

BEFORE THE ISLAMABAD HIGH COURT, ISLAMABAD

W.P. No. 4994/2014

Bolo Bhi, through its General Secretary Ms. Fariha Aziz

Karachi and another

...Petitioners

Versus

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

...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**

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Babar Sattar
Advocate High Court



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REJOINDER ON BEHALF OF PETITIONER TO REPLY OF RESPONDENT 1 & 2

The Petitioner respectfully submits as under:-

REPLY TO PRELIMINARY SUBMISSIONS

1. The content of Para No. 1 is a matter of record however denied to the extent that it alleges any incorrect facts.
2. The content of Para No. 2 is denied to the extent that it implies that the Rules of Business, 1973 (“**Rules**”) empower the Ministry of Information Technology and Telecommunications Divisions (“**MOIT**”), Respondent No. 1, to form policy in general pertaining to the regulation of content on the Internet. In fact Rule 3(3) read with Clauses 17A(1) and 17A(6) of Schedule II of the Rules explicitly limit MOIT’s powers for policy-making to development of technology and logistics. The relevant provisions of the Rules are reproduced hereunder:-

117A. Information Technology and Telecommunications Division

1. Preparation of an overall integrated plan as well as formulation of policy for the development and improvement of Information Technology and Telecommunications, including related infrastructure, in Pakistan.

...

6. Planning, policy making and legislation covering all aspects of telecommunications excluding radio and television and issuance of policy directives.

3. The content of Para No. 3 is denied. The formation of the Inter-Ministerial Committee for Evaluation of Websites (“**IMCEW**”) is entirely *ultra vires* to the Constitution of the Islamic Republic of Pakistan, 1973 (“**Constitution**”), the Rules and the Pakistan Telecommunication (Reorganization) Act, 1997 (“**Telecom Act**”).

a. Article 19 of the Constitution protects the fundamental right of freedom of expression of the citizens of Pakistan. The Article is reproduced hereunder:-

“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.”

b. Article 19A of the Constitution enshrines the fundamental right to information whereby *“every citizen shall have the right to have access to information in all matters of public importance subject to regulation and reasonable restrictions imposed by law.”*

c. Both Articles 19 and 19A of the Constitution provide for the curtailment of the freedom of expression and right to information only through *“reasonable restrictions imposed by law...”* There is no statute that empowers any of the Respondents to determine or lay down the criteria for what may be deemed *offensive, obscene, pornographic, incitement, or immoral* for the citizens of Pakistan.

d. Section 31 of the Telecom Act does empower Respondent No. 3 to take action against anyone that *“unauthorizedly transmits through a telecommunication system or telecommunication service any intelligence which he knows or has reason to believe to be false, fabricated, indecent or obscene”* however it is worth noting that it prevents the *unauthorized* transmission of such intelligence. Furthermore, the section does not empower the Respondent No. 3 to determine the nature of intelligence as to whether it may be offensive or immoral etc.

e. The Respondent No. 1 has formed the IMCEW without any legal basis or authority. Of the MOIT, the IMCEW, or Pakistan Telecommunication Authority (“**PTA**”), none have been endowed with powers either to regulate content on the Internet or determine a censorship standard.

f. It is an established principle of law that public functionary or corporation may only do what it is authorized by law to do and so cannot step outside the four corners of the powers delegated to it by a statute. The Respondents cannot assume the power to impose conditions on Articles 19 and 19A of the Constitution when it requires the same to be done by law. Reliance may be placed upon on **1997 SCMR 641** (*Gadoon Textile Mills v. WAPDA*) wherein it was held:-

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 authorised 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 mould their decisions and actions within the frame of law for the benefit of public, De Smith in Judicial Review of Administrative Action Fourth Edition, at page 317, observed as follows:

“A public authority cannot effectively bind itself not to exercise a discretion if to do so would be to disable itself from fulfilling the primary purposes for which it was created. It has been said that if a person or public body is entrusted by the Legislature with certain powers and duties expressly or impliedly for public purposes, those persons or bodies cannot divest themselves of these powers and duties. They cannot enter into any contract or take any action incompatible with the due exercise of their powers or duties. So to act would be to renounce a part of their statutory birthright.

g. It is also an established principle of law that redundancy cannot be imputed to any word in a provision of law or statute. Where Articles 19 and 19-A of the Constitution require reasonable limits to be imposed by law the same ought to be imposed by law and not assumed by any public office or functionary merely by misconstruing the Rules or the Telecom Act. Reliance may be placed upon:-

➤ **2011 PLD SC 407** (*Munir Hussain Bhatti vs. Federation of Pakistan*): **“It is an established rule of interpretation that Parliament does not waste words and redundancy should not be imputed to it. This principle would apply with even greater force to the Constitution the supreme law of the land.”**

