid., Para 36

³³ Dexter Oil Limited v Republic of Liberia

³⁴ Global Concern Cameroon v Ministry of Post and Telecommunication, Cameroon Telecommunication, and State of Cameroon, Pages 3-5

³⁵ Article 47(2) of the Constitution of Cameroon states that matters may be referred to the Constitutional Council by the President of the Republic, the President of the National Assembly, the President of the Senate, one-third of the members of the National Assembly or one-third of the Senators.

³⁶ Interception of Communications Act. (2007). <http://www.veritaszim.net/node/252>

³⁷ ZLHR and MISA Zimbabwe v Minister of State for National Security and Others, Para 47

of procedural infirmity regarding the Minister of State's (lack of) authority to issue any directive under the Interception of Communications Act.³⁶ While this was a preliminary argument made by the petitioners, it was sufficient to allow the High Court to pass a provisional order holding the internet shutdown directive unlawful.³⁷

Similarly, the Islamabad High Court's decision in CM Pak centred on the interpretation of the provisions of the Pakistan Telecommunications (Reorganisation) Act of 1996, particularly sections 8 and 54(3). While Section 8 grants the Federal Government the power to issue policy directives, these are subject to the other provision of the Act of 1996. The Policy Directive issued by the Government is inconsistent with Section 54(3) as the only eventuality contemplated under the Act of 1996 to cause suspension of operation of a license is when the President has proclaimed an Emergency in the exercise of powers conferred under Part X of the Constitution.

In Anuradha Bhasin, the Supreme Court of India also took cognizance of the extent of the state's powers under the relevant statute. The Court referred to Rule 2 of the Suspension Rules,³⁸ which lays down the procedure for any restriction on the internet, as well as Section 5 of the Telegraph Act from which the restrictions are borne.³⁹

They held that since the Suspension Rules only govern the temporary suspension of internet services, the statutorily required Review Committee must, within seven days of the previous review, assess the continued compliance of these orders keeping in mind the principles of proportionality and the fact that the ban cannot be unlimited. Accordingly, two reliefs were awarded. First, the state was mandated to publish all orders suspending the internet so as to enable the challenge of the same before the appropriate fora and secondly, the state was directed to consider allowing government websites, e-banking facilities, hospital services and other such essential services in regions where the internet services is not likely to be restored immediately.

On the other hand, the Gujarat High Court was

far more deferential to the power available to the authorities. In Gaurav Sureshbhai Vyas, the petitioners had argued that Section 144 of the Code of Criminal Procedure, which gave far broader powers to the state, was used to order the shutdown instead of Section 69A of the Information Technology Act, which should have been used instead. However, the court held that there was an appropriate use of Section 144 CrPC as this provision and Section 69A of the IT Act operate in two separate domains. It stated that Section 69A may, in a given case, also be exercised for blocking certain websites, whereas under Section 144 of the CrPC, directions may be issued to certain persons who may be the source for extending the facility of internet access.

It is worth noting that cases where the focus lay on procedural soundness have come at the expense of the courts' consideration of substantive arguments made by petitioners that further the protection of natural and juristic persons' fundamental rights. Both the Zimbabwe and Islamabad High Courts did not delve into substantive questions such as the legality of blanket internet shutdowns.⁴⁰

Human and fundamental rights

In Amnesty International Togo it was held that while access to the internet is not a fundamental human right, it is complementary to the enjoyment of the right to freedom of expression and therefore is both a derivative right and an element of a human right to which states are under obligation to provide for protection in accordance with the law.⁴¹

However, the Supreme Court of Pakistan, overturning CM Pak, stated that a legitimate need to suspend cellular services can arise to preserve national security and public order. It clarified that this power should be proportionate to the threat envisaged, and was valid as long as it was "reasonable, fair, consistent with the object of the law".

