

1st NATIONAL PIL DRAFTING COMPETITION- 2021

Lexpeeps in association with Chambers of Himanjali Gautam

Before

THE SUPREME COURT
OF
INDIA

Bhavana Pandey

(Petitioner)

Vs.

Union of India

(Respondent)

PUBLIC INTEREST LITIGATION UNDER ARTICLE 32 OF THE CONSTITUTION
OF INDIA.

UPON SUBMISSION TO THE HON'BLE JUSTICE, SUPREME COURT OF INDIA.

~ MEMORENDUM ON BEHALF OF THE PETITIONER ~

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ABBREVIATION

¶	Paragraph
AIR	All India Reporter
Art.	Article
Ed.	Edition
Gov.	Government
HC	High Court
Hon'ble	Honorable
ICCPR	International Covenant on Civil and Political Rights
J&K	Jammu and Kashmir
MANU	Manupatra
Ors.	Others
PIL	Public Interest Litigation
SC	Supreme Court
SCC	Supreme Court Cases
U/d	Under
UDHR	Universal Declaration of Human Rights
UN	United Nations
UOI	Union of India
US	United States
UT	Union Territories
v.	Versus
W.P	Writ Petition

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A.

ACTS & STATUTES

THE CONSTITUTION OF INDIA, 1950.

THE CODE OF CRIMINAL PROCEDURE, 1974.

THE TELEGRAPH ACT, .

B. BOOKS & COMMENTARIES

- 1 JUSTICE FAZAL KARIM, JUDICIAL REVIEW OF PUBLIC ACTION .588-589 (Pakistan Law House, 2008) 26
- 2 DURGA DAS BASU, COMMENTARY ON CONSTITUTION OF INDIA 1388 (2008)..... 24, 26
- 2 H. M. SEERVAI, CONSTITUTIONAL LAW OF INDIA, 1586 (4th ed., 2007)..... 15
- ARVIND P. DATAR, DATAR ON CONSTITUTION OF INDIA, Wadhwa & Company, (1st ed. 2001)..... 27
- BLACK'S LAW DICTIONARY. (10th ed. 2014)..... 34
- JAGDISH SWARUP, CONSTITUTION OF INDIA 1114 (3rd ed Thomson Reuters)..... 28
- M.P. JAIN, INDIAN CONSTITUTIONAL LAW, 1430 (8th ed. 2018)..... 18, 19, 20, 26, 30
- N. JAYAPALAN, INDIAN SOCIETY AND SOCIAL INSTITUTIONS 531 (Atlantic Publishers & Distributors, 2001)..... 23

C. ARTICLES & JOURNALS

- ALAN GEWIRTH, *Are All Rights Positive?*, 30 PHILOS. PUBLIC AFF. 321, (2001) 26
- CARL WELLMAN, *A Theory of Rights: Persons Under Laws, Institutions, and Morals*, ROWMAN & ALLANHELD 225, (1985) 19
- LEON TRAKMAN, ET AL., *Rights and Responsibilities*, U OF T 376, (1999)..... 19
- LIU, FENGSHU. *The Internet in the Everyday Life-World: A Comparison between High-School Students in China and Norway*, 6 COMP. EDUC. REV. 527, 528 (2010)..... 18, 20, 27
- MITTAL, *Right To Equality And The Indian Supreme Court*, 14 AM J COMP LAW 426, (1965)..... 25
- PAULA UIMONEN, *Internet as a tool for Social Development*, UNRISD, (2016)
- <https://www.eldis.org/document/A26457> 18, 20

SHAMNAD BASHEER & PRASHANT REDDY, *Ducking” TRIPS in India: A Saga Involving Novartis and the Legality of Section 3(d)*, 20 NATL. LAW SCH. INDIA REV., 131, 142 (2008)..... 21

D. INTERNATIONAL TREATIES AND REGULATIONS

UN GENERAL ASSEMBLY, *Promotion and protection of all human rights, civil, political, economic, social and cultural rights, including the right to development* at Thirty-second session, 27 June 2016, A/HRC/32/L.2021

UN GENERAL ASSEMBLY, *Promotion and protection of all human rights, civil, political, economic, social and cultural rights, including the right to development* at Twentieth session, 29 June 2012, A/HRC/20/L.1321

UN GENERAL ASSEMBLY, *Universal Declaration of Human Rights*, ART. 19, [1948, 217 A (III)]26

UN GENERAL ASSEMBLY, *Universal Declaration of Human Rights*, ART. 26 , [1948, 217 A (III)]... ..29

E. REPORTS & OTHER AUTHORITIES

FORUM FOR HUMAN RIGHTS IN JAMMU AND KASHMIR, *Jammu and Kashmir: The Impact of Lockdowns on Human Rights*, NEWS CLICK (Feb 15, 2021, 8:30 PM) <https://www.newsclick.in/Jammu-Kashmir-Impact-of-Lockdowns-on-Human-Rights-Report>.30

HUMAN RIGHT WATCH, *India: Abuses Persist in Jammu and Kashmir*, (last visited Feb. 15, 2021) available at: <https://www.hrw.org/news/2020/08/04/india-abuses-persist-jammu-and-kashmir>17

MAJID MAQBOO, *An Hour to Download ICU Guidelines': Amid COVID-19, Kashmir Doctors Struggle with Slow Internet*, THE WIRE (Feb 15, 2021, 8:30 PM) <https://thewire.in/rights/coronavirus-kashmir-slow-internet> 29

PAOLA SERAFINO, *Exploring the UK’s digital divide*, OFFICE OF NATIONAL STATISTIC, (Feb. 15, 2021, 7:30 PM), available at: <https://www.ons.gov.uk/peoplepopulationandcommunity/householdcharacteristics/homeinternetandsocialmediausage/articles/exploringtheuksdigitaldivide/2019-03-04>..... 27

POOJA SINGH, <i>Healing Kashmir on a 2G connection</i> , LIVE MINT, (Feb 15, 2021, 7:30 PM) https://www.livemint.com/mint-lounge/features/healing-kashmir-on-a-2g-connection-11600961156478.html	30
REGINA MIHINDUKULASURIYA, <i>Internet shutdowns, pandemic have cost Kashmir Rs 40,000 crore, 5 lakh jobs, says industry head</i> , THE PRINT (Feb 15, 2021, 7:30 PM) https://theprint.in/economy/internet-shutdowns-pandemic-have-cost-kashmir-rs-40000-cr-5-lakh-jobs-says-industry-head/474028/	28
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SUDARSHAN MAITY, <i>Panoramic view of digital education in COVID-19: A new explored avenue</i> , REV. EDUC. RES., (2020), available at https://doi.org/10.1002/rev3.3250	26
THE KASHMIR CHAMBER OF COMMERCE AND INDUSTRY, <i>Preliminary Economic Loss Assessment Report</i> (Aug.-Dec., 2019).....	27, 32

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STATEMENT OF JURISDICTION

The Hon'ble Supreme Court of India has the inherent jurisdiction to try, entertain and dispose of the present case by virtue of Article 32¹ of the Constitution of India. The Petitioner most humbly and respectfully submits to the jurisdiction of the Honorable Supreme Court of India.

¹ 32. Remedies for enforcement of rights conferred by this Part

(1) The right to move the Supreme Court by appropriate proceedings for the enforcement of the rights conferred by this Part is guaranteed

(2) The Supreme Court shall have power to issue directions or orders or writs, including writs in the nature of habeas corpus, mandamus, prohibition, quo warranto and certiorari, whichever may be appropriate, for the enforcement of any of the rights conferred by this Part

(3) Without prejudice to the powers conferred on the Supreme Court by clause (1) and (2), Parliament may by law empower any other court to exercise within the local limits of its jurisdiction all or any of the powers exercisable by the Supreme Court under clause (2)

(4) The right guaranteed by this article shall not be suspended except as otherwise provided for by this Constitution.

