BEFORE THE ISLAMABAD HIGH COURT, ISLAMABAD

W.P. No. 4994/2014

1. **Bolo Bhi,** through its General Secretary Ms. Farieha Aziz
2. **Ms. Farieha Aziz**

…Petitioners

Versus

1. **Federation of Pakistan,** through Secretary, Ministry of Information Technology, 4th Floor, Evacuee Trust Complex, Agha Khan Road, Sector F-5/1, Islamabad

2. **Inter-Ministerial Committee for Evaluation of Websites,** through through its Convener, Secretary, Ministry of Information Technology, 4th Floor, Evacuee Trust Complex, Agha Khan Road, Sector F-5/1, Islamabad

3. **Pakistan Telecommunication Authority,** through its Chairman, Pakistan Telecommunication Authority Headquarters, Sector F-5/1, Islamabad

…Respondents

WRIT PETITION UNDER ARTICLE 199 OF THE CONSTITUTION OF ISLAMIC REPUBLIC OF PAKISTAN, 1973 READ ALONG WITH ALL OTHER ENABLING PROVISIONS OF THE LAW

The Petitioner respectfully submits that:

DESCRIPTION OF PARTIES AND THEIR RELATION TO SUBJECT MATTER

1. Petitioner No. 1 is a not-for-profit organization duly registered under the Societies Act, 1860 and is geared towards research, advocacy and policy related to internet access and freedom, digital security and privacy, government transparency, freedom of speech and information and gender rights. Aggrieved by the actions and directives issued by the Respondents, Petitioner No. 1 is filing this Petition through its General Secretary, Farieha Aziz who is fully conversant with the facts of the case and is authorized on behalf of Bolo Bhi to institute, verify, file and plead this Writ Petition. Petitioner No. 2 is the General Secretary and director of Petitioner No. 1, a journalist and has been a vociferous advocate of freedom of speech and information.

*(The constitutive documents of Bolo Bhi are appended herewith as **Annexure A**)*

2. Respondent No. 1 is the division of the Federal Government of Pakistan vested with the authority of the Federal Government pursuant to Section 2(fa) of the Pakistan Telecommunication (Reorganization) Act, 1996 ("**Telecom Act**").

3. Respondent No. 2 is the Inter-Ministerial Committee for Evaluation of Websites ("**IMCEW**") constituted by notification (dated 29.08.2006) ("**Impugned Notification**") issued by Respondent No. 1 with the following terms of reference:

   (i) Formalization of procedure for blocking of websites (URLs).
   (ii) To evaluate/examine all such materials and requests for blocking of offensive, objectionable/obnoxious websites (URLs) forwarded by the agencies, Ministries or individuals and shall send its recommendation to MoIT for issuance of necessary directives after scrutiny for filtering/blocking by the PTA accordingly.
   (iii) The Committee will also finalize TOR, procedure and mechanism for examining the requests for blocking the websites (URLs) on rational (*sic*) and merit.

   Since its inception, Respondent No. 2 continued to issue directives for blocking access to online content and websites available on the Internet in Pakistan.

   *(A copy of the notification of the Ministry of Information Technology dated 29.08.2006 is appended herewith as **Annexure B**).*

4. Respondent No. 3 is the Pakistan Telecommunication Authority established under Section 3 of the Telecom Act and is mandated to regulate the establishment, maintenance and operation of the telecommunication systems and the provision of telecommunication services in Pakistan. It is pursuant to Section 8 of the Telecom Act that Respondent No. 1 issues policy directives to Respondent No. 3 on the instruction of Respondent No. 2 that Respondent No. 3 orders telecom licensees and service providers to censor Internet content and block websites in Pakistan.

FACTS OF THE CASE

5. The subject matter of the present Petition pertains to challenging the legality of the existence and operation of Respondent No. 2, the Inter-Ministerial Committee for Evaluation of Websites, which was constituted by the Impugned Notification. Through a Freedom of Information Request filed under the Freedom of Information Ordinance, 2002, Petitioner No. 1 acquired a copy of the Impugned Notification. The stated purpose of constituting the Respondent No. 2 was to formalize a procedure for blocking access of the citizens of Pakistan to online content and websites and thus affecting Internet censorship in Pakistan.

According to the Impugned Notification, Respondent No. 2 comprises (i) the Secretary, Ministry of Information Technology (as Convener), (ii) a nominee of the Ministry of Information and Broadcasting, (iii) a nominee of the Ministry of Interior, (iv) a nominee of the Cabinet Division, (v) a telecommunications expert from the Ministry of Information Technology, and (vi) a nominee of the Inter-Services Intelligence Agency (ISI).

6. Respondent No. 2 has been tasked with the mandate to determine on its own accord or on requests made by intelligence agencies, ministries and individuals which websites/URLs provide access to "offensive", "objectionable" or "obnoxious" content and order Respondent No. 1 to block such websites/URLs. Respondent No. 1 upon receipt of directives from Respondent No. 2 issues "policy direction" to Respondent No. 3 under Section 8 of the Telecom Act to ensure that the said websites/URLs are blocked. Respondent No. 3 in turn issues directives to Internet Service Providers ("**ISPs**"), who are licensees of Respondent No. 3, to block such websites/URLs. The license conditions of ISPs oblige them to abide by the instructions issued by Respondent No. 3. This is the manner in which Internet censorship regime functions in Pakistan.