➤ **2010 P T D 1024** (*Director Intelligence and Investigation vs. Bagh Ali*): **“Be that as it may, addressing question No.2 first, it may be held that the interpretation of the relevant provisions invoked in these cases needs to be structured on the three foundational, settled and time tested principles; (i) the golden rule of construction, (ii) no redundancy and/or superfluity can be imputed to the express provision and words of statute, (iii) where the law requires and act to be performed or a thing to be done in a particular manner it has to be so performed/done. The Golden Rule, has been articulately enunciated in Statutory Interpretation by Cross-P-15, in the following words:-**

“I have been along and deeply impressed with the wisdom of the rule now, I believe, universally adopted, at least in the Courts of law in Westminster Hall, that in construing wills and indeed, statutes, and all written instruments, grammatical and ordinary sense of the words is to adhered to, unless that would lead to some absurdity, or some repugnance or inconsistency with the rest of the instrument, in which case the grammatical and ordinary sense of the words may be modified, so as to avoid the absurdity and inconsistency but no farther.”

h. It is probably in recognition of lack of lawful authority for creation of IMCEW that it has been dissolved through notification No. 5-1/2005-DFU dated 13.03.2015. However given that Respondent No. 1 possesses no power and authority to regulate or censor the Internet content, it cannot delegate such authority to any other entity such as PTA, just as it couldn't delegate it to IMCEW.

4. The content of Para No. 4 is denied. PTA is not empowered under the Telecom Act or any other statute to regulate and prescribe standards for content on the Internet as also candidly acknowledged by Chairman PTA before this honourable Court. Content of the foregoing paragraph is reiterated.

5. The content of Para No. 5 is denied. The Petitioners are not seeking the redressal of an individual grievance against a legitimate action of PTA. Rather the Petitioners' cause of action is beyond the scope of merely PTA's powers under the Telecom Act. The cause of

action pertains to collective fundamental rights, interpretation of the Constitution and other enabling laws, and the perimeters of MOIT and IMCEW's authority. The issues that require attention fall well outside the scope of the PTA's powers to provide "appropriate remedy."

6. The content of Para No. 6 is denied. While Respondent No. 1 may be empowered to issue policy directives to Respondent No. 3, they must be within the four corners of the Constitution and the law. In the matter of ***Pakistan Muslim League vs. Federation of Pakistan*** (PLD 2007 SC 642) the honourable supreme held that executive action cannot violate fundamental rights. It held that:-

"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."

In the matter of ***Threads (Private) Limited vs. Zila Nazim Lahore*** (PLD 2004 Lahore 376) Justice Saqib Nisar candidly observed that:-

"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."

REPLY TO PRELIMINARY OBJECTIONS

1. The content of Para 1 is denied for the following reasons:-
 - a. The subject matter of the case pending before the Supreme Court of Pakistan pertains to a particular video "Innocence of Muslim" and its availability on the webpage of YouTube. The instant Petition challenges the validity of the formation and function of the IMCEW and further the *vires* of the various policy documents issued by the Respondent No. 1 in order to curtail and block content on the Internet.
 - b. Appointment as amicus in any court case does not preclude Petitioner No. 2 from filing the instant Petition. Such an objection has no basis in law or reason and betrays the Respondents lack of understanding of the role of *amicii* appointed by the Court for assistance.

- c. The Supreme Court of Pakistan never directed Respondent No. 3 to block YouTube in fact it merely directed it to block the offending material from YouTube. Further it instructed Respondent No. 3 to prevent the video Innocence of Muslim from other websites where it may be available. The order of the Supreme Court does not authorize Respondent No. 3 to arbitrarily block all content it finds offensive.

2. The content of Para No. 2 is denied for the following reasons:-

- a. The matter before the Lahore High Court, Lahore was not similar to the instant Petition. The instant Petition seeks the determination of the legality of IMCEW and its functions and the constitutionality of the Respondents' role in blocking content on the Internet. The matter before the Lahore High Court was limited to the blocking of blasphemous content on YouTube. The instant Petition which is of wider scope and seeks judicial review of unauthorized and illegal executive action, can, therefore, be heard even if the issue of blockage of YouTube matter is pending adjudication before the Supreme Court of Pakistan.
- b. Petitioner No. 2's statements were made in response to the honorable Court's query and were from a policy and technology standpoint. They do not in any way bar her from the institution of the instant Petition which is in the nature of Public Interest litigation and has been filed as the Petitioner and all other citizens of Pakistan have a legitimate interest in ensuring that the Respondents perform their legal duties and exercise authority strictly in accordance with law.
- c. The Respondents have failed to bring to this honourable court's attention an interim order of the Lahore High Court passed during the proceedings of Writ Petition 958/2014 whereby the Lahore High Court recorded its displeasure with the adhoc method of content regulation employed by the Government without any code of self regulation. The relevant portion from the order dated 25.07.2013 is reproduced hereunder for reference:-

"9. This court has been made to understand by the submission made by the parties that the "complaint driven" strategy adopted by the MOIT needs to be seriously revisited. The public needs to be candidly informed that the answer to the problem does not lie in generating false hope that controversial websites can be blocked but in taking up the issue head on and by evolving a code of self regulation for ourselves based on our cultural and religious sensitivities. It appears from the submissions made before this Court that we as a nation need to regulate ourselves rather than take up a defenseless battle against the digital age and the global information available on the World Wide Web. In the end, the responsibility and the choice is of the individual to watch or not to watch a controversial website as the same cannot be effectively blocked according to the level of technology present in our country today."

