IN THE SUPREME COURT OF INDIA

CIVIL ORIGINAL WRIT JURISDICTION

Writ Petition (Civil) 1031 & 1164 of 2019

IN THE MATTER OF:

Anuradha Bhasin **... Petitioner**

vs.

Union of India & Ors. **... Respondent(s)**

CONSOLIDATED WRITTEN SUBMISSIONS OF THE PETITIONERS AND INTERVENORS

1. Pursuant to the order of this Hon'ble Court dated 27.11.2019, the Petitioners (Anuradha Bhasin in WP (Civil) 1031 of 2019 and Ghulam Nabi Azad in WP (Civil) 1164 of 2019) and the Intervenors supporting the Petitioners are filing consolidated written submissions, as well as a convenience compilation in respect of all loose documents handed over or referenced in this Hon'ble Court during the course of the hearing. During the course of the hearing three sets of written submissions were tendered by Senior Advocates Mr. Huzefa Ahmadi, Mr. Dushyant Dave and Ms. Meenakshi Arora. While their arguments have been incorporated into this document, their separate written submissions have also been annexed for ready reference of this Hon'ble Court.

2. The captioned writ petitions raise substantial questions of law with respect to the constitutionality of communication shut-downs and restrictions upon the freedom of movement, assembly, and association, particularly a shutdown which brought to a standstill the lives of 7 million people of the Kashmir valley and severely impacted the lives of a further 5 million people in the Jammu and Ladakh region. In the history of independent India, restrictions at such scale have never been imposed in absence of a formal declaration of an emergency under the Constitution. It is therefore submitted, that this case for the first time raises the issues of imposition of emergency like restrictions in the absence of declaration of an emergency.

3. These written submissions will first address the importance of the freedom of speech under Article 19(1)(a) of the Constitution **(A)** and the factual backdrop in which the case arises **(B).** Thereafter, the submissions address the following legal arguments: *First,* the communication shut-down orders are *ultra vires* the Temporary Telecom Suspension Rules, under whose authority they have been passed (**I**); *secondly*, the communication shut-down violates Article 19(1)(a) of the Constitution, and fails the test of proportionality under Article 19(2) (**II**);

thirdly, the restrictions also fails the test of over-breadth under Article 19(2) (**III**); *fourthly*, that the restrictions upon communication have caused a chilling effect upon the exercise of fundamental rights and freedoms (**IV**); *fifthly*, the State's arguments which amount to justifying an effective suspension of fundamental rights for an entire territory – cannot be made outside the four corners of Article 352 of the Constitution, i.e., a formal Emergency (**V**); *sixthly*, that the Section 144 orders violate the Constitution (**VI)**; *seventhly*, the State has failed to discharge its positive obligations to protect the rights of Citizens (**VII**); *eighthly*, the restrictions violate the international obligations of India under the ICCPR (**VIII**); *ninthly*, the State has failed to put place complete information before this Hon'ble Court (**IX**); and *finally*, the pleadings of the State attacking the Petitioner in WP (C) 1031/2019 are malafide and incorrect (**X**).

PRELIMINARY SUBMISSIONS

A. IMPORTANCE OF THE FREEDOM OF SPEECH AND RIGHT TO LIFE UNDER ARTICLE 19(1)(A) AND THE RIGHT TO LIFE UNDER ARTICLE 21

4. This Hon'ble Court has long held that the freedom of speech and expression under Article 19(1)(a) is a vital fundamental right, central to guaranteeing individual autonomy as well as a thriving democracy based upon a marketplace of ideas (***Brij Bhushan and Ors. vs. The State of Delhi, 1950 Supp SCR 245 (para 4); Sakal Papers (P) Ltd. v. Union of India, (1962) 3 SCR 842, 866; Bennet Coleman v. Union of India, (1972) 2 SCC 788 (para 98); Indian Express Newspapers (Bombay) Private Ltd. and Ors. vs. Union of India & Ors., (1985) 1 SCC 641 (para 32-6); Rangarajan and Ors. vs. P. Jagjeevan Ram and Ors., (1989) 2 SCC 574 (para 36-9)***.

5. The freedom of speech under Article 19(1)(a) has been consistently interpreted to include the right of the public to know and receive information. **(*State of U.P. vs. Raj Narain and Ors., (1975) 4 SCC 428 (para 74); S. P. Gupta v. Union of India, 1981 Supp SCC 87 (para 64-7); Indian Express Newspapers (Bombay) (P) Ltd. v. Union of India, (1985) 1 SCC 641 (SC) (para 68); Ministry of Information and Broadcasting, Govt. of India v. Cricket Assn. of Bengal, (1995) 2 SCC 161 (para 13, 43).***

6. This Hon'ble Court has accordingly read the guarantee of the freedom of press into Article 19(1)(a). **Indian Express Newspapers (Bombay) Pvt. Ltd. and Ors. v. Union of India and Ors., (1985) 1 SCC 641, para 32). For instance, in *Ministry of Information and Broadcasting, Govt. of India v. Cricket Assn.***

***of Bengal*, (1995) 2 SCC 161**, this Hon'ble Court held that the freedom of speech includes the right to receive and communicate information in any medium, and also includes the freedom of press:

> *"...The freedom of speech and expression includes right to acquire information and to disseminate it. Freedom of speech and expression is necessary, for self-expression which is an important means of free conscience and self-fulfilment. It enables people to contribute to debates on social and moral issues. It is the best way to find a truest model of anything, since it is only through it that the widest possible range of ideas can circulate. It is the only vehicle of political discourse so essential to democracy. Equally important is the role it plays in facilitating artistic and scholarly endeavours of all sorts. The right to communicate, therefore, includes right to communicate through any media that is available whether print or electronic or audio-visual such as advertisement, movie, article, speech etc. That is why freedom of speech and expression includes freedom of the press. The freedom of the press in terms includes right to circulate and also to determine the volume of such circulation. This freedom includes the freedom to communicate or circulate one's opinion without interference to as large a population in the country, as well as abroad, as is possible to reach." (para 43)* (Emphasis supplied)

7. Similarly, in ***Indian Express Newspapers vs Union of India* (1985) 1 SCC 641**, the role of the media and the essence of its freedoms has been detailed by this Hon'ble Court:

> *"32..In today's free world freedom of press is the heart of social and political intercourse. The press has now assumed the role of the public educator making formal and non-formal education possible in a large scale particularly in the developing world, where television and other kinds of modern communication are not still available for all sections of society. The purpose of the press is to advance the public interest by publishing facts and opinions without which a democratic electorate cannot make responsible judgments. Newspaper being surveyors of news and views having a bearing on public administration very often carry material which*

would not be palatable to governments and other authorities." (Emphasis supplied)

8. In ***Sakal Papers (Pvt) Ltd v Union of India*** **(1962) 3 SCR 842**, the use of indirect means to impinge on the freedom of newspapers by curtailing circulation was held unconstitutional:

"*Its object thus is to regulate something which, as already stated, is directly related to the circulation of a newspaper. Since circulation of a newspaper is a part of the right of freedom of speech, the Act must be regarded as one directed against the freedom of speech. It has selected the fact or thing which is an essential and basic attribute of the conception of the freedom of speech viz., the right to circulate one's views to all whom one can reach or care to reach for the imposition of a restriction. It seeks to achieve its object of enabling what are termed the smaller newspapers to secure larger circulation by provisions which without disguise are aimed at restricting the circulation of what are termed the larger papers with better financial strength. The impugned law far from being one, which merely interferes with the right of freedom of speech incidentally, does so directly though it seeks to achieve the and by purporting to regulate the business aspect of a newspaper. Such a course is not permissible and the courts must be ever vigilant in guarding perhaps the most precious of all the freedoms guaranteed by our Constitution. The reason for this is obvious. The freedom of speech and expression of opinion is of paramount importance under a democratic Constitution which envisages changes in the composition of legislatures and governments and must be preserved.*" (Emphasis supplied)

9. Furthermore, access to the internet is a basic and essential facet of the freedom of speech and expression and the Right to Know (including the right of the media to report freely). In addition, access to the internet is an indispensable requirement for access to various other fundamental rights, such as access to healthcare and statutory welfare schemes, to which persons are entitled in law. Today, the internet is an essential and basic attribute of news-reporting. Consequently, any interference with access to the internet is a direct violation of the right itself. As this Hon'ble Court has long held, fundamental rights

guaranteed under the Constitution also include ancillary guarantees that make those rights meaningful (***PUCL v Union of India*, (2013) 10 SCC 1**).

10. Access to the internet was judicially recognized as a fundamental right in a recent decision of the Kerala High Court in ***Faheema Shirin v. State of Kerala* (W.P. Civil No. 19716 of 2019)**. The National Telcom Policy 2012 also recognizes the right to broadband connectivity as a "basic necessity like education and health." (Kindly see pg 171 of the Enclosed Compilation). The widespread and indiscriminate communication shutdown, which was enforced by the Respondents in Kashmir from 04.08.2019 onwards, by removing the internet as a platform, effectively suspended the right itself, which suspension continues even on the date of filing this Written Submission.

11. In this context, the observations of the European Court of Human Rights, in its judgment in the case of **Ahmet Yildirim v Turkey [Application 3111/2010]**, on the role of the internet as a platform, are important:

> "48..*As regards the importance of Internet sites in the exercise of freedom of expression, the Court reiterates that, in* ***Times Newspapers Ltd v. the United Kingdom (nos. 1 and 2) (nos. 3002/03 and 23676/03, § 27, ECHR 2009****), it found as follows:*
>
> *"In the light of its accessibility and its capacity to store and communicate vast amounts of information, the Internet plays an important role in enhancing the public's access to news and facilitating the dissemination of information in general."*

[Reliance is placed on Paras 48, 50, 56, 58, 59, 68; The same view is reiterated in the case of **Cengiz & Ors v Turkey, ECHR Applications No. 4822 of 2010 & 1427 of 2011** Paras 51, 52, 54, 55]

12. In the context of recognizing the role that the internet and an independent media play in a democracy, the Special Rapporteurs of the United Nations, namely: David Kaye Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression; Michel Forst, Special Rapporteur on the situation of human rights defenders; Bernard Duhaime, Chair-Rapporteur, Working Group on Enforced or Involuntary Disappearances; Clement Nyaletsossi Voule, Special Rapporteur on the right to peaceful assembly and association; and Agnes Callamard, Special Rapporteur on extrajudicial, summary or arbitrary executions, had written a joint letter dated 16.08.2019 to the Union of India stating,

"*Access to the internet and telecommunications networks are crucial to prevent disinformation, and they are crucial to protect the rights to health, liberty and personal integrity, by allowing access to emergency help and other necessary assistance. Access to telecommunications networks is also crucial to ensure accountability of authorities for possible human rights violations, including the excessive use of force against peaceful protesters and others. We express our deep concern that the network disruptions will fuel chaos and unrest in Jammu and Kashmir, and that they contribute to a climate fear and uncertainty in the population.*" (Emphasis supplied) (*Kindly see Pg. 191 of the Enclosed Compilation dated 03.12.2019*).