7. While the Impugned Notification required Respondent No. 2 to finalize "the procedure and mechanism for examining the requests for blocking the websites (URLs) on rational [basis] and merit", the said Respondent has failed to develop a criteria and procedure for doing during the last eight years of its existence. It is also pertinent to note since the constitution of Respondent No. 2 in 2006, there is no public record of either the meetings convened by it or the recommendations made in the aftermath of its meetings to Respondent No. 2. Respondent No. 2 thus continues to function in an ad hoc, arbitrary and whimsical manner and while it continues to order blockage of websites and Internet censorship, the manner in which it exercises authority under the Impugned Notification and the scrutiny that it undertakes prior to exercise of authority is completely devoid of transparency and reasonableness.

8. The constitution of Respondent No. 2 was part of the initiatives taken by Respondent No. 1 which led to increased monitoring, regulation and control of access to online content available on the Internet. Currently, the number of websites blocked in Pakistan range between 20,000 and 40,000. (The Petitioner, through a request made under the Freedom of Information Ordinance, 2002, sought a list of blocked websites, which was turned down and disclosure refused by Respondent No. 1 purportedly under Section 8(i) of the said Act.) The most glaring example of Respondent No. 2's arbitrary and ad hoc drive to regulate, monitor and censor content on the Internet was the blocking of YouTube in Pakistan. On the basis that a blasphemous video was uploaded to YouTube by a user of the video-sharing website and was available on the intermediary i.e. YouTube's website, Respondent No. 1 on the directive of Respondent No. 2 directed Respondent No. 3 to block complete access to YouTube on 17.09.2012. As a consequence, citizens of Pakistan remain deprived of access

to multitudes of informational, educative and entertainment content, while the same is not the case in other democratic and Muslim countries around the world.

9. Respondent 3 acknowledges in its response to Petitioner No. 1's Freedom of Information request, that the policy directive issued by Respondent 1 in May 2012 instructed it to carry out effective monitoring and control of obnoxious content (blasphemous and pornographic) over the Internet. However, the enthusiasm of Respondents 1 and 2 to affect Internet censorship is not limited to blasphemous or pornographic material. Both Respondents have chosen to interpret the powers outlined in the Impugned Notification, to Respondent No. 2 broadly, and have routinely exercised them to order blockage of any website or URL they deem 'offensive,' 'objectionable' or 'obnoxious.' In exercise of such overbroad, unstructured and unregulated power, in June 2014 the Respondents ordered the blockage of the Facebook page of Laal, a popular music band in Pakistan know for its performance on the poetry of Habib Jalib. The Facebook page of Laal was finally restored after a public furor over such mindless censorship of voices critical of the government and the state and wide reportage of the matter by the press.

(*Copies of news reports by the Express Tribune and New York Times dated 06.06.2014 are attached as* ***Annex C and D****, respectively, and Respondent No. 3's response to Petitioner No. 1's Freedom of Information Request is attached as* ***Annex E.***)

10. The trend of arbitrary and ad hoc censorship of the Internet pursuant to the directives issued by Respondent No. 2 is also patently obvious from the Government Requests Reports published by Facebook on its website. In the Government Requests Report for the period of July to December, 2013, Facebook states that it restricted access in Pakistan to 162 pieces of online content primarily reported by Respondent No. 1 and Respondent No. 3 that violated local (i.e. Pakistani) law. The amount of online content reported for restriction of access thereto increased astronomically for the period of January to June 2014 during which Respondent No. 1 and Respondent No. 3 reported 1,773 pieces of online content to Facebook for blocking. The content restriction were once again not limited to blasphemous content but in fact also pertained to 'criticism of the state.' Furthermore, Respondent No. 2 neither issued any notices to individuals or entities affected by such blockage to afford them due process, nor did it issue any reasoned orders to Respondent No. 1 establishing that exercised the authority derived from the Impugned Notification in a fair, just and reasonable manner.

(Copy of the Facebook Government Requests Reports for the period of July to December, 2013 and January to June, 2014 are appended herewith as ***Annexures F*** *and* ***G,*** *respectively.)*

11. Despite the fact that YouTube is still blocked and countless pages on Facebook and Twitter are being blocked through the orders of the Respondents, there is evidence that there is official use of filtering technology over and above such blocking measures. In June, 2013, Citizen Lab (a technology research and development organization in Canada) published a

report that reported the use of "Netsweeper" in Pakistan, which is a filtering technology developed by a Canadian firm. The key findings of the report were that:

i. Netsweeper filtering products has been installed on Pakistan Telecommunication Company Limited (PTCL)'s network being the largest telecommunication company and also the Pakistan Internet Exchange Point; and

ii. Netsweeper technology is being implemented in Pakistan on PTCL for the purposes of political and social filtering, including websites relating to human rights, sensitive religious topics, and independent media.