3. The content of Para No. 3 is denied. No factual disputes require adjudication in the instant Petition. In fact the Respondents have not denied any factual narrative of the Petitioner. Rather the matter requires an interpretation of the Constitution and the law and determination of the collective rights of the citizens of Pakistan.
4. The content of Para No. 4 is denied. The Respondents have failed to establish any wrong doing on part of the Petitioners.

5. The content of Para No. 5 is denied for following reasons:-

- a. The instant matter does not pertain merely to policy. It challenges the legality of the policy of the Respondents which is not based in the Constitution, the Telecom Act or the Rules.
- b. It is settled law that the Courts have the jurisdiction to judicially review the policy of the executive to ensure it does not trample fundamental rights and the provisions of the Constitution.

➤ **2012 SCMR 455 – *Akhtar Hassan Khan v. Federation of Pakistan***: The Courts while dealing with cases relating to financial management by the government or awarding of contract by it must appreciate that these are either policy issues or commercial transactions requiring knowledge in the specialized fields. The courts lack expertise to express any opinion on the soundness or otherwise of such acts/transactions. The question whether a contractual transaction or decision taken in the exercise of executive authority by the Government can be subjected to judicial review has engaged the attention of constitutional courts in several countries and the judicial consensus generally has been that the courts should ordinarily refrain from interfering in policy making domain of executive authority or in the award of contracts unless those acts smack of arbitrariness, favouritism and a total disregard of the mandate of law.

➤ **PLD 2011 Lahore 120 – *Shabeen Cotton Mills v. Federation of Pakistan***: However it may not be correct to hold that there is an absolute bar to the exercise of judicial review by this Court in all matters pertaining to a policy of the Government. The Hon'ble Supreme Court of Pakistan in the judgment reported as: Muhammad Iqbal Rafi v. The Province of Punjab (1986 SCMR 680) was pleased to hold as follows:

Whatever be the thinking of either side, the Government has the right of laying down the policy and if it chooses to do so and there is no law on the subject which it offends, it is not the right of any Court to throw it out, other than hold, in any genuine case, that the same is unreasonable or arbitrary.'

32. In Arshad Mehmood's case the Hon'ble Supreme Court of Pakistan has observed as follows:

'If any law is promulgated in derogation of fundamental rights, it would be declared void because at the cost of fundamental rights guaranteed by the Constitution, the executive Government is not empowered to frame a policy'

33. Thus, in cases where the policy collides with the Law or the Constitution or it arbitrary or unreasonable, this Court, in view of the afore-quoted judgments of Hon'ble Supreme Court of Pakistan, can intervene though it may not substitute the policy of the Government by laying down a new policy on the subject. Thus, this Court is not persuaded to hold that it has no jurisdiction to examine the offending Order/ notification or the policy of the Government that it

manifests. Even in policy matters, this Court can always exercise its powers of judicial review so as to ascertain that the said policy does not violate any law or the Constitution and that the same is not arbitrary or unreasonable”

➤ **2003 CLD 153 – *L. Puri Terminal v. Port Qasim Authority***: Judicial review is concerned with reviewing not the merits of the decision in support of which the application for judicial review is made, but the decision-making process itself. It is thus different from an appeal. When hearing an appeal, the Court is concerned with the merits of the decision under appeal. Since the power of judicial review is not an appeal from the decision, the Court cannot substitute its own decision. Apart from the fact that the Court is hardly equipped to do so, it would not be desirable either. Where the selection or rejection is arbitrary, certainly the Court would interfere. It is not the function of a Judge to act as a super board, or with the zeal of the pedantic schoolmaster substituting its judgment for that of the administrator. The duty of the Court is thus to confine itself to the question of legality. Its concern should be:--

- (1) Whether a decision-making authority exceeded its powers?
- (2) committed an error of law;
- (3) committed a breach of the rules of natural justice;
- (4) reached a decision which no reasonable Tribunal would have reached, or
- (5) abused its powers.

Shortly put, then grounds upon which an administrative action is subject to control by judicial review can be classified as under:---

(i) **Illegality**: This means the decision-maker must understand correctly the law that regulates his decision-making power and must give effect to it.

(ii) **Irrationality**, namely, *Wednesbury* unreasonableness. It applies to a decision which is of outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at. The decision is such that no authority properly directing itself on the relevant law and acting reasonably could...

(iii) **Procedural impropriety**.

The test to be adopted is that the Court, should, "consider whether something has gone wrong of a nature and degree which requires its intervention."