B. THE FACTUAL CONTEXT IN WHICH THE PETITIONS ARISE

Writ Petition (Civil) 1031 of 2019

13. Writ Petition (Civil) 1031 of 2019 was filed on 10.08.2019 under Article 32 of the Constitution of India by the Executive Editor of the newspaper Kashmir Times, which publishes two editions daily, one from Jammu and another from Srinagar. The English newspaper, Kashmir Times, was founded in 1954 as a news weekly. It was later converted to a daily newspaper in 1962 and has regularly been in print and circulation ever since. Kashmir Times is a widely read English newspaper in Jammu and Kashmir, and also has significant readership in the neighbouring states of Punjab, Delhi and Himachal Pradesh.

14. On 04.08.2019, sometime during the day, mobile phone networks, internet services, and landline phones were all discontinued in the Kashmir valley and in some districts of Jammu and Ladakh. No formal orders under which such action was taken by the Respondents were communicated to the affected population, including the residents of the Kashmir Valley. This meant that the people of Kashmir were plunged into a communication blackhole and an information blackout. The actions of the Respondents have had a debilitating and crippling effect on newsgathering, reporting, publication, circulation and information dissemination, and have also resulted in freezing of web portals and news websites.

15. From the morning of 05.08.2019, with a heavy military presence, barricades and severance of all communication links, the state of Jammu and Kashmir was placed under *de facto* de facto curfew. At the same time, on 05.08.2019, the Constitution (Application to Jammu and Kashmir) Order, 2019, C.O. 272

was published in The Gazette of India, *vide* which under the powers vested by Article 370(1) of the Constitution of India, Article 367(4) was added to the Constitution. Also on 05.08.2019, the Jammu and Kashmir Reorganisation Bill, 2019, was introduced in the Rajya Sabha, and passed. On 06.08.2019, the said Bill was passed by the Lok Sabha. The President's assent was given to the Bill on 09.08.2019. The Gazette Notification, dt 09.08.2019 states that the Jammu and Kashmir Reorganisation Act, 2019, will come into effect from 31st October, 2019, and that there shall be a new Union Territory of Jammu and Kashmir. All of this was carried out while the State of Jammu and Kashmir was in a lockdown, and silenced through a communication shutdown.

16. In such circumstances the Kashmir Times' Srinagar edition could not be distributed on 05.08.2019, and it could not be published thereafter from 06.08.2019 to 11.10.2019, as newspaper publication necessarily requires news gathering by reporters traveling across the Valley and unhindered interaction with public and officials. Due to the indiscriminate lockdown – including communication and internet blackout – and severe curbs on movement enforced by the Respondents, the Petitioner was prevented and hindered from carrying out her profession and work. Even after 11.10.2019, only a truncated copy of the newspaper is being published because of the severe restrictions in place even today (internet services and SMS services are completely shut down even after 115 days). The news portal / website is frozen till date.

17. It is submitted that a robust and independent media is the fourth estate of a democracy, and its freedoms are essential to the preservation of a democratic ethos in the day-to-day life of the society and polity. At a time when significant constitutional changes were being made that directly impact the people of Kashmir, it was even more incumbent on the Respondents to ensure robust press and media reportage was facilitated, so as to fuel debates, discussions and deliberations, which are the hallmarks of a functional democracy.

18. The absence of robust local news reporting due to the restrictions has led to a situation where the true facts on the ground have stayed unreported, leading to a contestation of facts and reports between various national and international news media outlets. It is reiterated that access to the internet forms a basic and essential attribute of news collection, publication, reporting, circulation and dissemination. By enforcing the communication shutdown, the Respondents have not restricted, but eroded, the freedom of speech of the Press and Media.

19. The prayers sought in the writ petition were:

a. Issue a writ in the nature of certiorari or in the nature of mandamus or any other appropriate writ, order or direction setting aside or quashing any and all order(s), notification(s), direction(s) and/or circular(s), whatever the case may be, issued by any of the Respondents herein or any other authority of the State, by/under which any and/or all modes of communication including Internet, mobile and fixed-line telecommunication services have been shutdown or suspended or in anyway made inaccessible or unavailable in any locality/area/district or division or region of the State of Jammu and Kashmir for being ultra vires, inter alia, Articles 14, 19 and 21 of the Constitution of India; and

b. Pass an appropriate writ, order or direction directing the Respondents to immediately restore all modes of communication including mobile, internet and landline services throughout Jammu and Kashmir in order to provide an enabling environment for the media to practice its profession; and

c. Pass an appropriate writ, order or direction directing the Respondents to take any and all steps necessary ensuring free and safe movement of reporters, journalists and other media personnel; and

d. Frame guidelines ensuring that the right and means of media personnel to report and publish news is not unreasonably curtailed through the issuance of orders by the Respondents or any other authority suspending telecom and/or internet services; [Kindly Refer to Prayers A-D @ Pg 21-22 of the WP (Civil) 1031 of 2019]

Writ Petition (Civil) 1164 of 2019

20. The Petitioner is the representative of the State of Jammu and Kashmir in Rajya Sabha and the Leader of Opposition in the Rajya Sabha.

21. Subsequent to August 5th, the Petitioner sought to travel to the State to reach out to the people and understand the concerns of the State of Jammu and Kashmir. However, he was not allowed to enter the State on three occasions, twice to Srinagar, when he flew on 8th August and 24th August, 2019 and once to Jammu on 20th August, 2019 and was made to return Delhi from the Airport. The Petitioner was only able to travel once pursuant to the order of this Hon'ble Court on 16.09.2019 passed in the captioned writ petition.

22. The Petitioner, in his petition, has brought to light the impact of the restrictions on the rights of the people of Jammu and Kashmir under Article 19 and 21, particularly in the following ways:

i. Right to livelihood of the people of the State: All industries such as tourism, handicrafts, manufacture, construction, cultivation, agriculture and the IT industry have come to a standstill and there have been reports of layoffs and closure of businesses. Losses to the economy have today amounted to Rs. 10,000 crore. (Kindly see pg 9-19, WP (Civil) 1164 of 2019)

ii. Right to health: There have been reports of limited access to hospitals, emergency services, super speciality services such as MRIs, dialysis, chemotherapy as well as the Union of India's medical scheme 'Ayushman Bharat.' (Kindly see pg 19-26, WP (Civil) 1164 of 2019)

iii. Right to education: students at all levels of education have been denied the right to education due to the closure of schools and universities and the absence of internet. (Kindly see pg 28, WP (Civil) 1164 of 2019).

iv. Right to information: The Respondents have taken no measures to ensure that ordinary people – especially those resident outside the state – are able to communicate with their families and ensure their safety. This has led to widespread confusion and anxiety. (Kindly see pg 4, WP (Civil) 1164 of 2019)

23. The prayers of the writ petition are, *inter alia*, as follows:

i. A Writ of Mandamus or any other appropriate writ directing the Respondent authorities to allow the Petitioner to travel to Jammu and Kashmir without conditionality and to freely interact with the people to ascertain the impact of the lockdown on their lives and enable them to put forth their demands and concrens, and/or

ii. A Writ of Mandamus or any other appropriate writ directing the Respondent 1 & 2 to produce all orders by way of which communication in the State of Jammu and Kashmir has been blocked since 04.08.2019, and/or

iii. A Writ of Mandamus or any other appropriate writ directing the Respondent 1 & 2 to produce all orders by way of which movement of persons has been restricted in the State of Jammu and Kashmir since 04.08.2019, and/or

iv. Writ of certiorari or any other appropriate writ, to quash the action of the Respondents that has enabled a communication shutdown in the state as violative of Articles 14, 19, 21, and/or

v. Writ of certiorari or any other appropriate writ to quash the action of the Respondents that has enabled a restriction on movement of persons in the State of Jammu and Kashmir as violative of Articles 14, 19, 21. (Prayers at pg 39-40, Writ Petition (Civil) 1164 of 2019).

24. Most of the restrictions outlined above continue to exist till date in the Kashmir valley, and – it is respectfully submitted – amount to an effective suspension of the fundamental rights of seven million people, under Articles 19 and 21 of the Constitution. The restrictions imposed by the State – the constitutionality of which requires adjudication by this Hon'ble Court – are outlined below:

Restrictions	**Restrictions lasted/lasting for**	**Remarks**
Landlines	31 days (approx.)	By the State's own admission there are only 43,114 landlines in Kashmir. That amounts to 1 landline per 1,623 people
Post paid Mobile Phone voice calls	70 days (approx.)	By the State's own admission there are only 20,05,293 post-paid phones in the valley.
Post Paid Mobile phone SMSes	115 days (continuing today)	SMSes are essential to obtain OTPs, and carry out any transactions or verification of services.
Prepaid Mobile phone voice calls	115 days (continuing today)	The State, in its status report, has admitted that there exist a total of 59,76,359 mobile phones out of which only 20,05,293 phones are working. This means a majority of the phones of the people in Kashmir are not working.
Prepaid Mobile SMSes	115 days (continuing today)	SMSes are essential to obtain OTPs and carry out any

		transactions or verifications of services.
Internet on phones and broadband in Kashmir	115 days (continuing today)	The internet is indispensable for all kinds of economic, educational and communicative activity including press reporting, and also impacts access to medical facilities.
Restrictions on movement	No clear response from the State on when restrictions were lifted or re-imposed.	Restrictions on movement have prevented persons from carrying out their daily activities, and have also prevented persons from accessing hospitals and other forms of emergency care.

25. It is settled law that once it is established, *prima facie*, that fundamental rights have been restricted or infringed, the burden is on the State to justify their reasonableness under Articles 19 and 21. (***Khyerbari Tea Co. v. State of Assam, (1964) 5 SCR 975, para 35; In Re Ramlila Maidan Incident, (2012) 5 SCC 1, para 25***). It is respectfully submitted that the State has miserably failed to discharge its burden in the present case. Instead, the State's case has rested on a set of astonishing premises: *first*, that it is exempted even from showing the law and orders on the basis of which it has restricted rights and freedoms to such a degree; *secondly*, that this Hon'ble Court ought to adopt a highly deferential approach upon the invocation of "national security" as a justification for restrictions upon rights; and *thirdly*, that because the State – by its own admission – has proven incapable of distinguishing between a "minuscule minority" of people who may be under suspicion and the vast majority of innocent people, it is entitled to impose blanket and indiscriminate restrictions on millions of individuals. It is respectfully submitted that each of these three propositions are utterly foreign to Indian jurisprudence, productive of great public mischief, and being constitutionally untenable do not deserve any consideration by this Hon'ble Court. And in the absence of these three propositions – it shall be shown – the State's case falls apart.