*(Copy of the report published by Citizen Lab in June 2013 is appended herewith as **Annexure H**)*

12. The directives issued by Respondent No. 2 for blocking access to various websites and online content are in line with Respondent No. 1's propensity of carrying out moral policing as well as censorship of free speech, thought and opinion, in the name of public order or national security, which is geared towards suppressing diversity of ideas and viewpoints critical of the government and its institutions. Such propensity has been obvious from the various initiatives taken by Respondent No. 1 over the years. It has extended to matters as diverse as regulation and control of access to information on the Internet as well as directions to institutions and universities to toe the line of policies made by Respondent No. 1 in carrying out educational and academic activities within their respective institutions.

12.1 A recent example of such propensity is a letter issued to the Rectors, Vice Chancellors or Head of every university or degree awarding institute, whether public or private, in Pakistan by the Higher Education Commission ("**HEC**"). In the said letter, the HEC has observed that it is the responsibility of universities and degree awarding institutions to promote *"ideology and principles of Pakistan through teachings, dialogues, meetings, conferences, formal and informal gatherings and societal discourse."* According to the HEC, *"demonstration of such rightful perceptions promote nationalism, dispel confusion and infuse beliefs and principles that brings harmony in a society, and bolsters unity and performance."*

12.2 In the letter, the HEC observes, however, that a few activities directly or indirectly hosted by universities and/or degree awarding institutions include discussions or presentations *"contrary to the ideology and principles of Pakistan"* and that such activities *"not only tarnish the image of an institution but fortify negativism and chaos."* The HEC goes on to solicit the help of the addressees of the letter in remaining *"vigilant"* and directs the same to *"forestall any activity that in any manner challenges the ideology and principles of Pakistan, and/or perspective of the Government of Pakistan thereof."*

12.3 It is obvious from the language and wording of the letter issued by the HEC that what is considered a valuable addition to the academic activities engaged in by universities and/or degree awarding institutions around the world – a free exchange of ideas, points of view,

opinions and thought which promotes tolerance in a society – is to be controlled, regulated and forestalled in universities and/or degree awarding institutions in Pakistan. Such free exchange of ideas, points of view, opinion and thought is referred to as *"negativism"* and *"chaos"* and a myopic view on all matters is through to *"dispel confusion."*

(Copy of the Higher Education Commission Letter No. 10-1/Ac&C/HEC/2013/869 dated 28-10-2014 is appended herewith as ***Annexure I****)*

13. The Impugned Notification and the entire machinery and process put together to block websites and URLs and undertake Internet Censorship pursuant to it ultra vires of (i) constitutional due process and fundamental rights guaranteed under Articles 4, 8, 9, 19, 19A and 25 of the Constitution, (ii) the Telecom Act, (iii) the Rules of Business, 1973, (iv) Section 24-A of the General Clauses Act and (v) the rules of natural justice.

14. Aggrieved by the illegal actions of the Respondents, the Petitioners have no other adequate remedy but to petition this honorable Court under Article 199 of the Constitution to issue a writ against the Respondents, who are performing functions in connection with affairs of the federation and fall within the territorial jurisdiction of this honorable Court, declaring that the Impugned Notification is without lawful authority and of no legal effect and directing the Respondents to act in accordance with the law and the Constitution.

LEGAL GROUNDS

A. The Impugned Notification, the Internet censorship regime constructed under it, and the actions of Respondents blocking websites and ordering Internet censorship are devoid of lawful authority and ultra vires of the Constitution. Article 19 of the Constitution guarantees the fundamental right to free speech while allowing the state to impose reasonable restrictions on freedom of the press, within select categories of speech, "by law". However, such reasonable restriction can only be imposed in accordance with the requirements prescribed by Article 19, which states that, "*Every citizen shall have the right to freedom of speech and expression, and there shall be freedom of the press, subject to any reasonable restrictions imposed by law in the interest of the glory of Islam or the integrity, security or defense of Pakistan or any part thereof, friendly relations with foreign States, public order, decency or morality, or in relation to contempt of court, commission of or incitement to an offense.*"

    a. While creating a fundamental right to free speech, Article 19 also identifies seven categories of speech that are afforded limited protection and can be subjected to reasonable restrictions imposed by law. The seven limited-protection categories of speech include speech reasonably deemed inimical to (i) glory of Islam or its integrity, (ii) security or defense of Pakistan, (iii) friendly relations with foreign states, (iv) public order, (v) decency or morality, or likely to cause (vi) contempt of court or (vii) commission or incitement of an offense.

b. Similarly Article 19-A that creates a fundamental right to have access to information in all matters of public importance also subjects such right to "*regulation and reasonable restrictions imposed by law*." Thus Articles 19 and 19-A while creating the fundamental rights to free speech and information leave room for a competent legislature to encumber those rights or place fetters through promulgation of a statute. However, in doing so that state is subjected to procedural and substantive requirements.

c. The procedural requirement cited in Articles 19 and 19-A is that any restrictions imposed must be imposed through law. In other words, there is no arbitrary right or discretionary authority vested in the executive branch of the state to curb these freedoms at will. It has been left to a competent legislature to regulate or restrict these freedom, if need be, through legislation.

d. The common substantive requirement, also mandated by both Articles 19 and 19-A, is that any restrictions imposed ought to be reasonable. Article 19, however, imposes a further content-based substantive requirement i.e. only such speech may be restricted that falls within one of the aforementioned limited-protection categories.