Petitions seeking to curb internet shutdown can also expand their arguments centring the fundamentals rights of speech, expression and

³⁸ Temporary Suspension of Services Rules (2017). <https://dot.gov.in/circulars/temporary-suspension-telecom-services-public-emergency-or-public-safety-rules-2017>

³⁹ Anuradha Bhasin v Union of India and Ghulam Nabi Azad v Union of India, Paras 84-88

⁴⁰ Misa Zimbabwe. (2019, 21 January). High Court sets aside internet shut down services. *Misa Zimbabwe*. <https://zimbabwe.misa.org/2019/01/21/high-court-sets-aside-internet-shut-down-directives/>

⁴¹ Amnesty International Togo & Ors v The Togolese Republic, Paras 37-46

⁴² Faheema Shirin v State of Kerala and Others, Para 13

information access. For example, in a landmark decision, the High Court in the Indian state of Kerala read the right to have access to the internet as being a part of the fundamental rights to education and privacy accorded by the Constitution of India.⁴²

All courts recognised “reasonable restrictions” to fundamental rights and also on internet access. The crucial pivot was on understanding the extent of what constitutes “reasonable” and the government's powers to determine the same. In a couple of instances, the court attempted to draw up a framework to assess reasonableness. In *Aliansi Jurnalis Independen (AJI)*, three conditions were laid down to examine the throttling and termination of internet access in West Papua: **first**, the fulfilment of a legitimate aim of human rights limitation which is to recognize and respect the rights and honour of others, or to protect moral, religious values, national security, decency, public order or public health in a democratic society; **second**, the restriction must be based on law; and **third**, it must be proven that such restriction was necessary and proportionate.⁴³ Applying this framework, it was held that the throttling and termination of internet access in West Papua fulfilled the first requirement, which is carried out to protect national security and public order.⁴⁴ The Court held that the shutdown did not meet the second and third requirements because they were not carried out according to the law nor were they proportional.

Similarly, in *Anuradha Bhasin*, the Supreme Court of India held that the right to freedom of speech and expression under Article 19 includes the right to choose the medium of expression, in this case, the internet. Therefore, the freedom of speech on the internet is an essential part of Article 19(1)(a) and consequently any restriction thereon must fulfil the requirements under Article 19(2). These requirements are: first that there must be a law providing for the action; second that the restriction must be reasonable; and third, it must be in

order to further the interest of sovereignty and integrity, security of state, public order or any of the other grounds mentioned in the text of Article 19(2). They rejected the argument of the petitioner that restrictions can never equal complete prohibition and stated that the same is allowed in certain appropriate cases. As per the Court, the requirements to impose a complete prohibition are: first that there must not be an excessive burden on free speech and the government must justify why complete prohibition was the least restrictive measure and; second that the existence of a complete prohibition is a question of fact. Further, they held that the test for proportionality would necessarily involve the prioritization of different interests at stake. In this case, the court held that the government was required to evaluate whether the measure was in line with the reasonable restrictions on free speech allowed under Article 19(2).

In various other instances, no overarching framework was deployed to assess the restrictions on fundamental rights arising from internet shutdowns. Instead, the starting point of the analysis was the threat to national security that the internet shutdown was imposed as a response to. For instance, the Gujarat High Court which upheld the constitutionality of the shutdown made references to the protests as riots and a law and order situation. Bearing this in mind, it held that “hence, it could not be stated that the objective materials were not at all considered [by the state]”.⁴⁵ As per the court, this meant that the court did not need to go into the sufficiency of the material. Deference to the state played out in the court’s fundamental rights analysis as well. It did make a reference to freedom of expression in Article 19 of the Constitution of India but stressed on reasonable restrictions and complete deference to decisions by the state. It did refer to other cases that spoke to fundamental rights including those cited by the petitioner, including *Shreya Singhal v UOI* which struck down Section 66A but held that it revolved around a different context.

43 Aziezi, T. (2020, 19 June). The Implementation of Human Rights Principles in Jakarta Administrative Court Judgement on Internet Access in Papua and West Papua. <https://leip.or.id/the-implementation-of-human-rights-principles-in-jakarta-administrative-court-judgement-on-internet-access-in-papua-and-west-papua/>