26. Furthermore, it is also submitted – and it shall be developed below – that the State's case suffers from a number of internal contradictions. On the one hand, it justifies its blanket and indiscriminate restrictions by pointing to the "unprecedented" and "one of a kind" situation existing in the state of Jammu and Kashmir; but on the other, it refuses to invoke the very Constitutional framework that was designed to deal with "unprecedented" situations where normal constitutional standards do not apply – that of Article 352. In other words, the State advances a series of arguments based upon the "exceptional" character of the present situation, but while wishing to stay within the legal framework meant for situations of "normalcy." On the one hand, the State argues that only a "miniscule" number of people are causing problems; but on other hand, it states that it has no effective way of identifying these "miniscule" individuals, and is driven to restrict everyone's rights. On the one hand, the State argues that there are no "judicially discoverable and manageable standards" to "segregate" individuals who use the communications network and the internet for legitimate purposes, and those who use it for illegal purposes; however, on the other hand, the State's *own* past actions indicate that it is fully capable of – and indeed, *has,* in the past as well as in the present – engaged in selective and targeted action against miscreants, based on credible intelligence inputs, etc.. In other words, therefore, it is respectfully submitted – and will be demonstrated – that the State's case fails upon the constitutional standard of proportionality, even on its own terms.

27. As a preliminary point, it is submitted that vide affidavit dated 30.10.2019 the Union of India has adopted the submissions of the State of Jammu and Kashmir so both parties are being jointly dealt with in the submissions.

LEGAL SUBMISSIONS

I. THE ORDERS ARE ULTRA VIRES THE PROVISIONS OF THE TEMPORARY TELECOM SUSPENSION RULES, 2017

28. Section 7 of The Indian Telegraph Act, 1885, provides for the power to frame Rules under the said statute. In exercise of that power, the Union of India notified the Temporary Suspension of Telecom Services (Public Emergency and Public Safety) Rules, 2017 (hereinafter referred to as 'Temporary Telecom Suspension Rules'). The Orders passed by the Respondents under the aforesaid Rules by which a complete communication shutdown and consequent information blackout was enforced in the State of J&K, especially in the Kashmir Valley, are all in breach and contravention of the scheme and object

of the said Rules and are constitutionally untenable. It is pertinent to note that the communication shutdown has continued for more than 110 days, and that by no stretch of imagination could be construed as "temporary". [***Kindly see Affidavit of the State of J&K dated 23.10.2019 at pgs 12-19***]

29. Since the Rules provide for the mechanism by which the State can temporarily interfere with the Fundamental Right of Freedom of Speech and Expression, including freedom of press, it requires strict compliance with the statutory framework to ensure that there is no misuse or abuse of authority, and to ensure that arbitrary, excessive and disproportionate orders are not passed to infringe core Fundamental Rights enshrined in the Constitution (for example, under Article 19(1)(a)). The Rules require rigorous adherence with the specific timeline stipulated by each sub-Rule, and they prescribe that the Orders suspending telecom services must be subjected to multiple levels of scrutiny and confirmation.

30. It is pertinent to note that the said Orders were never published or notified by the Respondents for public knowledge. The Petitioner in WP 1031 of 2019 sought copies of the said orders at the time of filing the Writ Petition through I.A. 121421 of 2019 (*Kindly see WP (Civil) 1031 of 2019, pg 65-67*). However, the same were not disclosed in the Limited Affidavit filed in Reply by the State of J&K dated 30.09.2019. Thereafter, the Petitioner filed her Rejoinder dated 12.10.2019, wherein detailed legal submissions were made qua The Temporary Telecom Suspension Rules of 2017 (*Kindly see Rejoinder Affidavit of the Petitioner dated 12.10.2019, Pg 13-4 at Para 16*). It is only after pleadings were completed, and that too upon directions of this Hon'ble Court, that the Respondents by an Additional Affidavit dated 23.10.2019, placed on record the said Orders.

31. On a bare perusal of the said Orders, it is apparent why the Respondents were reluctant to place the said Orders before this Hon'ble Court for judicial scrutiny, as they reveal the manifest arbitrariness and illegality of the communication shutdown enforced by the Respondents in the Kashmir Valley. <u>The legal grounds, as detailed below, on which the Orders have been assailed by the Petitioner, remain unrebutted and uncontroverted by the Respondents.</u>

(A) The Suspension Orders and Confirmation Orders reflect complete non-application of mind and are manifestly arbitrary

32. **<u>Order No. CS/KZ/19/2305-09 dated 04.08.2019 @ pg 12 of Addl. Affidavit of State of J&K dated 23.10.2019</u>**

a) It is pertinent to note that in Para 16 at pg 8 of Addl Affidavit of State of J&K dated 23.10.2019, it is stated that "*in view of the apprehension of misuse of data services by anti national elements, which is likely to cause deterioration in law and order situation restriction/ban on mobile, internet and landline phones was imposed vide Order No. CS/KZ/19/2305-09 dated 04.08.2019.*"

b) However, the Order No. **CS/KZ/19/2305-09 dated 04.08.2019 at pg 12** only directs the concerned authorities to reduce internet speed and makes no reference to landline phones. It directs "*to reduce 3G/4G data services to 2G speed (Not more than 128 kbps) in entire Kashmir Valley".*

c) Order No. **CS/KZ/19/2305-09 is further confirmed** vide Order No. Home/ISA/2017/Conf VIII @ pg 13 of Addl Affidavit of State of J&K dated 23.10.2019. The Confirmation Order is also only with respect to reducing the internet speed.

d) Thus, Order No. CS/KZ/19/2305-09**, contrary to the averment in Para 16 by the State of J&K, does not authorize a ban on mobile, internet and landline phones. Such a ban is thus manifestly illegal lacking any authority of law.**

33. Order No. **CS/KZ/19/2328-29 @ pg 14** of Addl Affidavit of State of J&K dated 23.10.2019 is issued for "*shut down of landline services*", although the Order refers to an apprehension of misuse of data services and not of voice calling or landline services. Thus, there is patent non-application of mind as landline services for voice calling cannot be used for misuse of data services.

34. Order No. **CS/KZ/19/2328-29** is confirmed vide Order No. Home/ISA/2017/Conf XIII at pg 15 of Addl Affidavit of State of J&K dated 23.10.2019 on the same day. However, pertinently the Subject denoted in the Confirmation Order is not with regard to landlines but broadband. The subject of the confirmation order is, "Shut down of broadband services", whereas the Order being confirmed had the subject, "Shutdown of Land Line Services". Thus the Confirmation Order is completely at variance with the order requiring confirmation, betraying yet again complete arbitrariness and non-application of mind. There is no power vested in the Confirmation Authority to modify or change the subject of the Order under confirmation.

35. **Order No**. **1921-26 at pg 16** of Additional Affidavit of State of J&K dated 23.10.2019 directs a complete shutdown of mobile voice / mobile data services

(tower shutdown) in border districts of Jammu. This order must be read in contradistinction to the Order at pg 12 of Addl Affidavit of State of J&K dated 23.10.2019, which was for the entire Kashmir valley. Order No. 1921-26 also makes it plain that the authorities are conversant with the framing of the order that is required for a complete shutdown of mobile voice and mobile data services. Thus **Order No. CS/KZ/19/2305-09 at pg 12** cannot be used by the Respondents to justify a total shutdown of mobile voice and data services in the Kashmir Valley from 04.08.2019 onwards.

36. The Subject of **Order No. 1921-26 at pg 16** is "*Complete Shutdown Mobile Voice / Mobile Data Services (Tower Shutdown)*". However, in the Confirmation Order No. Home/ISA/2017 at Pg 17, the Subject is noted as "*Snap down of data services (2G/3G/4G)*." The Confirming Authority, namely the Principal Secretary, Home Department, Govt of J&K, has therefore only confirmed reduction of data services and there is no confirmation of the order for a complete shutdown of mobile voice (tower shutdown) for the named districts of Jammu. The Confirmation Order is thus completely at variance with the Order of suspension, and there is no authorisation for the complete tower shutdown in the said districts, rendering the same illegal and unconstitutional.

37. Thus, manifestly **arbitrary and overbroad Orders were passed and then rubber stamped by the Confirming Authority without application of mind**. The Confirming Authority is therefore not discharging its role in terms of the Rules which envisage it to independently assess, evaluate and thereby confirm the temporary interference with the right to freedom of speech and expression. The Orders passed under the Rule 2 are patently arbitrary and illegal.

(B) All Orders are not issued by Competent Authority, in violation of Rule 2(1) of Temporary Telecom Suspension Rules

38. Rule 2(1) of the Telecom Suspension Rules states that:

> "*Directions to suspend the telecom services shall not be issued except by an order made by the Secretary to the Government of India in the Ministry of Home Affairs in the case of Government of India or by the Secretary to the State Government in-charge of the Home Department in the case of the State Government (hereinafter referred to as the competent authority) and in unavoidable circumstances, where obtaining of prior direction is not feasible,*

such order may be issued by an officer not below the rank of Joint Secretary to the Government of India, who has been duly authorised by the Union Home Secretary or the State Home Secretary, as the case may be.
Provided that the order for suspension of telecom services issued by the officer authorised by the Union Home Secretary or the State Home Secretary, shall be subject to the confirmation from the competent authority within 24 hours of issuing such order.
Provided further that the order of suspension of telecom services shall cease to exist in case of failure of receipt of confirmation from the competent authority within the said period of 24 hours."

39. The suspension orders at Pg 12, 14 and 18 of Addl Affidavit of State of J&K dated 23.10.2019 are issued by the Inspector General of Police, Kashmir Zone; and the Order at Pg 16 of Addl Affidavit of State of J&K dated 23.10.2019 is issued by the Inspector General of Police, Jammu Zone.

i. The IG of Police is <u>not the competent person authorized to issue orders under Rule 2(1)</u> of the Temporary Suspension of Telecom Services (Public Emergency or Public Safety) Rules, 2017. The Competent Authority as per the Rules is the Home Secretary (Govt of India or of concerned State as may be applicable)

ii. **No sudden or unavoidable emergency or circumstances:** As per the Rules, only in unavoidable circumstances where obtaining prior direction is not feasible, the order may be issued by an officer not below the rank of Joint Secretary to Govt of India, duly authorized by the competent authority. Facts before this Hon'ble Court clearly disclose that the Union of India and State of J&K were making arrangements prior to 5th August, 2019, to deal with the fallout, if any, of the move to abrogate Art. 370. Travel advisory, movement of troops, shutting down of schools, return of Amarnath Yatris, etc., were some such measures. Thus, no sudden or unavoidable circumstances had arisen which necessitated this power to be delegated. The Orders passed by the IGs of Police are therefore without jurisdiction, *ultra vires*, non-est and lack authority of law, as they are in direct contravention of the Rules.

iii. **IG of Police not Competent Authority as he is not duly authorised:** There is **no order on record, nor any averment in the pleadings, about**

the IG of Police having been duly authorised by the Home Secretary in terms of the Rules. A mere bald and belated averment made by the Respondent State in Para 3 of the Further Additional Affidavit dated 26.09.2019 unsubstantiated by any government order or document of authorization, does not meet the statutory requirement of due authorization in terms of Rule 2(1) of The Temporary Telecom Suspension Rules. It is humbly submitted that the said Affidavit does not redress the clear and absolute violation of Rule 2 of the concerned Rules.