B. The Impugned Notification and the Internet censorship regime constructed under it are ultra vires of the Constitution as no competent legislature has promulgated a law that allows the state to regulate, block or censor websites or URLs on the Internet. While there are various laws in force in Pakistan that encumber the right to free speech, none of them empower the Respondents to regulate speech they find "offensive", "objectionable" or "obnoxious". The laws, listed below, that do declare certain categories of speech illegal and regulate the right to information do not vest in the federal government / executive the authority to censor speech or regulate or censor the Internet.

a. Article 204 of the Constitution makes contempt of court an offence and the Contempt of Court Ordinance, 2003 further elaborates that nature of speech that is contemptuous.

b. Pakistan Penal Code criminalizes speech of various types.

c. Section 20 of the PEMRA Ordinance, 2002, requires licensees to ensure that, "*programs and advertisements do not contain or encourage violence, terrorism, racial, ethnic or religious discrimination, sectarianism, extremism, militancy, hatred, pornography, obscenity, vulgarity or other material offensive to commonly accepted standards of decency*."

d. Sub-section (1) of Section 6 of the Motion Pictures Ordinance, 1979, states that, "*a film shall not be certified for public exhibition if, in the opinion of the Board, the film or any part thereof is prejudicial to the glory of Islam or the integrity, security or defense of Pakistan or any part*

thereof, friendly relations with foreign states, public order, decency or morality or amounts to the commission of, or incitement to, an offense."

e. Section 3 of the Defamation Ordinance, 2002, holds that, "*any wrongful act or publication or circulation or a false statement or representation made orally or in written or visual form which injures the reputation of a person, tends to lower him in the estimation of others or tends to reduce him to ridicule, unjust criticism, dislike, contempt or hatred shall be actionable as defamation*."

f. The Official Secrets Act, 1923, imposes restrictions against photography, sketches etc. of prohibited and notified areas and the publication of various materials.

g. Laws providing for access to information, including, Freedom of Information Ordinance, 2002, Khyber Pakhtunkhwa Right to Information Ordinance 2013 and Punjab Right to Information Ordinance, 2013.

C. The Impugned Notification and the Internet censorship regime constructed under it are ultra vires of the Constitution as neither the Parliament (in view of the entries in the Federal Legislative Lists under the Fourth Schedule) has the legislative authority to promulgate laws to regulate or censor the Internet in the interest of public order, decency or morality pursuant to Articles 19 and 19A, nor does the Federal Government have the executive authority pursuant to Article 97 of the Constitution (read together with the Fourth Schedule) to regulate, block or censor content on the Internet. Further, there exist no laws enabling any federal or provincial authority to regulate, block or censor content on the Internet. Consequently, neither has the Constitution or any statute vested any authority in the Respondents to regulate or block the content on the Internet, nor is the Parliament endowed with the legislative authority to vest such power in the Federal Government.

D. The Impugned Notification and the Internet censorship regime constructed under it are ultra vires of Article 99(3) of the Constitution as the Federal Government is required to conduct its business in accordance with the Rules of Business, 1973, and the said rules that allocate the business of the Federal Government amongst various ministries and divisions vest no authority in Respondent No. 1 to create an inter-ministerial committee of the sort created by the Impugned Notification.

a. The Rules of Business, 1973, do not authorize Respondent No. 1 to extend its authority to the Ministries of Interior, Information and Broadcasting, the Cabinet Division and the Inter-Services Intelligence and constitute a committee that inducts members from such ministries, divisions and agencies.

b. Clause 17A of Schedule II under Rule 3(3) of the Rules of Business that describes the functions and authority vested in Respondent No. 1 does not include any authority delegated to the Information Technology and Telecommunications Division to regulate, block or censor the Internet. It is a settled principle of law that no agent (i.e. IT Division) can sub-delegate to a sub-agent (i.e. the IMCEW) such authority that the agent doesn't possess.

c. Pursuant to Section 8 of the Telecom Act, Respondent No. 1 has the legal authority to issue policy directions to Respondent No. 3 in relation to matters specified in the said section, which do not include directions to regulate, block or censor content on the Internet. Thus, Respondent No. 1 has no legal authority to issue any directions to Respondent No. 3 to regulate, block or censor content on the Internet.

d. Section 8 of the Telecom Act further vests no authority in Respondent No. 1 to further delegate the powers vested in it under the said section. It is a settled principle of law that when an authority has been delegated by the parliament to a particular entity, it cannot be further sub-delegated unless the parent statute explicitly authorizes such further delegation.

e. It is patent from the aforesaid that (i) Respondent No. 1 is vested with no legal authority to constitute Respondent No. 2, (ii) Respondent No. 1 is vested with no legal authority to delegate its functions to Respondent No. 2, and (iii) Respondent No. 1 is vested with no legal authority to issue any instructions to Respondent No. 3 to regulate, block or censor content on the Internet.