The principles deducible are:--

(2) The modern trend points to judicial restraint in administrative action.

(3) The Court does not sit as a Court of Appeal but merely reviews the manner in which the decision was made.

(4) The Court does not have the expertise to correct the administrative decision. If a review of the administrative decision is permitted it will be substituting its own decision, without the necessary expertise which itself may be fallible.

6. The content of para no. 6 is denied. The Petitioners as citizens of Pakistan have a vested interest in the access to information and freedom of expression. The actions of the Applicant being contrary to the law and Constitution aggrieve the Petitioners and infringe their fundamental rights along with the rights of all other citizens of Pakistan.

ON MERITS

The reply of the Respondents is responded to as under:-

1. The content of Para No. 1 is denied for the following reasons:-
 - a. The instant Petition relates to the fundamental rights of the Petitioners and the citizens of Pakistan.
 - b. The honourable Courts have broadly interpreted the meaning of “aggrieved person” in Article 199 of the Constitution to include public interest litigants such as the Petitioners. Reliance may be placed upon the following:-
 - **P L D 1969 Supreme Court 223 - *Mian Fazal Din vs. Lahore Improvement Trust***: the right considered sufficient for maintaining a proceeding of this nature is not necessarily a right in the strict juristic sense but it is enough if the applicant discloses that he had a personal interest in the performance of the legal duty which if not performed or performed in a manner not permitted by law would result in the loss of some personal benefit or advantage or the curtailment of a privilege or liberty or franchise.
 - **P L D 1978 Lah. 252 - *Mss. Inayat Bibi etc. v. Assistant Settlement Commissioner etc.***: It is to be observed that the expression 'aggrieved party' as occurring in paragraph (a) of clause (1) of Article 199 of the Constitution has a wide connotation and it would even embrace a person who though suffering from no violation of a legal right, has been deprived of a benefit, privilege, liberty or franchise by an illegal act or omission of a public authority.

- **P L D 1957 Lah. 914** - *Montgomery Flour and General Mills Ltd. v. Director, Food Purchaser*: It is true that a petitioner must have some right if he applies to the Court for a direction or order under Article 170 (corresponding to Article 199 of the present Constitution) but he need not have a right in that strict sense of the term which is mentioned above. Whenever an enactment empowers a public officer to pass orders that benefit or harm a citizen, the citizen gets a right that in a matter in which he is concerned an order be passed in accordance with law. This too is a right that can be enforced by the Court in the exercise of its jurisdiction under Article 170 of the Constitution of Pakistan. If the officer concerned passes an order that is not in accordance with law, any person whose interests are affected by the order can maintain a petition for a writ or direction under Article 170. All orders of executive officers are subject to challenge by those affected by the orders, and a person would be "affected" even if he loses some benefit or advantage which he would have gained if the order was in accordance with law."
- **P L D 1988 Supreme Court 416** - *Miss Benazir Bhutto Vs Federation Of Pakistan*: Now the initiation of the proceedings is no longer confined to an "aggrieved person." Any person acting bona fide can activate the Court for the infraction of the Fundamental Rights of a class or a group of persons in addition to an aggrieved person whose individual rights are violated. As a result of this innovation a new form of litigation has come into existence which is gaining momentum as is evident from the successive judgments of that Court. This is a creative and a beneficial approach not only for the enforcement of Fundamental Rights, but also for securing social and economic justice, and if I may say so the case of Charanjit Lal Chowdhury has been left far behind... Therefore, there can be no doubt that when the impugned legislation by reference to its provisions is ex facie violative of Fundamental Rights of an individual or political parties or associations or unions, proceedings lie for the enforcement of those rights irrespective of the fact whether any prejudicial order has been passed by the Executive under the law as the Constitution treats the Fundamental Rights as superior to ordinary legislation and for that reason sub-Articles (1) and (2) of Article 8 of the Constitution have been enacted which clearly reflect the object and intention of the framers of the Constitution, that is, to keep the Fundamental Rights at a high pedestal and to save their enjoyment from legislative infractions. Sub-Article (1) of Article 8 lays down that any law in so far as it is inconsistent with the rights conferred by this Chapter shall, to the extent of such inconsistency, be void. This could not have been without a purpose but to preserve and protect the Fundamental Rights. Sub-Article (2) of Article 8 places a restriction on the Legislature not to make law which take away or abridges the rights so conferred, and any law made in contravention of this clause shall to the extent of such contravention, be void. Article 199(1)(c) authorizes the High Court to enforce the Fundamental Rights of an aggrieved person and to declare that so much of the law which is inconsistent with the Fundamental Rights shall be void. Therefore, there is the power to declare the law to be void and the power to enforce the Fundamental Rights which are violated by the law itself. Article 184(3) of the Constitution empowers the

Supreme Court to enforce the Fundamental Rights where the question of public importance arises in relation thereto. And if looked at from this angle it is hardly of any importance whether the Executive has passed a prejudicial order or not when the infraction of the Fundamental Rights takes place by the operation of the law itself. In this context what would be relevant would be the language of the provisions of the impugned Act itself. It will then not be a question of the Court merely granting a declaration as to the validity or invalidity of law in the abstract.