44 Ibid.

45 Gaurav Sureshbhai Vyas v State of Gujarat, Para 10

46 Ibid., Para 10

47 Amicus Curiae Submission of Access Now on Aliansi Jurnalis Independen (AJI) and Pembela Kebebasan Berekspresi Asia Tenggara (SAFE)net v The Ministry of Communication and Information (Kominfo) and The President of the Republic of Indonesia. <https://www.accessnow.org/cms/assets/uploads/2020/05/Indonesia-Shutdowns-Amicus-ENG.pdf> Amicus Curiae Submission of Access Now on Amnesty International Togo. https://www.accessnow.org/cms/assets/uploads/2020/06/KIO_ECOWAS_Togo-Intervention.pdf

In Gaurav Sureshbhai Vyas, the Gujarat High Court did not agree with the petitioner's contention that only social media sites should be blocked as against a blanket ban on the access to the internet.⁴⁶ It held that the strategy for dealing with the situation should be left to the discretion of the authorities. Further, it held that the threat of future shutdowns is hypothetical and thus do not warrant any intervention by the court.

Reference to international law

There were limited references to international law in judgements, even though they were referred to in some petitions (such as in Amnesty International Togo) and several *amicus curiae* briefs.⁴⁷ Most judgements revolved around substantive and procedural domestic questions of law.

Bucking this norm was the decision in Aliansi Jurnalis Independen (AJI). The all-women panel of judges comprising of Nelvy Christin, S.H., M.H., Baiq Yuliani, S.H., M.H. and Indah Mayasari, S.H., M.H., in addition to domestic constitutional and human rights provisions, made extensive references to international instruments to derive a three-pronged test for testing the lawfulness of the throttling and termination of internet access in Papua and West Papua. Specific reference was made to the Universal Declaration of Human Rights (UDHR); The International Covenant on Civil and Political Rights (ICCPR); Siracusa Principles on the Limitation and Derogation of Provisions in the International Covenant on Civil and Political Rights; The Johannesburg Principles on National Security, Freedom of Expression and Access to Information; The Camden Principles on Freedom of Expression and Equality and General Comment No. 34 ICCPR concerning Article 19 of the ICCPR which regulates the right to freedom of expression.⁴⁸

Reference to *amicus curiae*

Reference to third-party interventions have been limited. The only exception was the ECOWAS case where the Court stated that it took note of the opinions provided by various experts in the *amicus curiae* briefs and while they were found instructive, the Court stated that the material provided by the parties sufficiently guided the Court to reach an informed decision.⁴⁹

Costs

In none of the cases analysed for this report was the petitioner ordered to pay costs, including in cases where the petitioner lost the case. In fact, both the Constitutional Council and the High Court in Cameroon explicitly stated that there was no mala fide intention on part of the petitioner as they were guided by human rights and a desire to serve society and as a result of which no costs should be imposed. In CM Pak, the single-judge of the Islamabad High Court also suggested that internet shutdowns may trigger claims of compensation, stating that the unlawful suspension of telecommunication services “may expose the Federal Government or the Authority to claims of compensation or damages by the licensees or the users of the mobile cellular services.”⁵⁰

Recommendations for effective litigation

Advocacy efforts can be directed towards better coordination with telecommunications service providers:

Based on an assessment of six telecommunication companies by the Global Network Initiative (GNI), David Sullivan suggests a set of recommendations that the industry should uphold when confronted with government mandated shutdowns. This includes clarifying their legal obligations, documenting all demands which can serve as an evidence base for future litigation, narrow the

48 Aziezi, T. (2020, 19 June). The Implementation of Human Rights Principles in Jakarta Administrative Court Judgement on Internet Access in Papua and West Papua. <https://leip.or.id/the-implementation-of-human-rights-principles-in-jakarta-administrative-court-judgement-on-internet-access-in-papua-and-west-papua>

49 *Amicus Curiae Submission of Access Now on Amnesty International Togo*. https://www.accessnow.org/cms/assets/uploads/2020/06/KIO_ECOWAS_Togo-Intervention.pdf

50 CM Pak Limited v Pakistan Telecommunications Authority, Para 12.

51 Sullivan, D. (2020, 23 August). Five ways telecommunications companies can fight internet shutdowns. <https://www.lawfareblog.com/five-ways-telecommunications-companies-can-fight-internet-shutdowns>