STATEMENT OF FACTS

BACKGROUND

India is a Federal Republic in South Asia with the most populous democracy in the world. It is a Union of States which is Sovereign, Socialist, Secular, and Democratic Republic having 28 states and 8 Union Territories and shares its boundary with Pakistan on the western side, with China, Bhutan and Nepal on the northern side and with Bangladesh and Myanmar on the eastern Side. Jammu and Kashmir is one such province governed by India as a union territory and consisting of the southern part of the wider Kashmir region, which has been the focus of a conflict between India and Pakistan since 1947, and also between India and China since 1962.

INSURGENCY

Dispute between India and Pakistan over the autonomy of the Kashmir leads to insurgency in the state. The dispute between the militants and the Indian forces has led to a significant number of fatalities.

ARTICLE 370 AND STATUS QUO OF JAMMU AND KASHMIR

The dispute over the autonomy of the state gives rise to Article 370 under the Constitution of India. Article 370 enshrined in Part XXI of the Indian Constitution refers to as the “*Temporary, Transitional and Special Provisions*” grant Jammu and Kashmir special status, conferring them the right to have a separate constitution, a state flag, and control over the internal administration of the state.

REVOCATION OF SPECIAL STATUS AND INTERNET SHUTDOWN

On 5 August 2019, the Government of India withdrew the special status or limited autonomy conferred to the UT of Jammu and Kashmir pursuant to Article 370 and 35A of the Indian Constitution. The action of the Indian Government, *inter alia*, accompany the abrogation of Article 370 was the suspension of communications via the internet in the Kashmir Valley, an area stricken by a protracted separatist rebellion. Internet shutdowns resulted in no digital connectivity of millions of people with others in their region and with the outer world.

THE CRITICISM

Various NGOs and citizens of the state criticised the complete restriction of the Internet in the State. The Jammu-Kashmir Coalition of Civil Society (JKCCS) publishes a detailed study examining the scale of the internet outage, its crippling effects and material costs on the Kashmiri people. The report observes that:

“the multi-faceted and targeted denial of digital rights is a systemic form of discrimination, digital repression and collective punishment of the region’s residents, particularly in light of India’s long history of political repression and atrocities. The promise of lasting peace, freedom and justice for the people of Jammu & Kashmir is inextricably tied to digital and human rights in the region.”

GOVERNMENT JUSTIFICATION

The Government of India maintained that social media, which has encouraged users to share messages and interact with a multitude of people at the same time, maybe used as a way of inciting aggression. The shutdown of the Internet aims to ensure that the situation on the ground is not exacerbated by targeted communications from outside the world. In addition, the Internet allows for the dissemination of blatant propaganda or misleading images, which are often used to promote terror. The online world makes it possible for individuals to buy guns and illicit drugs.

ANURADHA BHASIN V. UNION OF INDIA

The petition W.P. (C) No. 1031 of 2019, was filed by Ms. Anuradha Singh Basin challenging the constitutionality of the suspension of the internet in the UT of Jammu and Kashmir. On 10th January 2020, the Supreme Court of India while declaring that the freedom of speech and expression and the freedom to exercise any profession or to engage in any trade, industry, or occupation on the Internet enjoy constitutional rights under Article 19(1)(a) and Article 19(1)(g) instructed the State to promptly examine any directives halting internet services.

OUTBREAK OF COVID-19

Amid the outbreak of COVID-19, the Government of India announces a nationwide lockdown on 24 March 2020 which resulted in a drastic usurp in the use of the internet and digitalization of communication, work, and education.

RESTORATION OF 2G INTERNET IN THE STATE

On January 25 the internet service were restored in the Kashmir but the speed was restricted to 2G and restriction on fixed lines were completely restored. However, it was criticised at wide level since it was not sufficient to execute daily work. According to reports of Mr. Prateek Waghre, 2G internet services take 50 times more hour than 3G and 4G. Meaning thereby even after the restorement of 2G internet service the rights remain suspended.

THE RESULTANT LITIGATION

The government partially lifts the ban on the internet in two out of twenty districts of Kashmir based on trial, however, the internet shutdown in the rest of the districts continued to persist despite the order of the Supreme Court. Pursuant to the aforementioned facts the public-spirited petitioners Aayush Vajpai and Jyoti Maurya approach the Hon'ble Supreme Court submitting that the order restricting internet usage in Kashmir should be struck down with an immediate effect as a violation of fundamental rights.

The Petition is submitted under the Public Interest Litigation.

ISSUES RAISED

- 1. WHETHER THE WRIT PETITION FILED BEFORE THE SUPREME COURT OF INDIA IS
MAINTAINABLE?**
- 2. WHETHER THE GOVERNMENT' ACTION OF PROHIBITING INTERNET ACCESS IS *ULTRA VIRES*?**
- 3. WHETHER THE SHUTDOWN OF INTERNET VIOLATED THE FUNDAMENTAL RIGHTS OF
PEOPLE OF JAMMU AND KASHMIR?**

SUMMARY OF ARGUMENTS

1. THE WRIT PETITION FILED BEFORE THE SUPREME COURT OF INDIA IS MAINTAINABLE.

It is submitted that Article 32 confers wide power to the hon'ble Supreme Court to issue writs, directions, orders for the enforcement of fundamental rights. The jurisdiction of SC can be invoked under Art. 32 by the affected person, or by any public spirited individual or body, or by *suo moto* cognizance taken by the Apex court. It is submitted that the writ petition is maintainable on primarily three grounds, that the petitioners have *locus standi* to file the present petition, that the right to livelihood, under article 21, of the people of Kashmir stand violated; and that suspending internet usage in Kashmir violates Customary International Law.

2. THE SHUTDOWN OF THE INTERNET VIOLATED THE FUNDAMENTAL RIGHTS OF THE PEOPLE OF JAMMU AND KASHMIR

It is humbly submitted, that the shutting down of the internet in the state of Kashmir is arbitrary and unreasonable action of gov., thus, violative of Art.14 and Art.21, Art. 21A and Art. 19 of the fundamental rights of the citizens of the States of Kashmir. These rights, embodying the Directive Principles of the government, have been guaranteed by the Constitution of India under Art. 13.

3. THE GOVERNMENT'S ACTION OF PROHIBITING INTERNET ACTION IS *ULTRA VIRES* THE CONSTITUTION OF INDIA

It is submitted that, when the law contains 'substantive' restriction with regard to the exercise of the right, as well as 'procedural' provisions, the courts would consider the reasonableness of both. The regulatory mechanism for the Internet is twofold: the first is contractual, relating to the arrangement negotiated between the Internet Service Providers and the Government, and the second is legislative, according to the Information Technology Act, 2000, the Criminal Procedure Code, 1973 and the Telegraph Act. The order restraining internet is ultra vires the statutory provision because procedures established by Telegraph Act is not followed, and the state act is not proportionate under section 144 of Crpc.

ARGUMENTS ADVANCED

**1. THE WRIT PETITION FILED BEFORE THE SUPREME COURT OF INDIA IS
MAINTAINABLE.**

1. Writ Jurisdiction of the Supreme Court flows from Article 32², which confers wide powers enabling the Court to issue writs, directions, orders for the enforcement of fundamental rights.³ It is submitted that the writ petition is maintainable on primarily three grounds: That the petitioners have *locus standi* to file the present petition; 1.2. That the right to livelihood, under article 21, of the people of Kashmir stand violated; and 1.3. That suspending internet usage in Kashmir violates Customary International Law.

THE PETITIONERS HAVE *LOCUS STANDI* TO FILE THE PRESENT PETITION

2. It is submitted that the Art. 32 confer the constitutional court, i.e., the Supreme Court, sentinel of justice, the extraordinary powers of judicial review to ensure that the rights of citizens are duly protected.⁴ The Supreme Court, under article 32, enjoys a broad discretion in the matter of framing the writs to suit the exigencies of the particular case.⁵ The Apex Court in *Daryao v. State of Uttar Pradesh*⁶ while explaining the role of article 32 held that:
- “The Fundamental Rights are intended not only to protect individual’s rights but they are based on **high public policy**. Liberty of the individual and the protection of the Fundamental Rights are the essence of the democratic way of life adopted by the constitution, and it is the privilege and the duty of the court to uphold those rights. This court would naturally refuse to circumscribe them or to curtail them except as provided by the constitution itself.”*
3. In general parlance, only an aggrieved person is entitled to seek judicial remedy, however, in public law, this traditional concept of *locus standi* has been liberalized to include any

² INDIA CONST. Art. 32.