iv. It has been submitted by the Respondent State in para 32 at pg 28 of its Written Submissions, handed over on 26.11.2019, that the violation of the Rules pertaining to the IG of Police not being the competent authority has not been pleaded by the Petitioner. It is submitted that the legal submissions qua the violation of the Rules was pleaded in para 16 @ pg 13 of the Rejoinder of the Petitioner, WP (Civil) 1031 of 2019, dated 12.10.2019. The said Orders, revealing the designation of the authority issuing the Order, were only placed on record by the State of J&K vide Additional Affidavit dated 23.10.2019, subsequent to the filing of the Rejoinder by the Petitioner. In any event, if an Order is passed without jurisdiction and is *ex-facie* in violation of the Rules, its validity becomes a question of law which can be raised at any stage, and especially at the first opportunity to respond to the Orders after they were placed on record (which was when the Petitioner's counsel addressed oral submissions).

v. **Even otherwise, the IG of Police cannot be authorised under the Rules:**

The word 'officer' in Rule 2(1) of The Temporary Telecom Suspension Rules must be read *sui generis* and cannot be construed to include a police officer. The non inclusion of police officers in the scope of the term 'officer' in Rule 2(1) is also manifest upon a reading of Rule 419A of The Indian Telegraph Rules (as amended on February 8, 2014), which is *pari materia* Rule 2(1) of the Temporary Telecom Suspension Rules. Rule 2(1) is a *verbatim* copy of Rule 419A upto the proviso to Rule 419A. In the Proviso to Rule 419A, the IG of Police is mentioned as the approving authority who is empowered to give prior approval for interception of messages in his capacity as Head or second senior most officer of the Security and Law Enforcement Agency. **Non-inclusion of this proviso in Rule 2(1) is indicative of the legislative intent** of not

empowering the IG of Police or the Security and Law Enforcement agency to pass orders under the said Rule. This legislative intent cannot be ignored or defeated by the Respondents by allowing the IG of Police to pass the said orders.

The orders passed by the IGs of Police are therefore without jurisdiction, non-est and lack authority of law, being in direct contravention of the Rules.

(C) Mechanical Orders, Bereft of Reasons: Contrary to law (violating Rule 2(2) of Temporary Telecom Suspension Rules) and arbitrary (violating Article 14 of the Constitution)

40. Rule 2(2) of Temporary Telecom Suspension Rules states, "***Any order issued by the competent authority under Sub-Rule (1) shall contain reasons*** *for such direction and a copy of such order shall be forwarded to the Concerned Review Committee latest by the next working day.*" (Emphasis Supplied)

41. Each of the Orders passed under Temporary Telecom Suspension Rules (Pg 12-19 of Addl Affidavit of State of J&K dated 23.10.2019) is mechanical, lacking in reasons and without any material facts or particulars. They are thus in direct infringement of Rule 2(2) of The Temporary Telecom Suspension Rules which mandates that the order shall contain reasons.

42. It is pertinent to note that in **para 15 at pg 8** of Addl Affidavit of State of J&K dated 23.10.2019, the Respondents have taken the stand that, "*reasons for passing such orders are never reflected in the orders*". This is manifestly illegal and against the statutory mandate of the Rules as well as settled jurisprudence of this Hon'ble Court.

43. It was submitted during oral arguments by the Respondent State that this Hon'ble Court need not pay heed to the words used in the Orders, and instead the broader picture ought to be assessed, as administrative authorities often lack in their legal training and may not use appropriate terms in passing such orders. It may be relevant to note here that it is precisely for this reason that The Temporary Telecom Suspension Rules specifically prescribe the designation of the officer who has the power to pass such an Order. As detailed earlier, in the present case, Orders were not passed by the Competent Authority. In that context it was argued by the Respondent State that this Hon'ble Court could rely on other material presented during oral arguments to ascertain the reasons on the basis of which the said Orders were passed. Such a submission is legally untenable and has been rejected by a catena of

judgments of this Hon'ble Court. (Kindly refer to Para 56 below for detailed submissions in this regard). A synopsis follows:

i. *"Reasons, when recorded by an administrative authority in an order passed by it while exercising quasi-judicial functions, would no doubt facilitate the exercise of its jurisdiction by the appellate or supervisory authority. But the other considerations, referred to above, which have also weighed with this Court in holding that an administrative authority must record reasons for its decision, are of no less significance. These considerations show that the recording of reasons by an administrative authority serves a salutary purpose, namely, it excludes chances of arbitrariness and ensures a degree of fairness in the process of decision-making."* – ***SN Mukherjee v. Union of India*, (1990) 4 SCC 594, paras 36, 40)**

ii. Some element of certainty should be traceable in the material facts recorded in the Order. Bald use of generic phrases does not constitute reasons - ***In Re Ramlila Maidan Incident* (2012) 5 SCC 1, paras 221**

iii. "8…*when a statutory functionary makes an order based on certain grounds, its validity must be judged by the reasons so mentioned and cannot be supplemented by fresh reasons in the shape of affidavit or otherwise. Otherwise, an order bad in the beginning may, by the time it comes to court on account of a challenge, get validated by additional grounds later brought out… Orders are not like old wine becoming better as they grow older*" – ***M.S. Gill v Chief Election Commissioner*, (1978) 1 SCC 405, para 8; *State of Punjab & Ors.* v. *Bandeep Singh & Ors.* (2016) 1 SCC 724, para 4; *Hindustan Petroleum Corp. Ltd.* v. *Darius Shapur Chennai & Ors.*, (2005) 7 SCC 627, para 21.**

(D) Mere bald, vague and unsubstantiated averment about Review Committee: the Orders violate Rule 2(5)

44. Rule 2(5) states that, "*The Central Government or the State Government, as the case may be, shall constitute a Review Committee...*"

45. It is not even averred by the Respondents in their pleadings whether any Review Committee in terms of Rule 2(5) was constituted or not, and whether the orders were forwarded to the said committee by the next working day as prescribed by the Rules. Only a mere bald, unsubstantiated and belated explanation is attempted vide the Further Additional Affidavit dated

26.11.2019 handed across during oral arguments of the State of J&K, wherein it is stated that the orders have been reviewed.

46. There is no averment by the Respondent State in any of its Affidavits with respect to the date of constitution and composition of the Review Committee as mandated under the Rules. The Respondent State has not placed on record before this Hon'ble Court any material facts or particulars with respect to the Review Committee. The Affidavits of the Respondent State are silent on whether the Orders were forwarded within the next working day, as required by Sub Rule (2). The submissions are thus bald, unsubstantiated and do not show compliance with the Rules. In the absence of pleadings and documents in support, the only inference possible is that Rule 2(5) was violated and the Review Committee was not set up as per the Rules. Most, importantly, the affidavits are silent on the point on the view of the Review Committee on how the orders comply with grounds under Section 5(2) of the Telegraph Act, 1885 when the orders use "law and order" as the basis of the action. In this context, it is respectfully submitted that as the matter concerns an infringement of fundamental rights, the burden of demonstrating that mandatory procedures were strictly complied with lies squarely upon the State.

(E) No record of Review Committee meetings and no findings of Review Committee – Orders violate Rule 2(6)

47. Rule 2(6) states that Review Committee "shall" meet and record its findings within 5 working days whether the Orders are in accordance with Section 5(2) Indian Telegraph Act.

i. No such findings have been placed on record, nor has any averment been made to that effect in the pleadings of the Respondents. Thus, the only inference that can be drawn is that the Orders are in blatant and complete violation of Rule 2(6) of The Temporary Telecom Suspension Rules.

ii. **Proviso to Section 5(2) of Indian Telegraph Act creates a special classification for the media:** Proviso to Sec 5(2) states, "*Provided that press messages intended to be published in India of correspondents accredited to the Central Government or a State Government shall not be intercepted or detained, unless their transmission has been prohibited under this sub-section.*"

iii. The Orders passed by the Respondents do not specifically mention that it shall include or cover the media. Consequently, they cannot provide the legal force for prohibiting the access of the media to internet and mobile

services as per Sec. 5(2) proviso. It was conceded by the Respondents during oral arguments that no Order was passed under Sec. 5(2) specifically qua the media.

(F) Orders that are *ex-facie* violative of Rules cannot be justified through Affidavits

48. It was contended by the Respondent State of J&K that the Orders by which the communication services including internet were shut down ought not to be scrutinised for the words used therein by the concerned authorities, and instead the broader picture ought to be assessed by placing reliance on material filed with written submissions, containing social media posts and news reports. This submission is based on a wrong, erroneous and constitutionally untenable reading of the law as laid down by the Hon'ble Supreme Court of India.

49. The submissions advanced by the State are in contravention of the settled law and have been rejected by a Constitution Bench of this Hon'ble Court in ***Dr. Ram Manohar Lohia vs State of Bihar AIR 1966 SC 740*** (Para 10-11) by stating,

> "*The satisfaction of the Government which justifies the order under the rule is a subjective satisfaction. A court cannot enquire whether grounds existed which would have created that satisfaction on which alone the order could have been made in the mind of a reasonable person. If that is so,-and that indeed is what the respondent State contends.- it seems to me that when an order is on the face of it not in terms of the rule, a court cannot equally enter into an investigation whether the order of detention was in fact, that is to say, irrespective of what is stated in it, in terms of the rule. In other words, in such a case the State cannot be heard to say or prove that the order was in fact made, for example, to prevent acts prejudicial to public order which would bring it within the rule though the order does not say so. To allow that to be done would be to uphold a detention without a proper order. The rule does not envisage such a situation. The statements in the affidavit used in the present case by the respondent State are, therefore, of no avail for establishing that the order of detention is in terms of the rule. The detention was not under the affidavit but under the order.... ...If a man can be deprived of his liberty under a rule by the simple process of the making of a certain order, he can only be so*

> *deprived if the order is in terms of the rule. Strict compliance with the letter of the rule is the essence of the matter. We are dealing with a statute which drastically interferes with the personal liberty of people, we are dealing with an order behind the face of which a court is prevented from going. I am not complaining of that. Circumstances may make it necessary. But it would be legitimate to require in such cases strict observance of the rules. If there is any doubt whether the rules have been strictly observed, that doubt must be resolved in favour of the detenu. It is certainly more than doubtful whether law and order means the same as public order. I am not impressed by the argument that the reference in the detention order to r. 30(1) (b) shows that by law and order what was meant was public order. That is a most mischievous way of approaching the question."* (Emphasis supplied)

In ***Lohia (Supra)*** therefore, this Hon'ble Court affirmed one of the key claims upon which the Petitioners' case rests: given the admittedly drastic nature of the infringement of rights in the present case – a blanket and indiscriminate communication shut-down affecting millions of people – State authorities must be held to the strictest threshold of procedural and substantive compliance with the law and the Constitution. This Hon'ble Court must ensure that the procedures have been followed *by the book*; and any ambiguity – as held in *Lohia* – must be resolved in favour of the citizen, and against the State.