52 Marchant, E & Stremlau, N. (2019). Africa's Internet Shutdowns: A report on the Johannesburg Workshop. *Programme in Comparative Media Law and Policy (PCMLP)*, University of Oxford, p. 17-18, <https://pcmlp.socleg.ox.ac.uk/wp-content/uploads/2019/10/Internet-Shutdown-Workshop-Report-171019.pdf>

53 Rydzak, J. (2018). Disconnected: A Human Rights-Based Approach to Network Disruptions. *The Global Network Initiative*. <https://globalnetworkinitiative.org/wp-content/uploads/2018/06/Disconnected-Report-Network-Disruptions.pdf>

disruption to the extent legally feasible, increase transparency and communicate regularly with users, and finally join advocacy efforts against internet shutdowns.⁵¹

The movement and coalitions working on network shutdowns will be greatly strengthened if telecommunication providers were to join and provide an additional perspective. In Burundi, in 2015 internet service providers sought to resist government directives to shut off access to social media websites to quell protests against President Pierre Nkurunziza third term.⁵² At the same time, they are also exposed to particularly hazardous and precarious positions as implementers of government directives.⁵³ In this case, the ISP's resistance was unsuccessful.

Shoring up arguments on admissibility: The (in) admissibility of petitions is often the states' first line of argumentation. When the letter of the law is clearly stacked against the petitioner, it is unlikely that courts will deviate from it.

The petition in Global Concern Cameroon sought to overturn clear bars on admissibility of the petition in Cameroon's Constitutional Court using the overriding value of international law in Cameroon's monist system. In PTA, the Supreme Court observed that the petition in CM Pak was premature as the petitioners had failed to approach the Federal Government with their grievances. (Para 9)". If litigation is unsuccessful in courts, petitioners can consider alternative modes of putting pressure of advocacy in different fora. For example, in Aliansi Jurnalis Independen (AJI), advocacy efforts in the form of drawing domestic and international attention through online petitions and statements, and expansive news coverage are regarded as particularly helpful in achieving a favourable outcome.⁵⁴

Illustrate the shutdown as proximate and actual causes of harm to highlight victim status of petitioner:

This is critical in jurisdictions where public interest litigation does not relax the doctrine of locus standi. With the central role that the internet plays in the day-to-day functioning at both the individual and institutional levels, arguments articulating the harm caused by internet shutdowns are commonplace, relatively easy to make and often received favourably by courts. Several studies have brought out the same and relying on them would be helpful.⁵⁵

For example, in Amnesty International Togo, a comment highlighting how the internet shutdown has hampered daily activities was sufficient to secure a favourable outcome for the petitioners. In CM Pak, alongside the appeal by CM Pak Limited, several connected petitions were filed by individuals who were using telecommunications services. The filing of multiple petitions could have been a key strategic choice, and may have played a crucial role in securing a favourable judgement.

Importance of technical legal arguments: While larger constitutional questions are important both in terms of the prevailing political situations and precedent value, the most appealing arguments to the court have been rooted in procedural questions. Therefore, petitioners could stress on the appropriateness of the statutes being used, the powers of authorities implementing the shutdown and the mode used to communicate this direction. Favourable outcomes on these questions can serve as incremental gains paving the path for substantive rights-based victories relating to internet shutdowns in the future. In ZLHR and Misa Zimbabwe and CM Pak, the litigation victories were a result of strong procedural arguments illustrating the lack of powers vested in the authorities that had issued directives shutting the internet down.

54 Press Freedom Defender Team. (2020). Internet Shutdown in Indonesia. Presentations at DRLN meeting. https://docs.google.com/presentation/d/1gfaoDCNqs8JlUs3PU3_N3mMvFgx72T8MfpC5qjgf-c/edit#slide=id.p

55 West, D. (2016, October). Internet shutdowns cost countries \$2.4 billion last year. <https://www.brookings.edu/wp-content/uploads/2016/10/internet-shutdowns-v-3.pdf> Kathruia, R & Kedia, M. et.al. (2018, April). The Anatomy of an Internet Blackout: Measuring the Economic Impact of Internet Shutdowns in India. https://icrier.org/pdf/Anatomy_of_an_Internet_Blackout.pdf, Collaboration on International ICT Policy in East and Southern Africa (CIPESA). A Framework for Calculating the Economic Impact of Internet Disruptions in Sub-Saharan Africa. https://cipesa.org/?wpfb_dl=252 Woodhams, S. & Migliano, S. (2020, 7 January). The Global Cost of Internet Shutdowns in 2019. <https://www.top10vpn.com/cost-of-internet-shutdowns/>