2. The content of reply to Para No. 2 needs no reply however it is denied to the extent that it alleges incorrect facts.
3. The content of reply to Para No. 3 is denied. In practice the IMCEW has been the final word on the content that is to be blocked for access on the Internet. The contention that it's merely a recommendatory body is being taken up at in these proceedings when its legality is being challenged. Even otherwise, the IMCEW's terms of reference allow it to formalize the procedure for blocking websites which is the delegation of a power that Respondent No. 1 never possessed itself. Furthermore, the IMCEW even as a recommendatory body is effectively the decision making body for blocking content as web pages recommended by it for blocking are blocked and no pages not recommended by it are blocked.
4. The content of reply to Para No. 4 is denied. The Defendants' reply is entirely evasive and does not address the question of where the Respondents derive authority to regulate content on the Internet.
5. The content of reply to para No. 5 is denied. Content of foregoing paragraphs is reiterated.
6. The content of reply to para No. 6 is denied. Content of foregoing paragraphs is reiterated
7. The content of reply to Para No. 7 is denied. Respondent No. 1 has failed to show how it is authorized to regulate content on the Internet much less constitute a committee and delegate such powers to it. Any mandate ascribed to Respondent No. 2 must have a basis in the Constitution and the law. The Policy Directive dated 25.05.2012 based on the notification dated 29.08.2006 is also unlawful, void, and *ultra vires* of the Constitution as any superstructure build on void order comes crumbling down with the void order. Reliance may be placed upon:-
 - **2008 SCMR 611** – *Mustafa Lakhani v. Pakistan Defence Officers Housing Authority*. “It is settled principle of law that if on the basis of a void order subsequent orders have been passed either by the same authority or by other authorities, the whole series of such orders, together with the superstructure of rights and obligations built upon them, must, unless some statute or principle of law recognizing as legal, the changed position of the parties is in operation, fall to the ground because such orders have as little legal foundation as the void order on which the instant case the very basis of allotment being illegal, void ab initio consequently no legal right was conveyed as such...”
 - **2007 SCMR 262** – *Evacuee Trust Property Board v. Sakina Bibi* : “It is a settled law that no limitations run against a void order.”

- **2007 SCMR 914** – *Azra Masood v. Noshaba Moeen* : “We may add that a void order is only a type of an illegal order and if it has created certain consequences, an aggrieved person must get rid of it.”
- **PLD 1972 Lahore 458** – *Sardar Begum v. Lahore Improvement Trust*: “However, even if possession had been taken by the Trust, the property would not have vested into the Trust for the reason that the Award in pursuance of which the possession is alleged to have been taken was not valid and had no existence in the eye of law. It was held in *Yousaf Ali v. Mohammad Aslam Zia* (1): “ If on the basis of a void order subsequent orders have been passed either by the same authority or by other authorities, the whole series of such orders, together with the superstructure of rights and obligations built upon them, must, unless some statute or principle of law recognizing as legal the changed position of the parties is in operation, fall to the ground because such orders have as little legal foundation as the void order on which they are founded.”
- **P L D 1958 Supreme Court (Pak.) 104** - *Yousaf Ali v. Muhammad Aslam Zia And 2 Others* “And if on the basis of a void order subsequent orders have been passed either by the same authority or by other authorities, the whole series of such orders, together with the superstructure of rights and obligations built upon them, must, unless some statute or principle of law recognizing as legal the changed position, of the parties is in operation, fall to the ground because such orders have as little legal foundation as the void order on which they are founded.”

8. The content of reply to Para No. 8 is denied for the following reasons:-

- a. Whilst PTA may be the telecom regulator, this does not endow it with the authority to regulate content on the Internet. As a regulator PTA regulates entities, i.e., licensees, telecom operators, service providers. The regulation of content is an entirely separate matter and sphere of regulation. The regulation of “content” encroaches upon Constitutional rights which is why the Constitution requires the same to be done through an act of Parliament rather than allowing the Executive to assume or exercise its discretion. Yet in stark contrast to Constitutional provisions, the Respondents are exercising authority that does not exist and discretion based on such assumed authority in an entirely arbitrary and abusive manner.
 - b. The Respondents have consistently used the order of the Supreme Court as a fig leaf to escape their own incompetence and their indifference towards protecting fundamental rights. The order of the Supreme Court never directed the blocking of all content and the entire YouTube URL. The Respondents have nevertheless used the Supreme Court order as a garb and deliberately misrepresented its contents in order to evade responsibility and accountability.
9. The content of reply to Para No. 9 is denied. The blocking of Laal’s Facebook page was covered by news media worldwide, not just in Pakistan. In fact the news reports even deliberate upon the content of Laal’s Facebook page which was never pornographic or obscene. The page instead had discussion from users regarding the policies of the government and the armed forces. The blocking of Laal’s page betrays the Respondents’ intentions not just to block obscene material but to cut down any open discourse which

dares to criticise government policy and performance. Proof has been appended to pages 38-45 of the Petition.