³ 2 H. M. SEERVAI, CONSTITUTIONAL LAW OF INDIA, 1586 (4th ed., 2007).

⁴ Manohar Lal sharma v. Principal Secretary, (2014) 2 SCC 532.

⁵ Federation of Bar Association in Karnataka v. UOI, AIR 2000 SC 2544.

⁶ AIR 1961 SC 1457, at 1457.

“public-spirited individual” or “association”,⁷ even an unrecognized association, in case a class of people have a collective grievance.⁸

4. Having regard to the peculiar socio-economic condition prevailing in the country where there is considerable poverty, illiteracy and ignorance impeding the accessibility to the judicial process, the court has taken the view that if the traditional rule of locus standi is adhered to be followed, it would lead to closing of doors and deprived section of the community.⁹
5. In the words of Bhagwati J, Public Interest Litigation is an evolution of the *Locus Standi* in order to make justice available to the lowly and lost. He stated that:
*“A new dimension has been given to the doctrine of locus standi which has revolutionised the whole concept of access to justice.”*¹⁰
6. The court in *Bandhua Mukti Morcha v. UOI*¹¹, explained that principle underlying public interest litigation as:
*“....where a person or class of persons to whom legal injury is caused by reason of violation of a Fundamental Right is unable to approach the court on account of poverty or disability or socially or economically disadvantaged position, any member of the public acting **bona fide** can move the court for relief under Article 32.”*
7. It is submitted that in *Vishwanath Chaturvedi v. Union of India*¹², it has been observed that in determining the question of *locus standi* in ‘public interest litigation’ the Court must look into: (i) the credentials of the applicant; (ii) *prima facie* correctness of information; (iii) subject matter of the writ petition (iv) must not go into merits of the case.¹³
8. In the present case, the claim made by the petitioners relates to widespread public grievance caused by suspension of the internet and loss of livelihood. The *prima facie* accuracy of the claims may be demonstrated by other independent facts such as: (i) the

⁷ S. P. Gupta v. President of India & Ors., AIR 1982 SC 149 at ¶¶ 14-25; Banwasi Seva Ashram v. State of UP., AIR 1987 SC 374.

⁸ Akhil Bhartiya Soshit Karamchari Sangh (Rly.) v. Union of India, AIR 1981 SC 298 at ¶ 63

⁹ M.P. JAIN, INDIAN CONSTITUTIONAL LAW, 1430 (8th ed. 2018).

¹⁰ S. P., *supra* note 7.

¹¹ AIR 1984 SC 802 : (1984) 3 SCC 161.

¹² (2007) 4 SCC 380.

¹³ *Id.* at ¶¶ 27-30.

Jammu-Kashmir Coalition of Civil Society report has identified various violation of human rights of people of Kashmir; (ii) the report admitted that the denial of internet is a form of discrimination and digital repression by the government.¹⁴

9. Furthermore, subject matter of writ petition manifests the failure of government duty towards its citizens which can clearly be interpreted from the '*Internet Siege Report*'¹⁵ of the Jammu-Kashmir Coalition of Civil Society. According to the report:

"livelihood consequences of the shutdown of August 2019 were severe, and losses suffered by various businesses during the first five months alone were estimated at Rs 178.78 billion, with more than 500,000 people having lost their jobs in the valley in the period. Education suffered a major setback, and in August 2020 students enrolled in Kashmir's 30,000 schools and 400 institutes of higher education marked the first anniversary of the internet shutdown as a full year without attending school, or college or university. Justice saw systemic delays further compounded by ineffective online hearings. Amidst the internet and telecommunications blackout, more than 6000 detentions and over 600 'administrative' detentions took place around August 5th 2019."

10. Also, according to the authorities such as Human Right Watch report, "*the internet shutdown is depriving Kashmiris who depend on mobile messaging apps or email access to their livelihood.*"¹⁶

11. It is further contended that the petitioners are *bona fide*, public-spirited members of the society, which are best placed to bring the issue to the attention of the Court. Hence, it is humbly submitted that the petitioners have locus standi to file the writ petition.

THE RIGHT TO LIVELIHOOD, UNDER ARTICLE 21, OF THE PEOPLE OF KASHMIR STANDS VIOLATED

12. It is contended that, if the right guaranteed under Art. 21¹⁷ stands to be violated, it is open for the aggrieved person to seek judicial redress under Art. 32. In *BALCO Employees'*

¹⁴ SHRIMOYEE NANDANI GHOSH, ET AL., *Kashmir's Internet Siege*, JAMMU KASHMIR COALITION OF CIVIL SOCIETY, <https://jkccs.net/report-kashmirs-internet-siege/>

¹⁵ *Ibid.*

¹⁶ HUMAN RIGHT WATCH, *India: Abuses Persist in Jammu and Kashmir*, (last visited Feb. 15, 2021) available at: <https://www.hrw.org/news/2020/08/04/india-abuses-persist-jammu-and-kashmir>

¹⁷ INDIA CONST. Art. 21.

*Union (Regd) v. UOI*¹⁸, the court has reminded that the only ground on which a person can maintain a PIL is where there has been an element of violation of Art. 21 on human rights or where litigation has been initiated for the benefit of the poor and the underprivileged.¹⁹ It is herein submitted that the fundamental right under A. 21 stand infringed.

The Right To Access Internet Is A Derived Right Under Article 21.

13. It is submitted that access to the Internet, in regards to social effects, tends to promote and improve the quality of basic requirements,²⁰ and Internet access continues to be a valuable accelerator for both the objectives of social growth and the priorities of the Sustainable Development Goals.²¹ This includes aspects as varied as hunger and poverty, social welfare, social equality, education, and the environment and empowerment in all aspects of life.²²

14. Reference must be made to the *Faheema Shirin. R. K v. State of Kerala*²³, Kerala HC relying on the report of the Human Rights Council on its twenty-third session held that:

*“access to information on the Internet facilitates vast opportunities for affordable and inclusive education globally, thereby being an important tool to facilitate the promotion of the right to education, while underlining the need to address digital literacy and the digital divide, as it affects the enjoyment of the right to education. Considering the importance of government engagement with all relevant stakeholders including civil society, private sector and technical community and academia protecting in promoting human rights and fundamental freedoms online, affirms that **the same rights that people have offline must also be protected online**, in particular freedom of expression, which is applicable regardless of frontiers and through any media of one's choice”*

15. Further, it is submitted that the right to access the internet is a secondary right derived from the art. 21. According to Right theorist Carl Wellman:

¹⁸ 90 (2001) DLT 789, 2001 (58) DRJ 351.

¹⁹ Villianur Iyarkkai Padukappu Maiyam v. UOI, (2002) 2 SCC 333 : AIR 2009 SC 350.

²⁰ LIU, FENGSHU. *The Internet in the Everyday Life-World: A Comparison between High-School Students in China and Norway*, 6 COMP. EDUC. REV. 527, 528 (2010).

²¹ PAULA UIMONEN, *Internet as a tool for Social Development*, UNRISD, (2016), available at: <https://www.eldis.org/document/A26457>.

²² LIU, *supra* note 20.

²³ 2019 (4) KHC 901.

*“Derived rights may be either more specific forms of some generic right, as the right to freedom of the press is a special case of the right to free speech, or auxiliary rights that serve to protect some primary right, as the right to habeas corpus serves to prevent a violation of the individual’s right to liberty”.*²⁴

16. The derived right is ancillary right, with all the privileges and the restriction of the primary right that it allows.²⁵ What makes it a secondary right is not its meaning or authority, but rather that it is based on its association with the primary right.²⁶ Under this context, it can be argued that a number of rights acquired pursuant to Articles 21 and 19 have been fully interconnected with Internet accessibility and that, in the absence of Internet access, those rights would lose their sense and value and would not allow citizens to appreciate those rights.