(G) Public Order cannot be read into Law and Order

50. It is respectfully submitted that 'Law and Order' – the phrase used in the impugned orders – is not a permissible ground for restrictions under Art 19(2) of the Constitution. The submission made by the Respondent State in its Written Submissions dt. 26.11.2019 in Para 39 at page 31, that "*public order has to be read into the phrase law and order*", is manifestly incorrect, legally untenable and has been rejected by a catena of judgments of this Hon'ble Court:

i. The import of the phrase 'law and order' is distinct from 'public order' and the two are not interchangeable. As was clearly held in *Lohia*, supra:

> *"One has to imagine three concentric circles. Law and order represents the largest circle within which is the next circle representing public order and the smallest circle represents*

security of State. It is then easy to see that an act may affect law and order but not public order just as an act may affect public order but not security of the State." [***Dr. Ram Manohar Lohia vs State of Bihar AIR 1966 SC 740*** **Para 10, 11, 51, 52** ; ***KK Saravana Babu vs State of TN (2008) 9 SC 89*** **Paras 17-23**]

ii. As "law and order" – in its legal sense – is of a narrower ambit than "public order", the invocation of "law and order" would likewise justify a much smaller degree of infringement of rights:

> ***"A restriction imposed with `law and order' in mind would be least intruding into the guaranteed freedom while `public order' may qualify for a greater degree of restriction since public order is a matter of even greater social concern."*** *- In Re Ramlila Maidan Incident (2015) 5 SCC 1* [Para 35]

iii. Thus, when apprehension is of disturbance to law and order, it does not permit the Respondents to enforce an all encompassing and complete shutdown of all communication services. The present is a classic case of using a **blunt instrument with an overbroad impact, instead of forging a sharp tool**.

(H) The principle of proportionality stands violated

51. It is settled law that State action, when it intervenes with the Fundamental Rights, in order to be permissible under the Constitutional scheme and framework, must conform to the doctrine of proportionality. In ***K S Puttaswamy (Retd.) & Anr. v. Union of India (Puttaswamy I)*** **(2017) 10 SCC 1** in which 9 Judges upheld privacy as a fundamental right, the proportionality test which had been laid down by a 5 judge Bench in *Modern Dental College* case was reiterated:

(a) *the action must be sanctioned by law;*

(b) *the proposed action must be necessary in a democratic society for a legitimate aim;*

(c) *the extent of such interference must be proportionate to the need for such interference;*

(d) *There must be procedural guarantees against abuse of such interference*

52. In ***K S Puttaswamy (Retd.) & Anr. v. Union of India (Puttaswamy II)*** **(2019) 1 SCC 1**, Hon'ble Justice Sikri reiterated a four-fold test of proportionality by

building on earlier judgments of this Hon'ble Court including the judgment by 9 Hon'ble Judges in ***Puttuswamy I,*** **(2017) 10 SCC 1**. The tests laid down are:

"(a) *A measure restricting a right must have a legitimate goal (legitimate goal stage).*

(b) *It must be a suitable means of furthering this goal (suitability or rationale connection stage).*

(c) *There must not be any less restrictive but equally effective alternative (necessity stage).*

(d) *The measure must not have a disproportionate impact on the right holder (balancing stage)"*

[*Kindly refer* to ***Puttaswamy II*** **(2019) 1 SCC 1- Paras 147, 148, 151, 152, 154, 157 and 158]**

53. In view of the test of proportionality, the total communication shutdown, including landline, mobile voice and internet services, enforced by the Respondents must pass the test of proportionality by demonstrating:

i. **The action in enforcing a complete ban/shutdown of communication services was sanctioned by law:** However, the orders provided at Pgs. 12-19 of the Additional Affidavit of the State of J&K dated 23.10.2019, are manifestly in violation of Temporary Telecom Suspension Rules and Indian Telegraph Act, and thus not sanctioned by law.

ii. **The aim/purpose behind the State action was legitimate:** Orders must contain reasons and reference to any material on the basis of which the Orders have been passed. However, a bare perusal of the Orders at Pgs. 12-19 of the Additional Affidavit of the State of J&K dated 23.10.2019 reveals that no reference has been made to any material in the said orders. Thus, the orders provide no assistance to determine the legitimacy of the goal of State action.

iii. **That there was a compelling need for such a move, and the aim/object could not have been achieved by a less restrictive move:** Since the orders state that the apprehension was of misuse of data services, less restrictive and least incisive methods ought to have been deployed instead of a generic and all encompassing shutdown. An apprehension of misuse of data services, even if taken on face value to be correct and genuine, still does not justify the shut down of landline phones and mobile voice services, which are in no way associated with data services. The Orders thus reveal that a generic ban was imposed on

all communication services instead of employing the least incisive means to achieve the stated goal. Generic ban instead of content specific measures is disproportionate, excessive, and unconstitutional.

iv. **Impact on the media and people must not be disproportionate and that there are procedural safeguards against misuse:** The Media is completely crippled by these excessive and disproportionate restrictions. There was no updation and access to e-papers and news websites, which is a significant mode of news circulation and dissemination, and the preferred mode of news consumption by the youth. The Petitioner's Srinagar edition was out of print till 11.10.2019, and ever since only a truncated version is being printed with a lot of difficulty. Pertinently, no such safeguards against misuse exist as the Orders were not even made publicly available by the Respondents. The residents of the Kashmir Valley had no knowledge of such orders and suffered the onslaught on their basic freedoms and rights with no remedy against the misuse of such orders.

The Petitioners will proceed to develop these arguments in greater detail below.

II. THE COMMUNICATION SHUT DOWN VIOLATES ARTICLE 19(1)(A) OF THE CONSTITUTION, AND IS NOT SAVED BY ARTICLE 19(2)

54. The petitioners respectfully submit that – contrary to the arguments advanced by the State – restrictions on fundamental rights are subject to judicial review under all circumstances, including when they are justified on the grounds of national security **(A)**; that the relevant standard that this Hon'ble Court must apply is the proportionality standard (**B**); and that the communication shut down fails the test of proportionality, and is therefore unconstitutional (**C**).

(A) The Indian Constitution provides no exception in respect of judicial review of fundamental rights violations in matters of national security

55. In its affidavit dated 23.10.2019, the State has sought to argue that the matters relating to *"law and order are primarily the domain of the administrative authorities concerned as they are best to assess the ground situation and hand such situation depending upon the peculiar needs within their special knowledge."* (Pg 3, para 6 and pg 7, para 14-15, Additional Affidavit of the State dated 23.10.2019) Similarly, in its written submissions the State has argued that judicial review in respect of matters of national security is limited, and that the Court may decline to exercise jurisdiction if its conscience is

satisfied that the measures were taken to safeguard the security of the citizens and the sovereignty of the citizens. Further, the State has also averred that there are several instances where the Court has declined to exercise jurisdiction when the measures are found to be in larger public interest. (*Written Submissions of the State pg 18-19; pg 80 to 92)*.

56. It is submitted that the State's arguments proceed in rank ignorance of settled law. In a constitutional democracy such as India, the State must at all times act within the rule of law, and within the bounds set by the fundamental rights chapter. Under Article 13, State action cannot violate fundamental rights. Under Article 32, the Judiciary bears the responsibility to strike down any State action that does. In ***In Re Ramlila Maidan Incident*** **(2012) 5 SCC 1**, this Hon'ble Court held:

> *"306. The primary task of the State is to provide security to all citizens without violating human dignity. Powers conferred upon the statutory authorities have to be, perforce, admitted. Nonetheless, the very essence of constitutionalism is also that no organ of the State may arrogate to itself powers beyond what is specified in the Constitution. (Vide GVK Industries Ltd. v. ITO [(2011) 4 SCC 36] and Nandini Sundar v. State of Chhattisgarh [(2011) 7 SCC 547 : (2011) 2 SCC (L&S) 762 : AIR 2011 SC 2839].)*
>
> *307. In Madhav Rao Jivaji Rao Scindia v. Union of India [(1971) 1 SCC 85 : AIR 1971 SC 530] this Court held that: (SCC p. 131, para 44) even:*
>
> *"in civil commotion, or even in war or peace, the State cannot act 'catastrophically' outside the ordinary law and there is legal remedy for its wrongful acts against its own subjects or even a friendly alien within the State".*

57. This Hon'ble Court has repeatedly held that there exists a duty of judicial review placed upon the Court in respect of adjudicating violations fundamental rights, such as Article 19 of the Constitution:

> *"Before proceeding to consider this question [whether restrictions are reasonable], we think it right to point out, what is sometimes overlooked, that our Constitution contains express provisions for judicial review of legislation as to its conformity with the Constitution, unlike as in America where the Supreme Court has*

assumed extensive powers of reviewing legislative acts undercover of the widely interpreted "due process" clause in the Fifth and Fourteenth Amendments. If, then, the courts in this country face up to such important and none too easy task, it is not out of any desire to tilt at legislative authority in a crusader's spirit, but in discharge of a duty plainly laid upon them by the Constitution. This is especially true as regards the "fundamental rights ", as to which this Court has been assigned the role of a sentinel on the qui vive. While the Court naturally attaches great weight to the legislative judgment, it cannot desert its own duty to determine finally the constitutionality of an impugned statute. We have ventured on these obvious remarks because it appears to have been suggested in some quarters that the courts in the new set up are out to seek clashes with the legislatures in the country." (***State of Madras v. V.G. Row, AIR 1952 SC 196, para 13. See also Chintaman Rao v. State of Madhya Pradesh 1950 SCR 759, pg 765-6 State of Punjab v. Khan Chand, (1974) 1 SCC 549, para 12, Romesh Thapar v. State of Madras,* 1950 SCR 594, para 3**).

58. The Constitutional text does not sanction Executive supremacy in respect of restrictions upon fundamental rights on grounds of national security. Nor does it suggest that the standard of review in such matters must be lower. In fact, this Hon'ble Court has consistently held to the contrary. For instance, in ***Vijay Narain Singh v State of Bihar (1984) 3 SCC 14*** considered and rejected the position previously accepted in English law that *"those who are responsible for the national security or for the maintenance of public order must be the sole judges of what the national security or public order requires."* Instead, this Hon'ble Court held *"our Constitution does not give a carte blanche to any organ of the State to be the sole arbiter in such matters."*

59. The State has cited certain cases that purportedly advocate the proposition that judicial review must be limited in respect of matters of national security and technical matters. On closer scrutiny, however, it becomes clear that these judgments cannot have any application in the present case, as most were concerned not with fundamental rights violations, but with administrative action challenged on grounds of administrative law or were cases where the specific statute under which the action undertaken specifically provided for administrative discretion. None of the cases cited relate to fundamental rights

violations under Article 19 which is the case here. (***Kindly see the table distinguishing all case law cited by the State, pg ___ of the enclosed Compilation***).