E. The Impugned Notification and the Internet censorship regime constructed under it is ultra vires of the Telecom Act as the said statue vests no authority in the Federal Government, the Pakistan Telecommunication Authority ("**PTA**") or any other entity created under the Telecom Act to regulate, block or control the Internet or content available over it. The functions, powers and responsibilities of Respondent No. 3 vested under Sections 4, 5 and 6 of the Telecom Act, respectively, confer no authority on PTA to regulate the Internet or direct ISPs to block websites or URLs. The directions issued by Respondent No. 3 for such purpose, whether on the instructions of Respondents 1 and 2 or otherwise, are thus devoid of legal authority and of no legal effect.

a. The Telecom Act vests no authority in Respondent No. 2 to regulate or prevent access to online content on the Internet, even though Section 54 of the Act makes provision for the exercise of police power of the State in the interest of national security in the following terms:

"54. National Security.—(1) Notwithstanding anything contained in any law for the time being in force, in the interest of national security or in the apprehension of any offence, the Federal

Government may authorize any person or persons to intercept calls and messages or to trace calls through any telecommunication system.

(2) During a war or hostilities against Pakistan by any foreign power or internal aggression or for the defense or security of Pakistan, the Federal Government shall have preference and priority in telecommunication system over any licensee.

(3) Upon proclamation of emergency by the President, the Federal Government may suspend or modify all or any order or licenses made or issued under this Act or cause suspension of operation, functions or services of any licensee for such time as it may deem necessary. Provided that the Federal Government may compensate any licensee whose facilities or services are affected by any action under this sub-section."

It is patent from the aforesaid provision that while making provisions to protect national security interests the Telecom Act does not contemplate blocking or denying access to specific information available on the Internet. Therefore, Respondent No. 2 is vested with no legal authority to issue directives for blocking access to online content for the reason of it being prejudicial to interests of the State.

b. Sub-clauses (ag) and (ah) of Section 57 of the Telecom Act authorize Respondent No. 1 to make rules for the purpose of *"enforcing national security measures within the telecommunications sector"* and *"lawful interception,"* respectively. Section 5 Telecom Act vests authority in Respondent No. 3 to prescribe regulations to carry out the purposes of the Act. While the provisions of the Act do not create any authority to regulate, block or censor Internet content, neither Respondent No. 1 has exercised its rule-making power nor Respondent No. 3 has exercised its regulation-making power to prescribe any procedure or criteria to regulate, block or censor websites and URLs or access to the Internet. This further confirms that the Respondents also understand that the Telecom Act vests no power in them to regulate, block or censor Internet access or content. Therefore, there is no legal basis for Respondent No. 1 to assume that it has the power and authority to create Respondent No. 2 and do indirectly what it is cannot do directly.

F. The Impugned Notification and the Internet censorship regime under it is ultra vires of the Constitution as at the heart of our constitutional scheme lies the distinction between the legitimacy of the acts of a public authority and those of a private citizen. As the Constitution is the fountainhead of all legal authority within the State, no public authority or public office holder can claim any inherent power or authority to do anything in the name of the State that is not empowered to do by the Constitution and the law. The scope and limitations of public authority were best explained by Saleem Akhtar, J. in ***Gadoon Textile Mills vs. WAPDA*** (1997 SCMR 803):

"A public authority or corporation is a creature of statute and its sphere of activities and actions are circumscribed by the relevant law. Such juristic person is permitted to do what it is authorized to do by law, unlike a human being who is permitted to do what he is not forbidden by law to do. The corporation created by statute mainly for public purpose with the object of rendering service, providing facilities, convenience and amenities to public, are required to mold their decisions and actions within the frame of law for the benefit of public."

G. The Impugned Notification and the Internet censorship regime under it is ultra vires of the Constitution as Article 8(1) of the Constitution unequivocally provides that, "Any law, or any custom or usage having the force of law, in so far as it is inconsistent with the rights conferred

a. It was unequivocally stated by the Supreme Court of Pakistan in ***Pakistan Muslim League vs. Federation of Pakistan*** (PLD 2007 SC 642) that in order to be legitimate, executive action must be backed by law and ought not violate fundamental rights in the following terms:

"Any invasion upon the rights of citizens by anybody no matter whether by a private individual or by a public official or body, must be justified with reference to some law of the country. Therefore, executive action would necessarily have to be such that it could not possibly violate a Fundamental Right. The only power of the Executive to take action would have to be derived from law and the law itself would not be able to confer upon the executive any power to deal with a citizen or other persons in Pakistan in contravention of a Fundamental Right…No infringement or curtailment in any Fundamental Right can be made unless it is in the public interest and in accordance with valid law. No doubt that reasonable restriction can be imposed but it does not mean arbitrary exercise of power or unfettered or unbridled powers which surely would be outside the scope of 'reasonable restriction' and it must be in the public interest."

b. The fundamental rights guaranteed by the Constitution do not confer powers on the State, but responsibilities in relation to citizens and prescribe a line that the State ought not to cross in exercise of its powers. To the extent that the State is authorized to infringe upon any fundamental right of a citizen, it must be done in strict adherence to the requirements and limits prescribed by the Constitution. ***K.B. Threads (Private) Limited vs. Zila Nazim Lahore*** (PLD 2004 Lahore 376) explained this in the following terms:

"The political institutions and social structure rest on the theory that all men have certain rights of life, liberty and the pursuit of happiness, which are unalienable, fundamental and inherent. When these 'unalienable' rights are protected by Constitutional guarantees, they are called 'fundamental' rights because they have been placed beyond the power of any organ of the State, whether executive or legislative to act in violation of them. They can be taken away, suspended or abridged only in the manner which the Constitution provides…It is thus clear that the fundamental rights are most

superior and special in nature and cannot be interfered with without strict recourse to the law and that too subject to the conditions provided for the exercise of these rights."