17. In *Maneka Gandhi v. Union of India*²⁷, while addressing the test for unenumerated rights under Art. 19 and 21, the test introduced by the court was whether the right asserted was an integral component or of the same sort as the right in question. Furthermore, in essence and in substance, these rights must be nothing but an indication of the exercise of the constitutional right alluded to.

The Fundamental Right To The Internet Is Construed In The Light Of The Directive Principles.

18. It is submitted that the statute should be interpreted so as to implement Directive Principle instead of reducing them to mere theoretical ideas. The fundamental rights and Directive principle complementary and supplementary to each other. While, the fundamental right acquires precedence, the Directive Principles of the State Policy are equally necessary to be embedded in the governance of the State.

19. In *Golak Nath v. State of Punjab*²⁸, court observed that the judiciary should interpret Fundamental rights in the light of the value underlying Directive Principles. The biggest beneficiary of this approach has been Art. 21.²⁹ The Supreme Court has derived a bundle

²⁴ CARL WELLMAN, *A Theory of Rights: Persons Under Laws, Institutions, and Morals*, ROWMAN & ALLANHELD 225, (1985).

²⁵ *Ibid.*

²⁶ LEON TRAKMAN, ET AL., *Rights and Responsibilities*, U OF T 376, (1999).

²⁷ 1978 AIR 597 : 1978 SCR (2) 621.

²⁸ 1967 AIR 1643 : 1967 SCR (2) 762.

²⁹ M.P., *supra* note 9 at 1472.

of right such as right to live with dignity³⁰, right to health³¹, right to education³² and right to privacy³³ by reading Art. 21 with the Directive Principles.

20. It is contended that Art. 38³⁴ envisage socio-economic justice which consists of diverse principles essential for the orderly growth and development of personality of every citizen.³⁵ The Art. 38 directs the state to strive to “minimize the inequalities in income” and endeavour “to eliminate inequalities in status, facilities and opportunities not only amongst individuals but also groups of people residing in different areas or engaged in different vocations.”³⁶ Further, Art. 21 is interpreted in the light of Art. 39(A)³⁷ to include the right to livelihood.³⁸ The state is under negative obligation, viz not to deprive a person of this right without just and fair procedure.³⁹

21. In the present case, the suspension of internet or restriction on the high-speed network amidst Covid-19, deprived the citizens of Kashmir to enjoy not only their right to livelihood but also the right to education⁴⁰ and right to live with dignity owing to the fact that increased necessity of internet in the field of education⁴¹, trade, local business and for communication⁴².

THE SUSPENSION OF INTERNET USAGE IN KASHMIR VIOLATES CUSTOMARY INTERNATIONAL LAW

22. It is submitted that the Indian Constitution urges the State to honour its international law and treaty obligations,⁴³ which are understood as creating ‘legitimate expectations’ of their observance.⁴⁴ The Supreme Court has regularly imported international norms where there

³⁰ Bandhua, *supra* note 11.

³¹ Consumer Education and Research Centre v. UOI, AIR 1995 SC 922 : (1995) 3 SCC 42.

³² Unnikrishnan v. AP, AIR 1993 SC 2178 : (1993) 1 SCC 645.

³³ Justice K.S.Puttaswamy (Retd.) v. UOI, (2017) 10 SCC 1.

³⁴ INDIA CONST. Art. 38.

³⁵ Air India Statutory Corporation v. United Labour Union, AIR 1997 SC 645 : (1997) 9 SCC 377.

³⁶ M.P., *supra* note 9 at 1476.

³⁷ INDIA CONST. Art. 39(A).

³⁸ Olga Tellis v. Bombay Municipal Corporation, AIR 1968 SC 180 : (1985) 3 SCC 545.

³⁹ *Ibid.*

⁴⁰ SHRIMOYEE, *supra* note 14.

⁴¹ LIU, *supra* note 20.

⁴² PAULA, *supra* note 21.

⁴³ INDIA CONST. Art. 51(c); His Holiness Kesavananda Bharati Sripadagalvaru v. State of Kerala, AIR 1973 SC 1461 at ¶164.

⁴⁴ Vishaka v. State of Rajasthan, AIR 1997 SC 3011 at ¶14.

is a gap in domestic law.⁴⁵ The ‘doctrine of incorporation’ has been implemented in the Indian legal system, according to which rules of international law become part of domestic law.⁴⁶

23. In the light of Article 51(c) and 253 of the Constitution of India and the role of judiciary envisaged in the Beijing Statement, the court in *Vishaka & Ors. v. State of Rajasthan & Ors.*⁴⁷, held that the international conventions and norms are to be read into the fundamental rights guaranteed in the Constitution of India in the absence of enacted domestic law occupying the fields when there is no inconsistency between them.⁴⁸

24. Art. 19 of the Universal Declaration of Human Rights (UDHR)⁴⁹, states that “*Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.*” Moreover, it recognises internet as basic human rights and directs the state to promote, protect the enjoyment of human rights on the internet.⁵⁰

25. Further, the resolution 20/8 adopted by the Human Rights Council in the 20th session of United Nations general assembly⁵¹ held that the exercise of human rights, in particular the right to freedom of expression, on the Internet is an issue of increasing interest and importance as the rapid pace of technological development enables individuals all over the world to use new information and communications technologies. The resolution states that:

- i. In accordance of Art. 19 the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights, people’s right must be protected both online and offline, especially freedom of expression, which is applicable regardless of frontiers and through any media of one’s choice.,

⁴⁵ SHAMNAD BASHEER & PRASHANT REDDY, *Ducking” TRIPS in India: A Saga Involving Novartis and the Legality of Section 3(d)*, 20 NATL. LAW SCH. INDIA REV., 131, 142 (2008).

⁴⁶ Gramophone Company of India v. Birendra Bahadur Pandey, AIR 1984 SC 667, ¶3-4; Maganbhai Ishwarbhai Patel v. Union of India, AIR 1969 SC 783, ¶79.

⁴⁷ Vishaka, *supra* note 44, ¶14.

⁴⁸ Vishaka, *supra* note 44, ¶16.

⁴⁹ UN GENERAL ASSEMBLY, *Universal Declaration of Human Rights*, ART. 19, [1948, 217 A (III)].

⁵⁰ UN GENERAL ASSEMBLY, *Promotion and protection of all human rights, civil, political, economic, social and cultural rights, including the right to development* at Thirty-second session, 27 June 2016, A/HRC/32/L.20.

⁵¹ UN GENERAL ASSEMBLY, *Promotion and protection of all human rights, civil, political, economic, social and cultural rights, including the right to development* at Twentieth session, 29 June 2012, A/HRC/20/L.13.

- ii. Recognizes the global and open nature of the Internet as a driving force in accelerating progress towards development in its various forms;
- iii. Calls upon all States to promote and facilitate access to the Internet and international cooperation aimed at the development of media and information and communications facilities in all countries;
- iv. Encourages special procedures to take these issues into account within their existing mandates, as applicable;
- v. Decides to continue its consideration of the promotion, protection and enjoyment of human rights, including the right to freedom of expression, on the Internet and in other technologies, as well as of how the Internet can be an important tool for development and for exercising human rights, in accordance with its programme of work.⁵²

26. In reference to aforementioned facts and arguments it is contended that in the present case, the writ petition is filed based on the finding that the shutting down of the internet in the state of Kashmir amidst COVID-19 has violated the enjoyment of human rights over the internet. It is humbly submitted that there is a constitutional and international obligation on India to protect the human rights of its citizens both online and offline.

⁵² *Id* at 2.

2. THE SHUTDOWN OF THE INTERNET VIOLATED THE FUNDAMENTAL RIGHTS OF THE PEOPLE OF JAMMU AND KASHMIR

27. It is humbly submitted, that in light of the below mentioned laws, cases, and arguments, the shutting down of the internet in the state of Kashmir is violative of Art.14 and Art.21, Art. 21A and Art. 19 of the fundamental rights of the citizens of the States of Kashmir. These rights, embodying the Directive Principles of the government, have been guaranteed by the Constitution of India under A. 13.