56 Collaboration on International ICT Policy in East and Southern Africa (CIPESA). A Framework for Calculating the Economic Impact of Internet Disruptions in Sub-Saharan Africa. https://cipesa.org/?wpfb_dl=252, Kathruia, R & Kedia, M. et.al. (2018, April). The Anatomy of an Internet Blackout: Measuring the Economic Impact of Internet Shutdowns in India. https://icrier.org/pdf/Anatomy_of_an_Internet_Blackout.pdf

Petitioners could submit empirical evidence on the short-run, medium run, and long run impacts of the shutdown: In the cases examined petitioners did this in a variety of ways.⁵⁶ Some petitioners, like in Global Concern Cameroon and Amnesty International Togo estimated the actual economic loss caused by the shutdown. The Jodhpur High Court (Rajasthan, India) in Dhirendra Singh Rajpurohit picked up on the immediate pressing need to resume internet services, which was the ongoing competitive exams for the post of constable and also stated in the order that the internet should not be shut down in the future during competitive exams.

Petitioners could provide evidence on the bona fide intentions of circumstances triggering internet shutdowns Several courts relied and considered the national security restriction by picking up on respondents' arguments about the violent nature of the protests or the possibility of the protests. In Amnesty International Togo, the Togolese government also attempted to convey that they had tried to broker a compromise. Safeguarding public order or national security could be the countervailing consideration that are prioritised at the expense of freedoms of speech and expression. This is also relevant for determining costs regardless of which way the decision goes. If the protests and the litigation was bona fide, the court is less likely to impose costs. Therefore, providing detailed evidence in the

petition on the protests themselves and the lack of sufficient initiative from the government to allow for alternatives, is a sound strategy.

Recognising the limitations of international law, foreign judgements and amicus curiae briefs: Provisions of international law and foreign judgements always have persuasive value even though there is only one instance of the court using it explicitly in the judgement as in Aliansi Jurnalis Independen (AJI). Therefore, rather than trying to construct an argument based solely on international law, petitioners should refer to provisions or jurisprudence of international law to bolster a point that already exists in domestic statutes and constitutional jurisprudence. Trying to construct an exclusively international law argument and applying it in absence of a municipal law provision providing for the same is unlikely to work. However, given that some cases have been successful in different jurisdictions, reference to those cases in the petition may be helpful.

Similarly, amicus curiae briefs also have persuasive value. However, there are limited references to them in the final judgement. As a result, overt reliance on the value of amicus curiae interventions may not be very fruitful. Sustaining and enhancing greater collaboration, resource sharing and logistical support locally is likely to lead to impactful outcomes.

Collaboration and solidarity

State actors across the world are increasingly resorting to internet shutdowns as a tool to purportedly protect sovereign interests. In response, civil society actors have been at the forefront of intensification of efforts to resist these tendencies of state actors. Alongside transnational and domestic advocacy efforts, legal challenges to internet shutdowns has been a key development. Advocacy efforts have played a crucial role in centring a rights-oriented discourse in resisting internet shutdowns. Legal challenges, then, have contributed to these advocacy efforts and thrived on them, to hold state actors to account for imposing internet shutdowns. With legal challenges increasing, several strategic trends are beginning to emerge. Consequently, so are successful challenges to internet shutdowns. In many cases, the shutdown was curbed or restricted and, in several others,, salient points were made about the negative impacts of shutdowns.

Of particular importance in supporting these efforts have been the collaborative networks of global solidarity and exchange among like-minded civil society actors. Sustaining and amplifying these are integral to ensuring that legal challenges continue and propel public discourse towards a no forbearance view of internet shutdowns. Similarly, it may be prudent to broaden these networks to identify and include actors (such as telecommunication services providers) that may so far have been excluded.