60. Moreover, the arguments of the State are based on a flawed premise. For instance, in paragraph 50 of the written Submissions dated 25th November 2019, it has cited the judgment of this Hon'ble Court in ***Ex-Armymen's Protection Services (P) Ltd. v Union of India*, (2014) 5 SCC 409** to argue that "*it is not for the Court to decide whether something is in the interest of the State or not. It should be left to the executive.*" At no point, however, has the Petitioner asked this Hon'ble Court to decide anything of the sort. The Constitution does not *only* require that State action be in the interests of national security, but also that – to the extent that State action infringes upon fundamental rights under Article 19 and 21 – it be *reasonable*, as per the standard of review under Article 19(2) and 21 (which, as argued below, is the proportionality standard). Consequently, the Petitioner is not asking this Hon'ble Court to substitute its judgment for the judgment of the Executive with respect to the *goal* of protecting national security, but to examine whether the constitutional standards that constrain the *manner* in which the State may go about achieving that goal have been breached or not.

61. To ignore the rigorous standard of review recognised under Article 19 and 21 whenever the State invokes "national security" would amount not only to denuding the fundamental rights chapter of any effective force, but would also drive a cart and horse through seven decades of settled jurisprudence on the point (culminating, most recently, in the nine-judge bench decision of this Hon'ble Court in ***K.S. Puttaswamy v Union of India***)

62. Indeed, it is submitted that it was only in ***ADM Jabalpur* v. *Shivkant Shukla*** (**1976) 2 SCC 521** that such arguments were accepted: i.e., where this Hon'ble Court hold in favour of limited judicial review in matters of national security – and that too, because a formal emergency had been declared (a point that shall be developed further below). In the absence of a formal declaration of an emergency, the question of limited judicial scrutiny in respect of rights under Article 19 cannot arise.

63. Moreover, a nine-judge bench of this Hon'ble Court in ***KS Puttaswamy* v. *Union of India,* (2017) 10 SCC 1** specifically overruled the decision of the Hon'ble Court in ***ADM Jabalpur v. Shivkant Shukla,* (1976) 2 SCC 521** on the point that rights under Article 21 would stand suspended during an

emergency. In *Puttaswamy*, this Hon'ble Court upheld the view taken by Justice Khanna, who held that even if wide powers are vested in the State in an emergency, the rule of law requires the Court to determine the legality of such action. Accordingly, this Hon'ble Court in *Puttaswamy* held:

> *137. A constitutional democracy can survive when citizens have an undiluted assurance that the Rule of Law will protect their rights and liberties against any invasion by the State and that judicial remedies would be available to ask searching questions and expect answers when a citizen has been deprived of these, most precious rights. The view taken by Khanna, J. must be accepted, and accepted in reverence for the strength of its thoughts and the courage of its convictions*."

64. It is also not out of place to mention that Constitutional courts of other countries which face similar cross border threats have emphasized that even while fighting terrorism, democratic governments cannot ignore their obligation to respect human rights. Most notably, the Israeli Supreme Court in ***Public Committee against Torture in Israel v. State of Israel*** **(1999 7 BHRC 31)** has held that democratic governments cannot use the same destructive and inhumane means as terrorists even if it means that the state must fight with one hand tied behind its back. The relevant extract of the judgement is as follows:

> *"39. This decision opened with a description of the difficult reality in which Israel finds herself. We conclude this judgment by revisiting that harsh reality. We are aware that this decision does make it easier to deal with that reality. This is the destiny of a democracy—it does not see all means as acceptable, and the ways of its enemies are not always open before it. A democracy must sometimes fight with one hand tied behind its back. Even so, a democracy has the upper hand. The rule of law and the liberty of an individual constitute important components in its understanding of security. At the end of the day, they strengthen its spirit and this strength allows it to overcome its difficulties.*
>
> *This having been said, there are those who argue that Israel's security problems are too numerous, and require the authorization of physical means. Whether it is appropriate for Israel, in light of its security difficulties, to sanction physical means is an issue that must be decided by the legislative branch, which represents the*

people. We do not take any stand on this matter at this time. It is there that various considerations must be weighed. The debate must occur there. It is there that the required legislation may be passed, provided, of course, that the law"befit[s] the values of the State of Israel, is enacted for a proper purpose, and [infringes the suspect's liberty] to an extent no greater than required."See article 8 of the Basic Law: Human Dignity and Liberty.

40. Deciding these petitions weighed heavily on this Court. True, from the legal perspective, the road before us is smooth. We are, however, part of Israeli society. Its problems are known to us and we live its history. We are not isolated in an ivory tower. We live the life of this country. We are aware of the harsh reality of terrorism in which we are, at times, immersed. The possibility that this decision will hamper the ability to properly deal with terrorists and terrorism disturbs us. We are, however, judges. We must decide according to the law. This is the standard that we set for ourselves. When we sit to judge, we ourselves are judged. Therefore, in deciding the law, we must act according to our purest conscience. We recall the words of Deputy President Landau, in HCJ 390/79 Dawikat v. The State of Israel, at 4:

We possess proper sources upon which to construct our judgments and have no need—and, indeed, are forbidden—to allow our personal views as citizens to influence our decisions. Still, I fear that the Court will appear to have abandoned its proper role and to have descended into the whirlwind of public debate; that its decision will be acclaimed by certain segments of the public, while others will reject it absolutely. It is in this sense that I see myself as obligated to rule in accordance with the law on any matter properly brought before the Court. I am forced to rule in accordance with the law, in complete awareness that the public at large will not be interested in the legal reasoning behind our decision, but rather in the final result. Conceivably, the stature of the Court as an institution that stands above the arguments that divide the public will be damaged. But what can we do, for this is our role and our obligation as judges?"

(B) The Standard of Review to be employed even in respect of fundamental rights violations under Article 19 and 21 (including on grounds of national security) is the proportionality standard

65. It is respectfully submitted – as indicated above – that the Constitution of India and the jurisprudence of this Hon'ble Court do not support a lower threshold of review in cases where the State invokes national security to justify fundamental rights violations. The State has placed reliance upon English case law such as ***C.C.S.U. v. Minister for Civil Service (HL(E.), [1984] 3 WLR 1174*** and ***Regina v. Home Secretary*****, [1991] 1 WLR 890** to argue for the contrary proposition: that the standard of review in matters of national security resembled a laxer standard (such as Wednesbury reasonableness), and not proportionality.

66. The State's submission sits at odds with the jurisprudence of this Hon'ble Court, as submitted above. This is borne out by constitutional history. The word "reasonable" was added to Article 19(2) by the First Amendment to ensure that the actions of the State are subject to rigorous judicial review. In the Constituent Assembly, Pandit Thakur Dass Bhargava explained the import of the word reasonable thus: "*If you put the word 'reasonable' there, the court will have to see whether a particular Act is in the interests of the public and secondly whether the restrictions imposed by the legislatures are reasonable, proper and necessary in the circumstances of the case. The courts shall have to go into the question and it will not be the legislature and the executive who could play with the fundamental rights of the people. It is the courts which will have the final say."* (*Constituent Assembly Debates, Vol VII, December 1, 1948*). (Emphasis Supplied)

67. It thus for this Hon'ble Court to evaluate whether a restriction (be it legislative or executive in nature) on any right under Article 19 is in pursuance of a ground expressly provided vis-à-vis the right under Article 19 and whether the restriction are proportionate. (***State of Madras v. V. G. Row, AIR 1952 SC 196, para 15; Om Kumar v. Union of India, (2001) 2 SCC 386, para 30-32, 36, Shayara Bano v. Union of India, (2017) 9 SCC 1, para 86; K.S. Puttaswamy v. Union of India, (2019) 1 SCC 1, para 147-8, 157)*** Indeed, in *V.G. Row*, this Hon'ble Court made clear that the "disproportion of the imposition" was an essential factor in judging reasonableness.

68. Furthermore, the State's argument – in its reliance upon English case law – must fail on its own terms. It is submitted that this Hon'ble Court in ***Om***

***Kumar v. Union of India*, (2001) 2 SCC 386** recognized that the position of law in the United Kingdom, in respect of judicial review, is completely different – as the United Kingdom does not have a written constitution with fundamental rights. In India, when it comes to violation of fundamental rights, all State action – legislative or administrative – must be tested on the anvil of proportionality. Further, the Hon'ble Court also noted that *even* in England, with the advent of the Human Rights Act, 1998 (which has attained an almost constitutional status), the position in United Kingdom has also undergone a change. Indeed, the United Kingdom has moved away from Wednesbury Reasonableness to proportionality and strict scrutiny. This Hon'ble Court held:

> *30. On account of a Chapter on Fundamental Rights in Part III of our Constitution right from 1950, Indian Courts did not suffer from the disability similar to the one experienced by English Courts for declaring as unconstitutional legislation on the principle of proportionality or reading them in a manner consistent with the charter of rights. Ever since 1950, the principle of "proportionality" has indeed been applied vigorously to legislative (and administrative) action in India. While dealing with the validity of legislation infringing fundamental freedoms enumerated in Article 19(1) of the Constitution of India — such as freedom of speech and expression, freedom to assemble peaceably, freedom to form associations and unions, freedom to move freely throughout the territory of India, freedom to reside and settle in any part of India, — this Court has occasion to consider whether the restrictions imposed by legislation were disproportionate to the situation and were not the least restrictive of the choices. The burden of proof to show that the restriction was reasonable lay on the State. "Reasonable restrictions" under Articles 19(2) to (6) could be imposed on these freedoms only by legislation and courts had occasion throughout to consider the proportionality of the restrictions. In numerous judgments of this Court, the extent to which "reasonable restrictions" could be imposed was considered. In Chintamanrao v. State of M.P. [AIR 1951 SC 118 : 1950 SCR 759] Mahajan, J. (as he then was) observed that "reasonable restrictions" which the State could impose on the fundamental rights "should not be arbitrary or of an excessive nature, beyond*

what is required in the interests of the public". "Reasonable" implied intelligent care and deliberations, that is, the choice of a course which reason dictated. Legislation which arbitrarily or excessively invaded the right could not be said to contain the quality of reasonableness unless it struck a proper balance between the rights guaranteed and the control permissible under Articles 19(2) to (6). Otherwise, it must be held to be wanting in that quality. Patanjali Sastri, C.J. in State of Madras v. V.G. Row [AIR 1952 SC 196 : 1952 SCR 597 : 1952 Cri LJ 966] , observed that the Court must keep in mind 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". This principle of proportionality vis-à-vis legislation was referred to by Jeevan Reddy, J. in State of A.P. v. McDowell & Co. [(1996) 3 SCC 709] recently. This level of scrutiny has been a common feature in the High Court and the Supreme Court in the last fifty years. Decided cases run into thousands.