H. The Impugned Notification and the Internet censorship regime under it that blocks and bans websites without due process or granting affected parties notice and a right to be heard is ultra vires of Section 6(d) of the Telecom Act, which obligates Respondent No. 3 to ensure that, "all persons affected by its decisions or determinations are given a due notice thereof and provided with an opportunity of being heard", and Section 24-A of the General Clauses Act that requires all public authorities to act in a just, fair and reasonable manner. The Internet censorship regime being run by the Respondents is ad hoc, whimsical and shrouded in secrecy and neither is the power being exercised by the Respondents to undertake such censorship backed by legal authority, nor is there any criteria or process regulating the exercise of such power usurped by the Respondents.

I. The Impugned Notification, the directions issued by Respondents No. 1 and 2 under it and implemented by Respondent No. 3 are in contravention of the principles laid down by superior courts in relation to exercise of statutory and regulatory authority. The honorable Supreme Court in *Alleged Corruption in Rental Power Plants* (2012 SCMR 773) and *Engineer Iqbal Zafar Jhagra vs Federation* (PLD 2013 SC 224) held that regulatory authority are under no obligation to abide by a policy directive of the Federal Government that is beyond the four corners of the law. The same principle was reemphasized in *PTML vs PTA* (PLD 2014 SC 478) in relation to the regulatory independence of Respondent No. 3 and no binding authority of policy directives of Respondent No. 1 under Section 8 that fall foul of the provisions of the Telecom Act, in the following terms:

"*It is obvious from the above reproduced portion of the order dated 26.3.2009 that PTA has conceived itself as a subordinate department of the federal government rather than the independent regulator envisaged by section 3, 4 and 5 of the act. If section 5(1)(d) of the Act is read with section 22 thereof, it will become immediately evident that the federal government has no role in modifying a license issued by PTA or carrying any condition thereof. This power is vested in PTA and is subject to the constraints of section 22 of the Act. The rationale for creating PTA as a regulator independent of the federal government by means of an act of parliament is to ensure that the government has no power to interfere in the working of PTA in matters of grant and administration of licenses. The policy directives issued by the government under section 8 of the act, therefore, cannot have binding affect to compel PTA to modify the terms of an existing license.*"

J. The Impugned Notification and the Internet censorship regime under it is ultra vires of the Constitution as while Article 19 of the Constitution identifies limited-protection speech categories, Article 19-A does not entitle the state to prevent access to limited-protection speech.

K. The Impugned Notification and the Internet censorship regime under it is ultra vires of the Constitution as even in the event that the Respondents had the authority to regulate and censor the Internet, which they do not posses, the manner in which it is being done neither

strikes the right balance between fundamental rights of citizens and vital interest of the state, nor uses the least restrictive means to pursue legitimate interests of the state. The Internet censorship regime simply fails to comprehend the right to free speech and information is a foundational right upon which are contingent many other fundamental rights and liberties of citizens.

a. The need for freedom of speech as well as the need to punish those who abuse such freedom is highlighted by Blackstone (*Corwin*, p. 769) as follows: "*Every man has an undoubted right in law to air what sentiment he pleases before the public: to forbid this, is to destroy the freedom of the press: but if he publishes what is improper, mischievous or illegal, he must take the consequences of his own temerity. To subject the press to restrictive power of a licenser…is to subject all freedom of sentiment to the prejudices of one man, and make him the arbitrary and infallible judge of all controversial points in learning, religion and government. But to punish…any dangerous or offensive writings, which when published, shall on a fair and impartial trial be adjudged of pernicious tendency, is necessary for the preservations of peace and good order, of government and religion, the only solid foundations of civil liberty. Thus the will of individuals is still left free; the abuse only of that will is the object of legal punishment.*"

b. In upholding a near absolute right to free speech, Holmes J., stated the 'clear and present danger' test in *Schenck v. U.S.* ((1918) 249 U.S. 47 @ 52) as follows: "*We admit that in many places and in ordinary times the defendants, in saying all that was said in the circular, would have been within their constitutional rights. But the character of every act depends upon the circumstances in which it is done…The law's stringent protection of free speech would not protect a man in falsely shouting 'fire' in a theatre, and causing panic. It does not even protect a man from an injunction against uttering words that may have all the effect of force…The question in every case is whether the words used are used in such circumstances and are of such nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent. It is a question of proximity and danger.*"

The concept of free flow of ideas and a marketplace of divergent ideas being the best determinant of their truth, Holmes J held the following in *Abrams v. U.S.* ((1919) 250 U.S. 616 @ 629):