The gains from these efforts, however, have largely not materialised on the ground, especially with state actors continuing to place reliance on internet shutdowns to achieve their political and security goals. The goal continues to remain for courts across jurisdictions to unequivocally declare a norm against shutting down the internet due to its deleterious effects.

Summary of cases

The table below is an excerpt of an accompanying workbook that delineates case and judgement details of legal challenges to internet shutdowns across the world. Please refer to the workbook for further details and copies of available judgements.

COUNTRY	COURT	CASE NAME	OUTCOME
Cameroon	Constitutional Council	Global Concern Cameroon v Ministry of Post and Telecommunication, Cameroon Telecommunication, and State of Cameroon	Rendered inadmissible by virtue of Art. 47(2) Remaining arguments not considered.
Togo (ECOWAS)	Community Court of Justice of the Economic Community of West African States in Abuja (Nigeria)	Amnesty International Togo & Ors v The Togolese Republic	<ol style="list-style-type: none"> 1. Court has jurisdiction and complaint is admissible. 2. Applicant have locus standi. 3. Shutting down of internet access violated the rights of the applicants to freedom of expression. 4. Directed Togo to take all measures to guarantee nonrecurrence in the future. 5. Directs the respondent to enact and implement laws to meet international and regional human rights obligations concerning freedom of expression. 6. Ordered respondent to pay two million CFA as compensation for the violation. 7. Chief Registrar to assess costs.

COUNTRY	COURT	CASE NAME	OUTCOME
India	Supreme Court	Anuradha Bhasin v Union of India and Ghulam Nabi Azad v Union of India	<p>The statutorily required Review Committee must, within seven days of the previous review, review the continued compliance of these orders keeping in mind the principles of proportionality and the fact that the ban cannot be unlimited. Two directions were issued to the state in this regard:</p> <ol style="list-style-type: none"> 1. The state was further mandated to publish all orders suspending the internet so as to enable the challenge of the same before the appropriate fora. 2. The state was directed to consider allowing government websites, e-banking facilities, hospital services and other such essential services in regions where the internet services are not likely to be restored immediately.
India	Gujarat High Court	Gaurav Sureshbhai Vyas v State of Gujarat	Petition dismissed

COUNTRY	COURT	CASE NAME	OUTCOME
India	Rajasthan High Court	Dhirendra Singh Rajpurohit v State of Rajasthan	The petition was held to be infructuous, as an order had been passed by the Special Secretary, Home (Disaster Management) Department, during the pendency of the case, directing that no order suspending internet services be issued in the future during competitive exams.
India	Karnataka High Court	Gaurav Sureshbhai Vyas v State of Gujarat	The Court referenced its order of 17th December, 2019 wherein it has recommended the state to consider inputs from various sources and consider the restoration of internet services during the afternoon, post 3 pm. It also mandated the respondent to place on record any material on the basis of which they require continued restrictions beyond these. In passing this order, the court noted that the respondent state had failed to provide any material to the effect of justifying continued suspension of internet services. As a result, as an interim measure, the court directed the state to restore all internet services from 5 pm that very day. It also observed that the state may take necessary steps to prevent the dissemination of incendiary material that may be disseminated on the internet.

COUNTRY	COURT	CASE NAME	OUTCOME
Indonesia	Pengadilan Tata Usaha Negara, Jakarta (State Administrative Court)	Aliansi Jurnalis Independen (AJI) and Pembela Kebebasan Berekspresi Asia Tenggara (SAFE-net) v The Ministry of Communication and Information (Kominfo) and The President of the Republic of Indonesia	Action deemed unlawful
Pakistan	Islamabad High Court	CM Pak Limited v Pakistan Telecommunications Authority	Action deemed unlawful
Pakistan	Supreme Court of Pakistan	Pakistan telecommunications authority v CMK Pak Limited	High court judgment overturned and shutdown deemed lawful
Russia	Magas District Court	Murad Khazbiev v Federal Security Services	Agreed with the Federal Security Service and held that the shutdown was legal
Zimbabwe	High Court of Zimbabwe, Harare	ZLHR and MISA Zimbabwe v Minister of State for National Security and Others	Action deemed unlawful. Respondent's directives issued under Section 6 (2) (a) set aside