31. Article 21 guarantees liberty and has also been subjected to principles of "proportionality". Provisions of the Criminal Procedure Code, 1974 and the Penal Code, 1860 came up for consideration in Bachan Singh v. State of Punjab [(1980) 2 SCC 684 : 1980 SCC (Cri) 580] the majority upholding the legislation. The dissenting judgment of Bhagwati, J. (*see Bachan Singh v. State of Punjab [(1982) 3 SCC 24 : 1982 SCC (Cri) 535]) dealt elaborately with "proportionality" and held that the punishment provided by the statute was disproportionate.*

37. The development of the principle of "strict scrutiny" or "proportionality" in administrative law in England is, however, recent. Administrative action was traditionally being tested on Wednesbury grounds. But in the last few years, administrative action affecting the freedom of expression or liberty has been declared invalid in several cases applying the principle of "strict scrutiny". In the case of these freedoms, Wednesbury principles are no longer applied. The courts in England could not expressly apply proportionality in the absence of the convention but tried to

safeguard the rights zealously by treating the said rights as basic to the common law and the courts then applied the strict scrutiny test. In the Spycatcher case Attorney General v. Guardian Newspapers Ltd. (No. 2) [(1990) 1 AC 109 : (1988) 3 All ER 545 : (1988) 2 WLR 805 (HL)] AC (at pp. 283-284), Lord Goff stated that there was no inconsistency between the convention and the common law. In Derbyshire County Council v. Times Newspapers Ltd. [1993 AC 534 : (1993) 1 All ER 1011 (HL)] Lord Keith treated freedom of expression as part of common law. Recently, in R. v. Secy. of State for Home Deptt., ex p Simms [(1999) 3 All ER 400 (HL)] the right of a prisoner to grant an interview to a journalist was upheld treating the right as part of the common law. Lord Hobhouse held that the policy of the administrator was disproportionate. The need for a more intense and anxious judicial scrutiny in administrative decisions which engage fundamental human rights was re-emphasised in R. v. Lord Saville, ex p [(1999) 4 All ER 860 (CA)] (All ER (870, 872) CA). In all these cases, the English courts applied the "strict scrutiny" test rather than describe the test as one of "proportionality". But, in any event, in respect of these rights "Wednesbury" rule has ceased to apply.

43. After Smith, the English Human Rights Act, 1998 has since been passed and is to be effective from 2-10-2000. The possibility of the demise of Wednesbury rules so far as administrative action affecting fundamental freedom are concerned, is now clearly visualised. (See Prof. R.P. Craig's Administrative Law, 1999, 4th Edn., pp. 585-86.)…

..47. Recently, Lord Irvine of Lairg, the Lord Chancellor has explained the position of "proportionality" after the commencement of the English Human Rights Act, 1998. (See The Development of Human Rights in Britain Under an Incorporated Convention on Human Rights, 1998 Public Law, 221, at pp. 233-34). The difference between the approach of courts in the cases governed by this Act and the traditional Wednesbury rules has been pointed out by Lord Chancellor as follows:

"Although there is some encouragement in British decisions for the view that the margin of appreciation under the Convention is

simply the Wednesbury test under another guise, statements by the Court of Human Rights seem to draw significant distinction. The Court of Human Rights has said in terms that its review is not limited to checking that the 'national authority exercised its discretion reasonably, carefully and in good faith'. It has to go further. It has to satisfy itself that the decision was based on an 'acceptable assessment of the relevant facts' and that the interference was no more than reasonably necessary to achieve the legislative aim pursued."

Explaining "strict scrutiny" or "proportionality" as above, in the wake of the Human Rights Act, 1998, the Lord Chancellor referred to the principles laid down by Simon Brown, L.J. in ex p, Smith [1996 QB 517 : (1995) 4 All ER 427 (QBD)] . In cases under the Human Rights Act, 1998, he said "a more rigorous scrutiny than the traditional judicial review will be required". The Lord Chancellor further observed:

"In areas where the Convention applies, the court will be less concerned whether there has been a failure in this sense (i.e. Wednesbury sense) but will inquire more closely into the merits of the decision to see for example that necessity justified the limitations of a positive right and that it was no more of a limitation than was needed. This is a discernible shift which may be seen in essence as a shift from form to substance." [See also Sir John Laws' The Limitations of Human Rights in Britain, 1998 Public Law 254 (at pp. 262, 265); Davind Pannick, Principles of Interpretation of Convention Rights under the Human Rights Act and the Discretionary area of judgment, 1998 Public Law 545 (at p. 549). Towards the Nut Cracking Principle; Reconsidering the objections to proportionality by Garreth Wong 2000 Public Law 92).]...

..50. It must be said that the House of Lords has deviated both from proportionality and Wednesbury. This deviation, in our view, is likely to lead to considerable vagueness in the administrative law which has just now been crystallising. It is difficult for us to understand how the primary role of the courts in cases involving fundamental freedoms and the secondary role of courts in other

cases not involving such rights and where Wednesbury rule is to be applied, can be equated…

..52. In the Indian scene the existence of a Charter of fundamental freedoms from 1950 distinguishes our law and has placed our courts in a more advantageous position than in England so far as judging the validity of legislative as well as administrative action. We have already dealt with proportionality and legislation. Now, we shall deal with administrative decisions and proportionality.

53. Now under Articles 19(2) to (6), restrictions on fundamental freedoms can be imposed only by legislation. In cases where such legislation is made and the restrictions are reasonable yet, if the statute concerned permitted the administrative authorities to exercise power or discretion while imposing restrictions in individual situations, question frequently arises whether a wrong choice is made by the administrator for imposing restriction or whether the administrator has not properly balanced the fundamental right and the need for the restriction or whether he has imposed the least of the restrictions or the reasonable quantum of restriction etc. In such cases, the administrative action in our country, in our view, has to be tested on the principle of "proportionality", just as it is done in the case of the main legislation. This, in fact, is being done by our courts.

54. Administrative action in India affecting fundamental freedoms has always been tested on the anvil of "proportionality" in the last fifty years even though it has not been expressly stated that the principle that is applied is the "proportionality" principle. For example, a condition in a licence issued to a cinema house to exhibit, at every show, a certain minimum length of "approved films" was questioned. The restriction was held reasonable (see R.M. Seshadri v. Distt. Magistrate Tanjore [AIR 1954 SC 747 : (1955) 1 SCR 686]). Union of India v. Motion Picture Assn. [(1999) 6 SCC 150] also related, inter alia, to the validity of licensing conditions. In another case, an order refusing permission to exhibit a film relating to the alleged obnoxious or unjust aspects of reservation policy was held violative of freedom of expression under Article 19(1)(a) (S. Rangarajan v. P. Jagjivan Ram [(1989) 2

SCC 574]). Cases of surveillance by police came up for consideration in Malak Singh v. State of P&H [(1981) 1 SCC 420] . Cases of orders relating to movement of goods came up in Bishambhar Dayal Chandra Mohan v. State of U.P. [(1982) 1 SCC 39 : 1982 SCC (Cri) 53] There are hundreds of such cases dealt with by our courts. In all these matters, the proportionality of administrative action affecting the freedoms under Article 19(1) or Article 21 has been tested by the courts as a primary reviewing authority and not on the basis of Wednesbury principles. It may be that the courts did not call this proportionality but it really was. (*Emphasis supplied*)

69. With the adoption of the Human Rights Act, 1988 which has the effect of constitutionalizing the European Convention of Human Rights, the courts in the United Kingdom have gradually moved toward the proportionality standard and have rejected arguments of deference even in matters of national security and terrorism. For instance, in ***A & Ors. v. Secretary of State for the Home Department*, [2004] UKHL 56,** the House of Lords declared section 23 of the Anti-terrorism, Crime and Security Act 2001 to be incompatible with Articles 5 and 14 of European Convention of Human Rights. This provision allowed the Government to indefinitely detain suspected international terrorists who could not otherwise be removed from the territory of the United Kingdom under international law. In this case, the Attorney General's submission was similar to the submission of the State of Jammu and Kashmir in the present case, that the matters of national security were the prerogative of the Executive and the Court could not usurp their authority:

"37…*He submitted that as it was for Parliament and the executive to assess the threat facing the nation, so it was for those bodies and not the courts to judge the response necessary to protect the security of the public. These were matters of a political character calling for an exercise of political and not judicial judgment. Just as the European Court allowed a generous margin of appreciation to member states, recognising that they were better placed to understand and address local problems, so should national courts recognise, for the same reason, that matters of the kind in issue here fall within the discretionary area of judgment properly*

> *belonging to the democratic organs of the state. It was not for the courts to usurp authority properly belonging elsewhere*."

The Court analysed precedent from the United Kingdom and the European Court of human rights and held that the Courts even in terrorist situations had not been willing to relax their supervisory role and upheld the application of the proportionality test (Kindly see paras 38 to 41):

> 42. *It follows from this analysis that the appellants are in my opinion entitled to invite the courts to review, on proportionality grounds, the Derogation Order and the compatibility with the Convention of section 23 and the courts are not effectively precluded by any doctrine of deference from scrutinising the issues raised. It also follows that I do not accept the full breadth of the Attorney General's submissions. I do not in particular accept the distinction which he drew between democratic institutions and the courts. It is of course true that the judges in this country are not elected and are not answerable to Parliament. It is also of course true, as pointed out in para 29 above, that Parliament, the executive and the courts have different functions. But the function of independent judges charged to interpret and apply the law is universally recognised as a cardinal feature of the modern democratic state, a cornerstone of the rule of law itself.*

Applying the proportionality test, the Court, inter alia, found that less restrictive measures that were used in respect of UK national suspected of terrorism could have been used in respect of foreign nationals instead of indefinitely detaining them. (Kindly see para 35). The Court held:

> "*43..This answer, however, reflects the central complaint made by the appellants: that the choice of an immigration measure to address a security problem had the inevitable result of failing adequately to address that problem (by allowing non-UK suspected terrorists to leave the country with impunity and leaving British suspected terrorists at large) while imposing the severe penalty of indefinite detention on persons who, even if reasonably suspected of having links with Al-Qaeda, may harbour no hostile intentions towards the United Kingdom. The conclusion that the Order and section 23 are, in Convention terms, disproportionate is in my opinion irresistib*le."

The State's invocation of English law, therefore, is outdated and fails on its own terms.

70. As expounded by this Hon'ble Court in *Om Kumar* (supra), the proportionality test is firmly rooted in Indian jurisprudence since 1950 and that when fundamental rights are involved (such as in the present case, where extensive restrictions have been placed on the rights under Article 19 and 21), the test of proportionality must be applied. **This does not imply that the Court would sit in appeal over the decisions of the State, or substitute its own judgment on matters of national security. Instead, the Court will evaluate whether the State has been able to justify and demonstrate that its action is proportionate, i.e. whether it is in pursuance of a legitimate aim, suitable to achieving the aim in question, necessary (i.e. there are no less restrictive means to achieve the aim), and not disproportionate (i.e. it does not have a disproportionate impact on the right holder).** ***(Modern Dental College and Research Centre & Ors v. State of Madhya Pradesh & Ors., (2016) 7 SCC 353; KS Puttaswamy v. Union of India, (supra)***. Thus, any characterization by the State as the proportionality test as a means for the Court to sit in appeal or substitute the judgment of the Executive is incorrect and insincere. In the same vein – as pointed out above – it is completely misconceived on the State's part to claim that the petitioners are sitting in appeal over the actions of the State authorities, when it is this Hon'ble Court who is exercising their power of judicial review in a petition under Article 32 of the Constitution of India. (Kindly see the Additional Affidavit of the State dated 23.10.2019, pg 10, para 19).