"*Persecution for the expression of opinions seems to me perfectly logical. If you have no doubt of your premises or your power and want a certain result with all your heart you naturally express your wishes in law and sweep away all opposition. To allow opposition by speech seems to indicate that you think the speech impotent, as when a man says that he has squared the circle, or that you do not care wholeheartedly for the result, or that you doubt either your power or your premises. But when men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas – that the best test of truth is the power of the thought to let itself accepted in the competition of the market; and that truth is the only ground upon which their wishes safely can*

be carried out. That, at any rate, is the theory of our Constitution. It is an experiment, as all life is an experiment."

c. Notwithstanding the legal authority to impose restrictions in the interest of public order, the Indian Supreme Court held in *S. Rangarajan v. P. Jagjivan Ram* ((1989) 2 S.C.C. 574 @ 598-99) wherein the Madras High Court had revoked a certificate issued to a Tamil film, that courts ought not cower under threats of violence posed by the mob in the following words:

"*We are amused yet troubled by the stand taken by the State Government with regard to the film which has received the National Award. We want to put the anguished question, what good is the protection of freedom of expression if the State does not take care to protect it? If the film is unobjectionable and cannot constitutionally be restricted under Article 19(2), freedom of expression cannot be suppressed on account of threat of demonstration and processions or threat of violence. That would be tantamount to negation of the rule of law and surrender to blackmail and intimidation. It is the duty of the State to protect the freedom of expression since it is a liberty guaranteed against the State. The State cannot plead its inability to handle the hostile audience problem. It is its obligatory duty to prevent it and protect the freedom of expression.*"

d. The status of freedom of speech as a fundamental right and the limits of such right under our Constitution is similar to that in India, as Article 19 of the Constitution explicitly subjects the right to free speech to limitations also listed therein. Dwelling on the right to freedom of speech and the associated right to receive information, our honorable Supreme Court stated in *Independent Newspaper Corporation (Pvt.) Ltd. v. Chairman Fourth Wage Board and Implementation Tribunal for Newspaper Employees* (1993 PLC 673) that:

"*Article 19 of the Constitution guarantees right of freedom of speech and expression. It ordains that there shall be a freedom of press subject to reasonable restrictions imposed by law elucidated therein. The freedom of expression includes the right to receive information through organs of public opinion and the freedom of press on its, turn rests on the assumption that there is a wide dissemination of information. Such dissemination inevitably contemplates absence of restraints. Thus any measure which directly or indirectly puts restraint on or curtails the circulation of newspaper, due to any factor, including cost of production and resultant increase in the price thereof should, in so far as possible, be avoided.*"

L. The Impugned Notification and the Internet censorship regime under it is ultra vires of the Constitution as even in the event that the Respondents had the authority to regulate and censor the Internet, which they do not posses, the manner in which it is being done is fundamentally unreasonable.

a. In relation to restrictions on the freedom of speech under Article 19 of the Indian Constitution the test of reasonableness that has come to be widely accepted was laid down in *Madras v. V.G. Row* ((1952) S.C.R. 597 @607) as follows:

"*It is important…to bear in mind that the test of reasonableness, whenever prescribed, should be applied to each individual statute impugned, and no abstract standard, or general pattern of reasonableness can be laid down as applicable to all cases. The nature of the right alleged to have been infringed, the underlying purpose of the restrictions imposed, the extent and urgency of the evil sought to be remedied thereby, the disproportion of the imposition, the prevailing conditions at the time, should all enter into the judicial verdict. In evaluating such elusive factors and forming their conception of what is reasonable, in all the circumstances of a given case, it is inevitable that the social philosophy and the same of values of the judges participating in the decision should play an important part, and the limit to their interference with legislative judgment in such cases can only be dictated by their sense of responsibility and self-restraint and the sobering reflection that the Constitution is meant not for people of their way of thinking but for all, and that the majority of the elected representatives of the people have, in authorizing the imposition of restrictions, considered them to be reasonable.*"

b. Explaining the need for the right balance between the fettered right and the public interest to be protected through the restriction imposed, it was held in *Chintaman Rao v. M.P.* ((1950) S.C.R. 759 @763) that:

"*…limitation imposed on a person in enjoyment of the right should not be arbitrary or of an excessive nature, beyond what is required in the interests of the public. The word 'reasonable' implies intelligent care and deliberation, this is, the choice of a course which reason dictates. Legislation which arbitrarily or excessively invades the right cannot be said to contain the quality of reasonableness and unless it strikes a proper balance between the freedom guaranteed in Article 19(1)(g) and the social control permitted by Article 19(6) it must be held to be wanting in that quality.*"

c. Where there are two competing rights or two public interests, the courts are required to balance such rights and interest in determining the question of reasonability. In the context of balancing public interest in freedom of speech against that in preventing unfair influence being brought to bear during administration of justice, Lord Reid in *A.G v. Times Newspapers* ((1974) A.C. 273 @ 294) stated that:

"*Public policy generally requires a balancing of interests which may conflict. Freedom of speech should not be limited to any greater extent than is necessary but it cannot be allowed where there would be real prejudice to the administration of justice.*"

d. The superior courts in Pakistan have largely endorsed the Indian test of reasonableness and the need to strike the right balance between the disadvantage

imposed on the individual and the advantage the public is envisaged to derive. In *East and West Steamship Company v. Pakistan* (PLD 1958 SC 41) it was held that:

"*A 'reasonable restriction' in the sense of Article 11 is one which is Imposed with due regard to the public requirement which it is designed to meet. Anything which is arbitrary or excessive will of course be outside the bounds of reasons in the relevant regard, but in considering the disadvantage imposed upon the subject in relation to the advantage which the public derives, it is necessary that the Court should have a clear appreciation of the public need which is to be met and where the statute prescribes a restraint upon the individual, the Court should consider whether it is a reasonable restraint, in the sense of not bearing excessively on the subject and at the same time being the minimum that is required to preserve the public interest.*"

e. It was emphasized in *Saiyyid Abul a'la Maudoodi v. Government of Pakistan* (PLD 1964 SC 673) that it was for the executive to establish to the satisfaction of the court that it had complied with procedural and substantive requirements in exercising authority in a manner that restrained the fundamental freedoms of citizens in the following terms:

"*The Courts cannot regard themselves as satisfied that a citizen's freedom has been subjected to a reasonable restriction unless it is proved to their satisfaction that not only the grounds of the restrictions as stated by the law are reasonable in themselves, but they have been applied reasonably as required by the Constitution. The only manner which the Courts themselves would regard as reasonable is that existence of the factual grounds of the restriction should have been established in the mode which the Courts recognize as essential where a right to life or liberty or property is concerned, namely, after a proper hearing given to the person concerned. . . . Any presumption that the authority in question has acted in accordance with justice or reason or equity, if made by the Courts in respect of such actions, would amount to a denial of the duty which the Courts are called upon to discharge in respect of these fundamental matters. The duty of the Courts would be thus to apply the principles of reason and justice according to the procedures with which they are familiar, to the ascertainment of the questions whether the restrictions in themselves are consistent with justice and reason, whether the conditions for their application have in fact been established, and whether they have been applied by competent authority. These are matters falling within the large principle of judicial review as a power possessed by the Courts, for the correction of excesses in action.*"

f. In enunciating the concept of reasonable restrictions, the Supreme Court has also held that where pursuit of a public purpose requires imposition of restrictions on protected rights, the purpose ought to be pursued in such manner that is least restrictive of fundamental rights. *In Pakistan Muslim League v. Federation* (PLD 2007 SC 642) it was stated that:

"*A reasonable restriction is one which is imposed with due regard to the public requirement which it is designed to meet. Anything which is arbitrary or excessive will of course be outside the bounds of reasons in the relevant regard, but in considering the disadvantage imposed upon the subject in*

relation to the advantage which the public derives, it is necessary that the Court should have a clear appreciation of the public need which is to be met and where the statute prescribes a restraint upon the individual, the Court should consider whether it is a reasonable restraint, in the sense of not bearing excessively on the subject and at the same time being the minimum that is required to preserve the public-interest…A restriction is unreasonable if it is for an indefinite or an unlimited period or a disproportionate to the mischief sought to be prevented or if the law imposing the restrictions has not provided any safeguard at all against arbitrary exercise of power."

g. In view of the aforesaid it is patent that the Internet censorship regime established pursuant to the Impugned Notification is unreasonable, apart from being illegal, for it doesn't provide any safeguards against arbitrary exercise of authority, makes no effort to pursue legitimate state interests in the least restrictive manner and pursues a decision-making process that lacks integrity and transparency.

M. The Petitioners humbles seek permission to raise additional ground during the course of the arguments.

PRAYER

In light of the above it is humbly prayed that this Honorable Court may:

1. Declare that the Impugned Notification and the constitution of Respondent No. 2 is ultra vires of the Constitution, the Telecom Act, the General Clauses Act, the Rules of Business, 1973 and the principles of natural justice;

2. Declare that the Impugned Notification, the Internet censorship regime established pursuant to it and the actions of Respondents aimed at regulating, blocking and censoring Internet content and access to it is illegal, unconstitutional, arbitrary, whimsical and devoid of legal authority;

3. Declare that all orders, directives and notifications issued by Respondents No. 2, and directions issued by Respondents 1 and 3 in pursuance of such orders, directives and notifications are illegal, unconstitutional, without lawful authority and void *ab initio*;

4. Declare that the Respondents have no legal authority to undertake Internet censorship or content regulation and direct the Respondents to act strictly within the legal authority duly vested in them under law;

5. Order Respondent No. 3 to recall all orders issued to ISPs to blocks or bans websites and URLs that have been issued in excess of authority vested in it under the Telecom Act, dismantle any filtering devices installed by ISPs or telecom service providers to obstruct access to Internet content without the permission and content of consumers; and

6. Grant the cost of this litigation and any other relief deemed fair and just in the circumstances.

On behalf of Petitioners

Through

Babar Sattar
(Advocate High Court)

Sarah Rehman
(Advocate High Court)

AJURIS, *Advocates and Corporate Counsel*