THE EXECUTIVE ORDERS ARE CONSIDERED IN LAW

28. In *Indra Sawhney v. Union of India*,⁵³ the Hon'ble Supreme Court held that, "Executive order is no less a law under Article 13(3)."⁵⁴ Thus, even if the statute which conferred power to the executive is not discriminatory, the executive order which derived its power from the statute can be challenged under Art.14 on the grounds of being discriminatory,⁵⁵ or arbitrary,⁵⁶ as A.14 does not allow the **State** to discriminate between persons.⁵⁷

29. Furthermore, 'State' defined under A. 12 includes the Legislature and Executive of both the Centre and the States and other executive authorities within the territories of India. "Article 14, therefore, is an injunction to both the legislative as well as the executive organs of the State and the other subordinate authorities. It protects us from both legislative and executive tyranny by way of discrimination."⁵⁸

30. The trilogy formed by Articles 12, 13 and 14 ensure non- discrimination in State action in the spheres of both legislation and execution in India.⁵⁹ Thus when any executive order violates fundamental rights, it will be quashed by the judiciary as to keep the excesses of the executive at bay.⁶⁰ The Hon'ble Supreme Court is the repository of fundamental rights of the citizens.⁶¹

⁵³ AIR 1993 SC 477.

⁵⁴ *Id* at ¶527.

⁵⁵ *Ramakrishna v. Tendolkar*, AIR 1958 SC 538, ¶550.

⁵⁶ *Premium Granites v. State of Tamil Nadu*, AIR 1994 SC 2233.

⁵⁷ *Basheshar Nath v. The Commissioner of Income Tax, Delhi & Rajasthan*, AIR 1959 SC 149, ¶25.

⁵⁸ *Ibid*.

⁵⁹ *The State of West Bengal v. Anwar Ali Sarkar*, AIR 1952 SC 75, ¶8.

⁶⁰ *Gupta Enterprises v. Delhi Pollution Control Committee and Anr.*, (2008) ILR 1 Delhi 940.

⁶¹ N. JAYAPALAN, *INDIAN SOCIETY AND SOCIAL INSTITUTIONS* 531 (Atlantic Publishers & Distributors, 2001).

Article 14 Guarantees The Citizens Of The State Of Kashmir The Right To Be Treated Equally With Those Citizens In The Rest Of India.

31. The doctrine of equality before law is a necessary corollary of Rule of Law which pervades the Indian Constitution.⁶² Art.14 is read as a positive obligation⁶³ on the state to confer equal measures that benefit all citizens, including the right of all citizens in a political democracy to enjoy social and economic justice.⁶⁴ After 1974, the Hon'ble Supreme Court held in a number of cases that there was an over- emphasis on the doctrine of classification.⁶⁵

Intelligible Differentia

32. It is submitted that the Article 14⁶⁶ of the Constitution forbids discrimination, however, it does not forbid creation of class on well-founded principles that it must be on an intelligible differentia and that, it must have a reasonable nexus to the object sought to be achieved by the law⁶⁷ and such classification should not be arbitrary.⁶⁸ Further, such classification cannot be arbitrary but has to be rational. While interpreting Article 14, J. S.K. Das, of the Supreme Court has held in *The State of West Bengal v. Anwar Ali Sarkar*⁶⁹:
“In order to pass the test, two conditions must be fulfilled, namely, that the classification must be founded on an intelligible differentia which distinguishes those that are grouped together from others and that that differentia must have a rational relation to the object sought to be achieved by the Act.”

33. It was further held that where there is no nexus between a classification and the object of the Act, then there is no intelligible differentia, and such classification will be wholly arbitrary and be liable to be struck down.⁷⁰

34. In the present case, the citizens of the State of Kashmir should be given the right to access the internet just as this right has been given to the citizens of every other state during the

⁶² Ashutosh Gupta v. State of Rajasthan, (2002) 4 SCC 34 : AIR 2002 SC 1533.

⁶³ 2 DURGA DAS BASU, COMMENTARY ON CONSTITUTION OF INDIA 1388 (2008).

⁶⁴ Dalmatia Cement (Bharat) Ltd. v. Union of India, (1996) 10 SCC 104, ¶15.

⁶⁵ Saujat Ali v. Union of India, AIR 1974 SC 1631, ¶26.

⁶⁶ INDIA CONST. art. 14

⁶⁷ Western UP Electric Power and Supply Cop. Ltd. State of UP, AIR 1970 SC 21 : (1969) 1 SCC 817.

⁶⁸ EP Royappa v. State of Tamil Nadu, (1974) 4 SCC 3.

⁶⁹ The State, *supra* note 59.

⁷⁰ *Id.* at ¶67.

pandemic so that they could smoothly execute their office work or online classes and other facilities. The citizens of all states deserve the right to livelihood and education being uniformly implemented throughout the country. The citizens of the State of Kashmir are suffering in the process as victims of the executive order and hence their rights have been violated.

Reasonableness

35. Since *Maneka Gandhi*'s case,⁷¹ the Courts have adopted the Wednesbury principle⁷² that if the classification was an arbitrary act of the state under Art.12 of the Constitution, Art.14 would strike it down.⁷³ The test for arbitrariness is whether the executive acted illegally or omitted reasonable factors or its opinion was one which no reasonable man would have taken.⁷⁴ Arbitrariness is primarily an action performed by the executive capriciously without adequately determining principle and classifying based on unfounded nature of things.⁷⁵
36. Reasonableness postulates that the restrictions imposed should not be excessive but only to the extent necessary to secure the public good.⁷⁶ It is submitted that where a restriction imposed by a law is in excess of what was "requisite" in achieving the object of law, such restriction is to be struck down.⁷⁷
37. In the instant case prohibition on the internet since August, 2019 and imposition of restriction on the speed of the internet since September, 2020 is neither requisite nor reasonable to achieve peace in the state. Due to the aforementioned law, precedents and arguments, the Counsel humbly submits that the fundamental Right to Equality of the citizens of Kashmir have been violated under Art. 14 of the Constitution.

⁷¹ *Maneka*, *supra* note 27.

⁷² *Associated Provincial Picture v. Wednesbury Corp.*, (1948) 1 KB 223.

⁷³ *Kasturi Lal Lakshmi Reddy v. State of J &K*, AIR 1980 SC 1992 ¶14.

⁷⁴ *Om Kumar v. Union of India*, AIR 2000 SC 3689.

⁷⁵ MITTAL, *Right To Equality And The Indian Supreme Court*, 14 AM J COMP LAW 426, (1965).

⁷⁶ *Mohd. Faruk v. State of Madhya Pradesh and others*, AIR 1970 SC 93 : 1970 (1) SCR 156.

⁷⁷ *Chintaman Rao v. State of Madhya Pradesh*, (1950) 1 SCR 759.

That The State Has A Positive Obligation To Guarantee Article 21 Of The Constitution.

38. The Rights read into Art. 21 are those Directive Principles which the Supreme Court believed important enough to make justiciable by including them under the ambit of Fundamental rights. Though Art.21 is couched in negative phraseology,⁷⁸ it enforces positive obligations⁷⁹ on the state to take steps to ensure that the individual enjoys a dignified life.⁸⁰ It is not necessary to expressly state a right as a fundamental right to bring it under the ambit of Art. 21.⁸¹ Political, social and economic changes occurring in the country entail the recognition of new rights and laws to meet the demands of the society.⁸²

That Article 21 extends to the Right to Basic Necessities

39. The Hon'ble Supreme Court has read Right to Basic Necessities⁸³ into the Right to Life and Liberty under Art.21.⁸⁴ This right inherently ensures a dignified life to citizens of India,⁸⁵ which not only entails an assurance of fulfilling their primary needs,⁸⁶ but also guarantees all those conditions to the citizens which make life worth living.⁸⁷ Art.21 of the Constitution has been given a qualitative concept to Life,⁸⁸ and it safeguards the basic human rights required of every civilization.⁸⁹

40. It is submitted that amid Covid-19 pandemic, jobs and education provision has moved online⁹⁰ which plainly show that the Internet is no longer a luxury, a simple lifestyle improvement for those who can afford it rather, access to the Internet has been a

⁷⁸ Nandini Sundar and Ors. v. State of Chattisgarh, AIR 2011 SC 2839, ¶63.