10. The content of reply to Para no. 10 is denied. The Respondents cannot evade their obligation to uphold the Constitution by pointing to the policy of Facebook and other states. As part of Pakistan's executive the Respondents are governed by the law of Pakistan and therefore they are required to discharge such duties and obligations and uphold such rights as are prescribed in the Constitution and the law of Pakistan. The policy of Facebook does not override national law nor can the Respondents show it such deference. The Respondents' claim that individuals can seek redressal of grievances does not excuse the fact that the fundamental rights of citizens are being trampled upon and neither have any institutional structures for grievance redressal has been created, nor can they address the foundational issue of lack of authority to censor the Internet.
11. The content of reply to Para No. 11 is denied. The Respondents are entirely evasive in their denial of the instant paragraph and have not addressed the findings of the attached report. The attached report has been published by Citizen Lab, a non-partisan, organization and the Respondents have not even raised any reason to doubt the credibility of its report.
12. The content of reply to Para No. 12 is denied to the extent that it states incorrect facts. It is also denied that the Petitioners are propagating against the Constitution. Rather the Petitioners are and have been striving to protect and uphold the provisions of the Constitution of Pakistan hence the instant Petition.
13. The content of reply to Para No. 13 is denied. The Respondents have not once address how their actions are in compliance of an unambiguous requirement in Articles 19 and 19A of the Constitution that the foregoing rights may only be curtailed by law. The Respondents have referred to sections 4 and 31 of the Telecom Act which even when read together do not confer power on any of the Respondents to determine what may be deemed "obscene" or "indecent" and as a result to block/regulate content on the Internet.
14. The content of reply to Para No. 14 is denied to the extent that it states incorrect facts.

LEGAL GROUNDS

- A. The content of reply to Ground A is denied. Whilst it is admitted that the rights guaranteed under Article 19 and 19A are qualified, they may only be qualified by law. The Respondents have failed to establish that they have been delegated authority to regulate the Internet which stems from the Constitution and has been vested in them by the Parliament through a law.
- B. The content of para B is denied for being misconceived. As maintained by the Respondent, Section 23 of Telecom Act merely directs licensees to remedy any violation of the Telecom Act. However, the cited statutory provisions offer no credible justification for the existence and operation of Respondent No.2 that has been accorded unfettered powers to censor and block Internet content in Pakistan. Neither do the cited statutory provisions empower the Respondents to regulate and impose restrictions upon speech it finds "offensive" or "objectionable". The said legal provisions are silent on the right of the Federal Government or executive to censor speech in Pakistan. The Petitioner maintains that no statute has yet enabled any federal or provincial authority to regulate, block or censor content on the Internet. Nor does the law allow the legislature to impose arbitrary and vague restrictions on

the 'right to information' and the 'right to speech' enshrined under Articles 19 and 19A of the Constitution.

C. The content of para C is denied for the following reasons:-

- a. The Federal Legislative list accords no authority to the Respondents to 'block' or 'censor' Internet content. Clause 17(A)(1) of Schedule II (Distribution of Business among the Division) of the Rules, merely ascribes authority to prepare an overall integrated plan as well as policy formulation for the development and improvement of Information Technology and Telecommunications. It does not authorize arbitrary measures and undue restrictions on the right to information. It is also worth mentioning that the nature of the Internet is starkly different from telecommunication and broadcast and so requires a different form of regulation. In that way, the Internet cannot be conflated with Clause 7 of the Federal Legislative list.
- b. The Respondents' argument that the IMCEW established under the Notification dated 29.08.2006 does not constitute a 'censorship regime' has little standing since Respondent No.2 has formalized the process of Internet censorship in Pakistan and the activities of the said committee have effectively blocked access to Internet content. Furthermore, it has trampled upon the fundamental rights of free speech and the right to information enshrined under the Constitution.
- c. The Respondents' argument that the PTA has performed its statutory duty without undue interference with fundamental rights pursuant to Policy Directive dated 20.08.2006 is baseless. The citizens' rights to freedom of speech and right to information under the Constitution are broadly construed and cannot be subjected to unwarranted restrictions. The Respondents have been disrespectful of these vital constitutional rights since the blockage of web content constitutes a blatant violation of said rights and public interest protected by free flow of ideas and information.