⁷⁹ Maruti Shripati Dubal v. State of Maharashtra, 1987 (1) Bom CR 499.

⁸⁰ ALAN GEWIRTH, *Are All Rights Positive?*, 30 PHILOS. PUBLIC AFF. 321, (2001).

⁸¹ P Rathinam v. UOI, (1994) 3 SCC 394.

⁸² M.P., *supra* note 9 at 1207.

⁸³ Byrraju Ramalinga Raju v. The State CBI, Criminal Petition No. 5454 of 2009.

⁸⁴ DURGA *supra* note 63 at 371.

⁸⁵ Francis Coralie Mullin v. The Administrator, Union Territory of Delhi & Ors., AIR 1981 SC 746.

⁸⁶ Byrraju, *supra* note 83, p. 1272.

⁸⁷ M.P., *supra* note 9 at 1207.

⁸⁸ Chameli Singh v. State of Uttar Pradesh, AIR 1996 SC 1051.

⁸⁹ 1 JUSTICE FAZAL KARIM, JUDICIAL REVIEW OF PUBLIC ACTION .588-589 (Pakistan Law House, 2008)

⁹⁰ SUDARSHAN MAITY, *Panoramic view of digital education in COVID-19: A new explored avenue*, REV. EDUC. RES., (2020), available at <https://doi.org/10.1002/rev3.3250>.

fundamental necessity.⁹¹ The UK gov. has already recognised the problem of ‘*digital poverty*’.⁹²

41. As aforementioned, the Right to Life and Liberty under Art. 21 of the Constitution extends to the Right to Basic Necessities. The executive order depriving them of their latter has in effect deprived them of the former right too.

That Article 21 extends to Right to Livelihood and Right to Work

42. The landmark case *Olga Tellis v. Bombay Municipal Corporation*,⁹³ established that Right to Livelihood, is a fundamental right under the purview of A.21.

*“Deprive a person of his right to livelihood and you shall have deprived him of his life.”*⁹⁴

43. In *Delhi Development Horticulture Employee’s Union v. Delhi Administration*,⁹⁵ the Supreme Court further expanded this Right to include the Right to Work. Art. 37 though renders Directive Principles unenforceable; Art.39(a) and Art.41 have been read harmoniously⁹⁶ with fundamental rights. The State has an obligation to ensure that Right to livelihood and Right to Work should be read into Right to Life.⁹⁷

44. It is submitted that, in the instant matter, the restriction imposed on the internet by way of an executive order infringes upon the rights of the workers, traders, and business. As this prohibition led to shutting down of business,⁹⁸ the workers working are forced to leave due to closure of the manufacturing⁹⁹ thereby violating their right to livelihood, an implied right, recognised under Article 21 of the Constitution. Therein, the Supreme Court of India had held that the right to livelihood is an important facet of the right to life.

⁹¹ LIU, *supra* note 20.

⁹² PAOLA SERAFINO, Exploring the UK’s digital divide, OFFICE OF NATIONAL STATISTIC, (Feb. 15, 2021, 7:30 PM), available at <https://www.ons.gov.uk/peoplepopulationandcommunity/householdcharacteristics/homeinternetandsocialmediausage/articles/exploringtheuksdigitaldivide/2019-03-04>

⁹³ *Olga*, *supra* note 38.

⁹⁴ *Id.* at ¶32.

⁹⁵ AIR 1992 SC 789.

⁹⁶ *Minerva Mills Ltd. and Ors.v. Union of India (UOI) and Ors.*, AIR 1980 SC 1789.

⁹⁷ ARVIND P. DATAR, DATAR ON CONSTITUTION OF INDIA, Wadhwa & Company, 340 (1st ed. 2001).

⁹⁸ THE KASHMIR CHAMBER OF COMMERCE AND INDUSTRY, *Preliminary Economic Loss Assessment Report* (Aug.-Dec., 2019)

⁹⁹ *Ibid.*

45. According to a study published by the Kashmir Chamber of Commerce and Industry (KCCI), companies in the valley have sustained losses worth Rs 18,000 crore since August 5. The KCCI study reports that at least 4.96 Lakhs have lost their jobs and industries directly based on the Internet, such as information technology, have lost their jobs.¹⁰⁰ And e-commerce has been destroyed. According to Sheikh Ashiq Ahmad, president of KCCI, online payment, submitting work online, and sending email have become nearly impossible using the 2G network. He states: “2G internet has not done much to improve the quality of life in J&K during this Covid-19 pandemic, especially because high-speed 4G internet is at least 20 times faster than 2G, and has become the lifeline that keeps the global economy running.”¹⁰¹

That Article 21 Extends to Right to Socio- Economic Justice and Economic Empowerment

46. By reading social justice¹⁰² and economic empowerment of weaker sections,¹⁰³ as enshrined in the Preamble and the Directive Principles of State Policy, into A.21 of the Constitution,¹⁰⁴ the Hon’ble Supreme Court has legally assured all citizens of a life of human dignity.¹⁰⁵ Therefore, government is under obligation to raise economic and social status of people of J&K not to degrade their status by restricting internet access.

That Article 21 extends to Right to Health.

47. The right to health or healthcare is not expressly mention in the Constitution, But the Hon'ble Supreme Court of India in *Bandhua Mukti Morcha v Union of India & Ors*¹⁰⁶ interpreted the right to health under Article 21 which guarantees the right to life. Also, in the case of *State of Punjab & Ors. v. Mohinder Singh Chawla*¹⁰⁷ the apex court reaffirmed that the right to health is fundamental to the right to life and should be put on record that

¹⁰⁰ *Ibid.*

¹⁰¹ REGINA MIHINDUKULASURIYA, *Internet shutdowns, pandemic have cost Kashmir Rs 40,000 cr, 5 lakh jobs, says industry head*, THE PRINT (Feb 15, 2021, 7:30 PM) <https://theprint.in/economy/internet-shutdowns-pandemic-have-cost-kashmir-rs-40000-cr-5-lakh-jobs-says-industry-head/474028/>

¹⁰² Asok Kumar Gupta v. State of UP (1999) 5 SCC 201 ¶26.

¹⁰³ Chameli, *supra* note 88.

¹⁰⁴ Minerva *supra* note 93 at ¶13.

¹⁰⁵ JAGDISH SWARUP, CONSTITUTION OF INDIA 1114 (3rd ed Thomson Reuters).

¹⁰⁶ *Bandhua*, *supra* note 11.

¹⁰⁷ (1996) 113 PLR 499.

the government had a constitutional obligation to provide health services. Further, in *State of Punjab & Ors v. Ram Lubhaya Bagga*¹⁰⁸, the Hon'ble court made it clear that it is the state's duty maintain healthcare services.

48. It is submitted that J&K medical practitioners are combating COVID-19 without a complete library of information. The limited 2G Internet keeps healthcare professionals in the area from acquiring latest knowledge, public health recommendations and coronavirus studies, as well as reliable dissemination alerts in the region.¹⁰⁹ Iqbal Saleem, a professor of surgery, said, "This is frustrating. Trying to download the Intensive Care Management Guidelines—24 MBs and one hour. It is still not feasible to do so."¹¹⁰

Right To Education Stands Violated

49. United Nations universal declaration on human rights adopted in 1941 further states; *"Everyone human being has the right to education. Education must be free, at least in the primary and fundamental stages. Moreover, primary education shall be compulsory. Advance and professional education shall be made generally available and higher education shall be accessible to all on the basis of merit and equality."*¹¹¹
50. Taking Europe convention into consideration the hon'ble supreme court in the case of *Unni Krishnan, J.P. And Ors. Etc. v. State of Andhra Pradesh And Ors.*¹¹² held – *"Right to education means citizen has the right to call up the state to provide the facilities of education to them in according to the financial capacity".* The court further stated that right to education is a fundamental right flowing from right to life which being one of the fundamental rights.
51. Over the time the internet has become a vital educational tool¹¹³ and shutting it down is restricting a citizen to access vast and expanding sources of knowledge available online

¹⁰⁸ 1999 (1) SCC 297.