D. The content of para E is denied for deliberately disregarding Rule 3(3) under the Rules of Business 1973 and failing to provide a satisfactory explanation for violating Clause 17A of Schedule II under Rule 3(3) of the Rules of Business and Section 8 of the Telecom Act. The Respondents' argument appears to be premised upon Rule 9 of the Rules of Business 1973 which does not entitle Respondent No.1 to create an inter-ministerial committee or authorize the Respondent to sub-delegate its powers. The IMC in question evidently has broader functions than merely 'discussing' matters referred to it by a division. It thus fails to fall within the ambit of Rule 9 of the Rules of Business 1973. No plausible explanation has thus been offered to address the Petitioners' contention.

E. The content of para E is denied. The content of foregoing paragraphs is reiterated.

F. The Respondent's argument is denied. PTA'S authority to regulate the Telecom Sector is not absolutely unfettered or unlimited, particularly with respect to the exercise of constitutionally protected rights such as the freedom of expression and the right to information. PTA is only authorized to exercise such powers and authority as vested in it under the Telecom Act and further in such manner as provided thereunder.

- G. The content of para G is denied. As emphasized in the above captioned Writ Petition and reiterated in the preceding arguments, the Respondent's actions lack legal authority and are ultra vires of the Constitution, the Telecom Act and other applicable laws.
- H. The content of para H is denied. The Respondents have ignored the Petitioner's contention that the Respondents' actions constitute a violation of Section 6(d) of the Telecom Act.
- I. The content of para I is denied. The Respondents have failed to clarify why they conceive the Petitioner's argument with respect to policy directives being within the 'four corners of law' irrelevant to the instant matter.
- J. The content of para J is denied. The preceding arguments as well as the instant Petition elucidate how the Respondents' actions are ultra vires of the Constitution.
- K. The content of para K is denied. The right to freedom of expression has been accorded due importance under the Constitution. Restrictions on the said right must be 'reasonable' and the imposition of such restrictions operates within narrow confines. Furthermore, the constitutional definition of the right to freedom of expression ought not to be considered in isolation. Due weight must also be accorded to jurisprudence produced by the superior Courts in interpreting Constitutional provisions that enshrine these rights and highlight the importance of free speech and access to information. The superior courts have elaborated upon "reasonable restriction" of fundamental rights. Reliance may be placed upon the case cited as **PLD 2013 Lahore 693** entitled **D.G. Khan Cement Company Ltd v Federation Of Pakistan** wherein the Lahore High Court Lahore held the following:-

18. *In the context of this case, constitutional limitations are embedded in Articles 23 and 24 of the Constitution. The right to acquire, hold and dispose of property under Article 23 of the Constitution is subject to "reasonable restrictions". While the right to property under Article 24 states that no person shall be deprived of his property save in accordance with law. It is essential to understand the meaning and scope of "law" and "reasonable restrictions" under the Constitution.*

19. *"Laws could restrict human rights, but only in order to make conflicting rights compatible or to protect the rights of other persons or important community interests. Any restriction of human rights not only needs a constitutionally valid reason but also to be proportional to the rank and importance of the right at stake." "Reasonable restriction" or any sub-constitutional limitation ("law") on a constitutional fundamental right must also flow from the Constitution to protect lawful rights and interests of the others or the society at large. The "law" or "reasonable restrictions" in pith and substance must promote and advance fundamental rights of the community at large in order to qualify as a limitation to override the fundamental rights guaranteed to an individual under the Constitution. The "law" or the "reasonable restrictions" must be fashioned to uphold the constitutional themes of democracy, freedom, equality, tolerance, social justice and advance the principles of policy under the Constitution. The roots of sub-constitutional limitation ("law" or "reasonable restrictions") must be grounded in the Constitution itself, only then can they possess the constitutional character and strength to take away the fundamental rights of an individual.*

*As observed by the Constitutional Court of South Africa: "The limitation of constitutional rights for a purpose that is reasonable and necessary in a democratic society involves the weighing up of competing values, and ultimately an assessment based on proportionality." Professor Barak in his book "**Proportionality Constitutional Rights and Their Limitations**" writes that "Proportionality is a legal construction. It is a methodological tool. It is made up of four components; proper purpose, rational connection, necessary means, and a proper relation between the benefit gained by realizing the proper purpose and the harm caused to the constitutional right (the last component is also called "proportionality stricto sensu" (balancing))."*

22. "The element of proper purpose reflects a value-laden component. It reflects that the notion that not every purpose can justify a limitation on a constitutional right.... The purposes that justify "limitation" on human rights are derived from the values on which the society is founded. In a constitutional democracy, these values are democratic values. Indeed, a proper purpose is one that suits the values of the society in a constitutional democracy." Our Constitution with its preamble, fundamental rights and principles of policy hold out our democratic values. The proper purpose behind sub-constitutional legislations is to uphold these constitutional values.

23. "What is required by the "rational connection" ...test? The requirement is that the means used by the limiting law fit (or are rationally connected to) the purpose the limiting law was designed to fulfill. The requirement is that the means used by the limiting law can realize or advance the underlying purpose of that.. Accordingly, if the realization of the means does not contribute to the realization of the "laws" purpose, the use of such means would be disproportional. There must be a rational connection between proper purpose and the sub-constitutional limitation.

24. "The next component of proportionality is the "necessity test." It is also referred to as the requirement of "the less restrictive means." According to this test, the legislator has to choose - of all those means that may advance the purpose of the limiting law - that which would least limit the human right in question"

25. The last test of proportionality is the "proportional result" or "proportionality stricto sensu." "This test requires a balancing of the benefits gained by the public and the harm caused to the constitutional right brought the use of the means selected by law to obtain the proper purpose. Accordingly, this is a test balancing benefits and harm. It requires an adequate congruence between the benefits gained by the law's policy and the harm it may cause to the constitutional right.

26. The above principle has echoed in our jurisprudence even though not with the same exactness as argued by Professor Barak above. August Supreme Court of Pakistan deliberating on the limits imposed by 'Law' on fundamental rights in Pakistan Muslim League (N) through Khanuja Muhammad Asif, M.N.A. and others v. Federation of Pakistan through Secretary Ministry of Interior and others, (PLD 2007 SC 642) has held as under:-

"31. It is worth mentioning that no fundamental right can be surrendered or waived by means of any agreement or an undertakingbecause the idea behind the concept of Fundamental Rights is that the preservation of certain basic human rights against State interference is an indispensable condition of free society. The paramountcy to State-made laws is the hallmark of a Fundamental Right. It follows that the aim of having a declaration of Fundamental Rights is that certain elementary rights of the individual such as his right to life, liberty, freedom of speech, freedom of faith and so on, should be regarded as inviolable under all conditions and that the shifting majorities in the Legislatures of the country should not be able to tamper with them. Absolute and unrestricted individual rights do not exist in any modern State and there is no such thing as absolute and uncontrolled liberty. The collective interests of the society, peace and security of the State and the maintenance of public order are of vital importance in any organized society. Fundamental Rights have no real meaning if the State itself is in danger and disorganized. If the State is in danger, the liberties of the subjects are themselves in danger. It is for these reasons of State that an equilibrium has to be maintained between the two contending interest at stake; one, the individual liberties and the positive rights of the citizen which are declared by the Constitution to be Fundamental, and the other, the need to impose social control and reasonable limitations on the enjoyment of those rights in the interest of the collective good of the society."

And this Court in Mian Ayaaz Anwar v. Federation of Pakistan through Secretary Interior and 3 others, (PLD 2010 Lahore 230) has held:

"33. The right to life and liberty of a citizen can only be restricted or abridged if it is in "accordance with law." 'Law' here means Law that caters to larger collective public interest. Therefore, the fundamental right of an individual guaranteed under the constitution can only surrender and succumb to a lawful collective interest of the community or the society. Public Interest or collective community interest is a basket of various public interests including public morality, public order,

public health, national security and foreign policy of the country besides fundamental rights of the others. Public interest is an essential ingredient of any law that proposes to take away, abridge or interfere with the fundamental rights of an individual...."

27. The term "reasonable restrictions" has also come up before our courts and have advanced the principle discussed above. *A. R. Cornelius, J. speaking for the Supreme Court in Messrs East and West Steamship Company v. Pakistan and others (PLD 1958 SC (Pak) 41) held:-*

"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."

28. *In Pakistan Muslim League (N) through Khawaja Muhammad Asif, M.N.A. and others v. Federation of Pakistan through Secretary Ministry of Interior and others, (PLD 2007 SC 642) the august Supreme Court held:-*

"34. It is, however, to be noted that right conferred upon a citizen is neither absolute nor unlimited but subject to "reasonable restriction" imposed by law in the public interest which means that this right can be restricted by imposing "reasonable restriction of law" in the public interest. In other words the State has power to impose reasonable restrictions on the right of freedom of movement of a free citizen where such restriction is necessary in the interests of the general public. Thus the law restricting the movement of prostitutes in a part of the town, or restricting movements of a person under Goonda Act are reasonable restrictions. 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."

29. *Reliance with advantage is also placed on The State of Madras, v. V. G. Row, (AIR 1952 SC 196):-*

"15.It is important in this context to bear in mind that the test of reasonableness, wherever 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 own conception of what is reasonable, in all the circumstances of a given case, it is inevitable that the social philosophy and the scale 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 only 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 the restrictions, considered them to be reasonable."

- L. The content of para L is denied. The Respondents have failed to give any valid reason for branding the Petitioner's argument as 'irrelevant' to the instant matter. Contrary to the Respondent's claim, the case law cited pertains to reasonable restrictions on free speech and is hence vital to the matter at hand.

PRAYER

In light of the above it is humbly submitted that:-

1. The prayer of the Respondents may be dismissed;
2. The above-captioned Petition may be allowed; and
3. Any other relief deemed fair and equitable may also be granted.

On behalf of Petitioners

Through

Babar Sattar
(Advocate High Court)

Sarah Rehman
(Advocate High Court)