¹⁰⁹ POOJA SINGH, *Healing Kashmir on a 2G connection*, LIVE MINT, (Feb 15, 2021, 7:30 PM) <https://www.livemint.com/mint-lounge/features/healing-kashmir-on-a-2g-connection-11600961156478.html>

¹¹⁰ MAJID MAQBOO, *An Hour to Download ICU Guidelines': Amid COVID-19, Kashmir Doctors Struggle with Slow Internet*, THE WIRE (Feb 15, 2021, 8:30 PM) <https://thewire.in/rights/coronavirus-kashmir-slow-internet>

¹¹¹ UN GENERAL ASSEMBLY, *Universal Declaration of Human Rights*, ART. 26, [1948, 217 A (III)].

¹¹² 1993 AIR 2178 : 1993 SCR (1) 594.

¹¹³ LIU, *supra* note 20.

courses, reading material and scholarly researches available on the internet consequently violative of an individual's right to education.

52. In *Faheema Shirin.R.K v. State of Kerala*¹¹⁴, the SC held that:

"....the right to have access to the Internet becomes a part of the right to education as well as right to privacy under Article 21 of the Constitution of India."

53. In the middle of pandemic students are more vulnerable to learn from home, the internet being one of the only platforms for them to be learned. In such a situation, it is more obvious that deprivation of the Internet would lead to deprivation of education.

54. According to the report of the Human Rights Forum for Jammu and Kashmir, since the lockdown to contain Covid-19 the restriction on the internet has severely impacted education. It states that: *"The limiting of networks to 2G has made it impossible for online classes to function adequately. Graduate students and teachers have been unable to participate in conferences or have their papers published, causing wilful harm to their careers and violating the rights to education."*¹¹⁵

That Right To Freedom Has Been Violated.

55. It is submitted that the constitution of India provides various freedoms necessary to promote certain basic rights of the citizen along with the democratic values in the country.¹¹⁶ Article 19 guarantees some of the basic, valued and natural rights inherent in a person.¹¹⁷ Right to be governed under Art. 19, it is not necessary to be explicitly present, it may yet be implicit, in various clauses of Art. 19.¹¹⁸

Freedom of Speech cannot be taken away except as provided by Article 19(2)

56. Freedom of speech and expression, enshrined in Art. 19(1)(a), is a bulwark of democratic country.¹¹⁹ The phrase 'speech and expression' has a very broad connotation so as to

¹¹⁴ *Faheema*, *supra* note 23.

¹¹⁵ FORUM FOR HUMAN RIGHTS IN JAMMU AND KASHMIR, *Jammu and Kashmir: The Impact of Lockdowns on Human Rights*, NEWS CLICK (Feb 15, 2021, 8:30 PM) <https://www.newsclick.in/Jammu-Kashmir-Impact-of-Lockdowns-on-Human-Rights-Report>.

¹¹⁶ M.P., *supra* note 9 at 1051.

¹¹⁷ *Ibid*

¹¹⁸ *Kharak Singh v. Uttar Pradesh*, AIR 1963 SC 1295.

¹¹⁹ M.P., *supra* note 9 at 1058.

include freed discussion of issues, public opinion on social, political and economic matters through any medium.¹²⁰ In *Maneka Gandhi case*¹²¹, Bhagwati J., has emphasised on the significance of the freedom of speech and expression as:

“Democracy is based essentially on free debate and open discussion, for that is the only corrective of government action in a democratic set up. If democracy means government of the people by the people, it is obvious that every citizen must be entitled to participate in the democratic process and in order to enable him intelligently exercise his right of making a choice, free and general discussion of public matter is absolutely essential.”

57. It is submitted that in the instant case, the restricting internet speed in the UT of J&K is similar to restricting a medium for people to express their views and expression over social media on mere apprehension that it will lead to aggression and violence. In *S. Rengarajan and others v. P. Jagjivan Ram*¹²², it was held that freedom of expression cannot be suppressed on account of threat of demonstration and processions or threats of violence which would tantamount to negation of the rule of law and the surrender to blackmail and intimidation.

The constitution has conferred the right to choose to carry on trade, business or any profession.

58. The Article 19(1)(g)¹²³ of the Indian Constitution guarantees to all citizens the right to practice any profession, or to carry on any occupation, trade or business though subjected to reasonable restriction. The Constitution also proclaims by Article 301¹²⁴ the freedom of trade, commerce and intercourse throughout the territory of India. There is implicit right to choose any profession, or any occupation, trade or business.¹²⁵ The principle of ‘level playing field’, is one of prominent factor embodied in Art. 19(1)(g) of the constitution.¹²⁶

¹²⁰ Radha Mohan Lal v. Rajasthan High Court, (2003) 3 SCC 427 : AIR 2003 SC 1467.

¹²¹ Maneka, *supra* note 27.

¹²² (1989) 2 SCC 574.

¹²³ INDIA CONST. Art. 19, § 1, cl. g.

¹²⁴ INDIA CONST. Art. 301.

¹²⁵ State of Karnataka v. Associated Management of English Medium primary and Secondary Schools, AIR 2014 SC 2094.

¹²⁶ Reliance Energy Ltd. Maharashtra State Road Development Corp. Ltd., (2007) 8 SCC 1.

59. Obligation of government to promote national economy plays one of the important the role in the formulation of right to trade, business, or any profession. In *Excel Wear v. UOI*¹²⁷, the court took the view that public enterprises uphold the principle of *socialism* however, private enterprises are equally important since it not only provide for livelihood or expenses of individual but also form capital for growth of national economy.
60. However, restriction on the internet has cause a major set-back to the economy as well as to the fundamental rights of the traders, businessmen and to other professional. According to the report of KCCI¹²⁸, handicraft sector, that is solely based on the internet, is at a standstill. As a result, 50,000 artisans are jobless, according to the experts the action against Kashmir has led to losses in tourism, health care, education and in the communications industries. The state economy has lost more \$1.5 billion due to restriction of internet combined with lockdown in view of Covid-19. Several companies, whose operations were internet-dependent, have been closed.¹²⁹
61. The Hon'ble Supreme Court in the case of *Life Insurance Corporation of India v. Prof. Manubhai D. Shah*¹³⁰, held: "Every citizen of this free country, therefore, has the right to air his or her views through the printing and/or the electronic media subject of course to permissible restrictions imposed under Article 19(2) of the Constitution. The print media, the radio and the tiny screen play the role of public educators, so vital to the growth of a healthy democracy."

Unreasonable Restriction

62. Reasonableness postulates that the restrictions imposed should not be excessive but only to the extent necessary to secure the public good.¹³¹ In *Mohd. Faruk v. State of Madhya Pradesh & Ors*,¹³² it was held that the restriction imposed may be partial or total, but the principle remains the same. In case of a total restriction or a total ban, the onus of proving that such a ban is for the maintenance of the general public interest, lies heavily on the

¹²⁷ AIR 1979 SC 25 : 1979 SCR (1)1009.

¹²⁸ THE KASHMIR, *supra* note 98.

¹²⁹ THE KASHMIR, *supra* note 98.

¹³⁰ AIR 1993 SC 171, 1992 SCR (3) 595.

¹³¹ MRF Ltd. V. Inspector Kerala Government, AIR 1999 SC 188 : (1998) 8 SCC 227.

¹³² Mohd, *supra* note 76.

State to show that such total restriction is in public interest.¹³³ As propounded in *VG Row*¹³⁴, the test required for the reasonable restriction constitute the question, (i) whether the right is a fundamental right, (ii) whether the restriction is contemplated by cluses (2) to (6) of Art. 19, and (iii) whether the restriction is proportionate and reasonable.

63. It is humbly submitted that in the age of digitalization a major chunk of countries economy is dependent on the internet as the business, e-commerce, start-ups, corporate and finances use internet services for transaction and affairs of businesses.¹³⁵ The Internet enables various platforms for online payment for payment of bills, fees etc.

64. The apex court in the case of *Gulam Nabi Ajad v. UOI & Anr.*¹³⁶ held that:

“The freedom of speech and expression and the freedom to practice any profession or carry on any trade, business or occupation over the medium of internet enjoys constitutional protection under Article 19(1)(a) and Article 19(1)(g). The restriction upon such fundamental rights should be in consonance with the mandate under Article 19 (2) and (6) of the Constitution, inclusive of the test of proportionality.”

65. In the era of digitalisation, internet shutdown over 18 months is neither a reasonable nor a propionate restriction on the freedom of speech and expression and right to trade, business and profession, resulting in huge loss of the economy of the nation and the democracy of the state, thus, violating the right granted to the citizens under Art. 19. In the *Anuradha Bhasin v. Union of India & Ors.*,¹³⁷ court held *"Imposition of restriction on fundamental rights should be based on the test of proportionality"*.

¹³³ Deena Dayal v. UOI, AIR 1983 SC 1155.

¹³⁴ State of Madras v. VG Row, AIR 1952 SC 196.

¹³⁵ P. UIMONEN, *supra* note 21.

¹³⁶ 41 (1990) DLT 115, 1990 RLR 242.

¹³⁷ AIR 2020 SC 1308 : (2020) 3 SCC 637.

3. THE GOVERNMENT'S ACTION OF PROHIBITING INTERNET ACTION IS *ULTRA VIRES* THE CONSTITUTION OF INDIA

66. When the law contains 'substantive' restriction with regard to the exercise of the right, as well as 'procedural' provisions, the courts would consider the reasonableness of both.¹³⁸ The regulatory mechanism for the Internet is twofold: the first is contractual, relating to the arrangement negotiated between the Internet Service Providers and the Government, and the second is legislative, according to the Information Technology Act, 2000, the Criminal Procedure Code, 1973 and the Telegraph Act.¹³⁹ It is submitted that the order restraining internet is ultra vires¹⁴⁰ the statutory provision because procedures established by Telegraph Act is not followed [I], and the state act is not proportionate under section 144 of Crpc [II].

THE PROCEDURES ESTABLISHED BY TELEGRAPH ACT IS NOT TRAILED

67. It is submitted that to restrict the internet procedure followed should be in accordance to suspension rule established in Telegraph Act¹⁴¹ According to the safeguard laid down by Telegraph act, suspension of the service must be pass in '*unavoidable*' circumstances confirmed by the competent authority¹⁴² and it should be reasoned order and proportional to the object sought.¹⁴³

68. In *BK Srinivasan v. State of Karnataka*,¹⁴⁴ court observed that the obligation to ensure that all directives passed under the Suspension Rules are made publicly available by some appropriate process. Further in *Anuradha Basin v. UOI*,¹⁴⁵ court noted that although the Suspension Rules does not provide for publication or notification of the orders, a settled principle of law, and of natural justice, is that an order, particularly one that affects lives, liberty and property of people, must be made available. Any law which demands compliance of the people requires to be notified directly and reliably.

¹³⁸ Maneka, *supra* note 27.

¹³⁹ Anuradha, *supra* note 132.

¹⁴⁰ *Ultra Vires*, BLACK'S LAW DICTIONARY. (10th ed. 2014).

¹⁴¹ Anuradha, *supra* note 132.

¹⁴² Telegraph Act, 1885, § 5 Cl. 1, No. 13, Acts of Parliament, 1949 (India).

¹⁴³ Telegraph Act, 1885, § 5 Cl. 2, No. 13, Acts of Parliament, 1949 (India).

¹⁴⁴ AIR 1987 SC 1059, 1987 SCR (1) 1054.

¹⁴⁵ Anuradha, *supra* note 132.

69. It is contended that no such notification is made in the instant case and the following observation has already been made by the Supreme Court.¹⁴⁶
70. Further, in order for the authority to be assured that it is required or reasonable to issue orders in the interests of the dignity and integrity of India, the protection of the State, relationships of goodwill with foreign states or law and order, or to avoid incitement to commit an offence, reasoning must be provided.¹⁴⁷ In *PUCL v UOI*,¹⁴⁸ court observed that it is necessary for the state to show that there exists national emergency and public safety interest. This necessity must be reviewed by the review committee¹⁴⁹ and question must be considered whether the restrictions are still in compliance with the requirements.¹⁵⁰
71. It is submitted that in the present case, restriction on the access of internet is not necessary anymore in the state, since the situation in the Kashmir does not show the condition of violence or the apprehension of violence due to the revocation of special status of the state.

The Imposition Of Restriction On The Internet Is Not Proportional.

72. It is submitted that it is necessary to reiterate that complete broad suspension of telecom services, be it the Internet or otherwise, being a drastic measure, must be considered by the State only if 'necessary' and 'unavoidable' and proportionate in action.¹⁵¹ Reliance is based on *Hukam Chand Shyam Lal case*,¹⁵² court observed that:

"It is well settled that where a power is required to be exercised by a certain authority in a certain way, it should be exercised in that manner or not at all, and all other modes (sic) of performance are necessarily forbidden. It is all the more necessary to observe this rule where power is of a drastic nature..." This applies with even more force considering the large public impact on the right to freedom of speech and expression that such a broad-based restriction would have."

¹⁴⁶ Anuradha, *supra* note 132.

¹⁴⁷ *Hukam Chand Shyam Lal v. Union of India*, AIR 1976 SC 789 : 1976 SCR (2) 1060.

¹⁴⁸ (1997) 1 SCC 301.

¹⁴⁹ Telegraph Act, 1885, § 5 Cl. 5, No. 13, Acts of Parliament, 1949 (India).

¹⁵⁰ Anuradha, *supra* note 132.

¹⁵¹ Gulam, *supra* note 131.

¹⁵² *Hukam*, *supra* note 146 at ¶ 18.

73. In the present situation, the state action to put restriction on the speed of the internet amid lockdown, when the whole world depends on the internet to access their livelihood, education and life, is glaringly unreasonable and exceptionally disproportionate in a developing country like India

THE SHUTTING DOWN OF INTERNET IS NOT JUSTIFIABLE UNDER SECTION 144 CRPC

74. Section 144¹⁵³ of Crpc, provides the power to the state to issue order in urgent cases of nuisance or apprehended danger. It is asserted that there is no disturbing facts which warrant the imposition of restrictions under Section 144, Crpc.

In Madhu Limaye case,¹⁵⁴ court stated that, “there has to be a balance and proportionality between the right and restriction on the one hand, and the right and duty, on the other. It will create an imbalance, if undue or disproportionate emphasis is placed upon the right of a citizen without considering the significance of the duty.....”

75. It is contended that the validity of the aforesaid restrictions has to be tested on its reasonableness. The restrictions imposed must be proportionate to the proposed or perceived threat., however, this is not the case in present situation. Restrictive order passed by the state thus liable be struck down with immediate effect.

¹⁵³ Code of Criminal Procedure, 1974, § 144, No. 2, Acts of Parliament, 1949 (India).

¹⁵⁴ Madhu Limaye v. The State of Maharashtra, AIR 1978 SC 47 : 1978 SCR (1) 749

PRAYER

Wherefore in the light of the issues raised, arguments advanced and authorities cited, it is humbly requested that this Hon'ble Court may be pleased to:

- 1. Adjudge that the present writ petition is maintainable before the hon'ble court.*
- 2. Issue an appropriate writ, order or direction declaring Internet Shutdowns as unconstitutional and in violation of Article 19 & 21 of the Constitution of India and hence unenforceable.*
- 3. Declare that the restriction on Internet speed is unreasonable and arbitrary restriction under the Telecom Act.*

And pass any such order, writ or direction as the Hon'ble Court deems fit and proper, for this the petitioner shall duty bound pray.

DATE ___/___/___

ALL OF WHICH IS RESPECTFULLY SUBMITTED,
SD/-

COUNSEL FOR THE PETITIONER

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