71. Indeed, very recently, a Constitution Bench of this Hon'ble Court in ***KS Puttaswamy v. Union of India*, (2019) 1 SCC 1** employed the proportionality test to strike down executive action that was sought to be justified on grounds of national security. In that case, this Hon'ble Court struck down a circular authorizing the linkage of SIM cards and AADHAAR cards, on the ground that there exist less restrictive measures than infringing the privacy of everyone owing to misuse by a few individuals. (paras 500, 504). In the same judgment, this Hon'ble Court also struck down Rule 9 of Prevention of Money Laundering (Maintenance of Records) Rules, 2005 that directed the linking of bank accounts with AADHAAR, in order to prevent serious issues such as money laundering and black money. This Hon'ble Court ruled that the State had put forth no to show evidence as to how the linkage of AADHAAR and

bank accounts would prevent money laundering; it further held that there existed less restrictive measures that could have been considered. (para 489 to 496)

72. In conclusion, there can be no quarrel with the fact that national security can be a legitimate aim and the situation in the State of Jammu and Kashmir can raise concerns of national security. But, for the state to claim "national security", the impugned orders themselves invoke "national security" as a ground, which is not at all the case in the present facts. Further, even assuming the orders stated "national security" as a ground, the burden is on the State to justify that the particular form of restriction that it has chosen satisfies the test of proportionality.

73. The State also relied on the case of ***Secy, Ministry of Information Broadcasting v. Cricket Association of Bengal & Ors*** **(1995) 2 SCC 161** to argue that TV and similar media are different from media such as newspapers. However, in the same case it was held that irrespective of the medium, the level of judicial scrutiny under Article 19 would remain the same and broader restrictions could not be imposed on media such as televisions only owing to its reach. (Kindly see paras 37 and 78). These paragraphs were quoted with approval by this Hon'ble Court in ***Shreya Singhal v. Union of India*****, (2015) 5 SCC 1** even in the context of the internet (Kindly see paras 30-31) The fact, therefore, that communication is *faster* and *more extensive* on the internet does not change the legal standard of proportionality that this Hon'ble Court must apply while adjudicating the validity of restrictions upon the freedom of speech and expression.

(C) The Restrictions Imposed are not valid restrictions under Article 19(2) of the Constitution, as they fail the test of proportionality

74. It is respectfully submitted that, as per the judgments of this Hon'ble Court in **Modern Dental (supra), Puttaswamy I – Privacy (Supra) and Puttaswamy II – Aadhaar (supra**), the requirements of the proportionality standard are beyond cavil. As a preliminary point – as held in all these cases – the restrictions upon a fundamental right must be imposed by law (**a**); they must be in service of a "legitimate aim" (**b**); they must be suitable to achieve that aim (i.e., bear a rational relationship with the aim) (**c**)**;** they must be necessary (i.e., the least restrictive alternative available to achieve the said goal) (**d**); and they must not be disproportionate in their impact upon citizens **(e**). These prongs

apply conjunctively: each must be satisfied, and failure on any count will render State action unconstitutional.

(a) The Instructions under the Telecom Suspension Rules have no force of "law" and have not been issued "under authority of law"

75. It is respectfully reiterated – as submitted above - that a law is said to come into force only when it is validly promulgated and published in a reasonably accessible form to the general public.

76. In this connection, the record of the case indicates that all the orders/notifications/instructions issued under Telecom Suspension Rules, annexed from Pgs 12 – 19 in the Additional Affidavit, indicate that they were "Top Secret" / "Confidential." There is no indication whatsoever that the orders were either published in a reasonable place such as the Official Gazette where the general public may be able to scrutinise or reason. In fact, the submission of the State before this Hon'ble Court as recorded in the order dated 16.10.2019 is as follows:

> *"When we asked the Learned Solicitor General about the non-supply of orders issued by the authorities relating to the restrictions imposed, particularly with respect to the cellphone services, as well as section 144 proceedings, he claims privilege over those orders. He, however, states that those orders can be produced before this court. However, if for any reason, Ld. Solicitor General does not want to give a copy of those orders to the Petitioners we request him to file an affidavit indicating the reasons for claiming such privilege."*

77. Subsequent to the above order, the Respondent State placed some of the orders on record, but the fact that the state was claiming privilege on the orders up until 16.10.2019 shows that at least until that date they were unpublished. In any event, it has also not pleaded or averred by the Respondent that the said orders/notifications were in deed published in any reasonable place.

78. It is submitted therefore that the said orders/notification purportedly issued under the Telecom Suspension Rules 2017 have no force of "law." This also implies that those notifications do not satisfy the requirement of a validly enacted law as necessary to impose restrictions on free speech/communication under Article 19(2) of the Constitution of India. The said notifications and orders therefore ought to be set aside forthwith.

(b) The Restrictions imposed in pursuance of "Law and Order" fail the step of legitimate aim; furthermore, the term "Anti-National elements" has no legal meaning, and cannot be invoked to justify the restrictions

79. As stated above, the purported text of the order, which impose restrictions on the basis of "apprehension of deterioration of law and order" does not conform with the requirements of Article 19(2) or S. 5(2) of the Indian Telegraph Act and is *non est*. This in and of itself is a fit and sufficient ground to set aside the orders.

80. The Respondents have also argued attempted to justify the restrictions "*in view of the apprehension of misuse of voice/data services by any anti national elements/miscreants which is likely to cause deterioration in law and order situation*" (emphasis supplied). Despite being used in popular parlance, the term *"anti-national"* lacks any definition under the current law and it is highly susceptible to misuse. It is worth noting that during the Emergency in 1976, the Government introduced the infamous 42nd Amendment to the Constitution of India which included Article 31D for *"Saving of laws in respect of anti-national activities"*. Through Article 31D, the Government sought to shield laws enacted to prevent or prohibit anti-national activities from being struck down for violating Articles 14, 19 and 31 of the Constitution.

81. Unsurprisingly, Article 31D became a tool to suppress and punish political opposition during the Emergency and it was finally omitted from the Constitution through the 43rd Amendment. In the *Statement of Objectives and Reasons* for the 43rd Amendment, the then law minister Shanti Bhushan stated in his last point on December 12, 1977, as:

> *"Article 31D confers special power on Parliament to enact certain laws in respect of anti-national activities. It is considered that these powers of Parliament to make laws for dealing with anti-national activities and anti-national associations are of a sweeping nature and are capable of abuse. It is, therefore, proposed to omit article 31D."*

82. It is respectfully submitted that, through its repeated invocation of "anti-national elements", the State is attempting to bring back through the back door the legacy of the 42nd Amendment, which was categorically reversed by the 44th Amendment. It is respectfully reiterated that "anti-national

elements" has no legal meaning, and its inherent vagueness precludes it from underpinning any "legitimate aim" under the proportionality standard.

(c) The Restrictions are not suitable to achieving the aim of public order and security of state

83. In any event, it is submitted that the restrictions upon the communication of civilians and of the press do not bear a rational nexus to any aim legitimate aim under Article 19(2). The State has attempted to justify this blanket shut-down by stating that there is a need to prevent "rumour mongering" and the sharing of "provocative content", in order to ensure peace. However, the State has provided no evidence whatsoever to discharge its burden of demonstrating even a minimal causal link between a *communication shut-down* and the prevention of violence. Indeed, there is evidence to the contrary: experts have argued that communication shutdowns lead to uncertainty and resentment and therefore increase the risk of protests and demonstrations becoming more violent and also encourage rumour mongering. (Interview with Jan Rydzak, Research Scholar at Global Digital Policy Incubator, Stanford University, Caravan Daily, 07.10.2019 annexed at pg 227 of the Enclosed Compilation dated 03.12.2019).

84. In the same vein, it is submitted that restricting accredited press organisations from disseminating verified news in a continuing communication shutdown in fact increases the chances of "rumour mongering" and "provocative content" being spread through word-of-mouth, which the Respondent authorities apprehend. Furthermore, the presence of communication networks allow the State authorities themselves to more effectively and swiftly disseminate essential information about the security situation to the general public to enable them to avoid areas under lockdown if any and protect the civilian population.

85. The State has provided no evidence to justify the blocking of landline services, SMSes and Mobile Phones but has merely asserted that the same will be misused by anti-India elements across the border and within the region to "spread false provocative content to instigate violence." However, landlines, SMSes and Mobile Phones are meant for one to one communication and not for mass spreading of messages. Therefore, this reason cannot be considered a suitable reason for blocking Landlines, SMSes and Mobile phones.

86. Further, the order blocking landlines lists the apprehension of misuse of data services. However, there exists no connection between voice calls on landlines

and data services through landlines. Thus, the blocking of landlines for more than thirty days was wholly irrational and arbitrary.

87. In respect of the blocking of the internet, the State has produced certain academic articles dealing with the problem of terrorism on the internet. However, *not one* of the articles cited in fact advocates the blocking of the internet in the manner that has been done by the State as a suitable measure. It is respectfully submitted that when taking a decision as drastic as a blanket communication restriction upon seven million people, the State must do so on the basis of *some* evidence that the measure has any rational nexus with its stated goal (preventing violence). The State, however, has not even attempted to do that.

88. In all of its filings before the Hon'ble Court during the course of this case, the State has placed on record statistics showing the impact of terrorism and the cost that it has extracted in terms of human lives. The Petitioner and Interveners join the State in unambiguously deploring terrorism, and emphasize that even one life lost to terrorism is a life too many. The Petitioner and Interveners support the relevant measures that the State may take to address terrorism. However, the issue *in this case* pertains to the constitutionality of communication lock-downs; in the context, the limited data that the State *has* placed on record suggests the opposite: that incidents of terrorism have significantly reduced post the introduction of the digital era through mobile phones and internet. The Table annexed as Annexure R2/1 in Limited Affidavit of R2 at Pg 14-15 is reproduced in Status Report dated 20.11.2019, and the same reveals a decline in incidents of terrorism post the introduction of mobile phones around 2005. [See in the Table: Incidents of terror violence (2nd Column), Civilians Killed (3rd Column), Security Forces Killed (4th Column) before the year 2008 is very high. Significant drop thereafter, which coincides with the introduction and rampant spread of use of mobile phones.] Thus State data does not suggest any link between terror incidents and mobile/internet use. It is respectfully submitted that the suitability prong of the proportionality standard requires at least *prima facie* evidence of a rational connection between the measure undertaken and the legitimate State goal. It is respectfully submitted that *even under* a deferential approach, and without any intention of substituting judicial wisdom for that of the State's, this rational connection has not been made out on the record.

(d) The blocking of communication channels fails the necessity step

89. This Hon'ble Court has held that restrictions on speech should be imposed in a manner and to an extent which is unavoidable in a given situation; furthermore, the measures in question can be taken only if there exist no conceivable alternatives that restrict the right to a lesser extent. (**Kindly see,** ***See State of Madras v. V. G. Row, AIR 1952 SC 196, para 15; In Re Ramlila Maidan Incident (2012) 5 SCC 1, para 28, Kameshwar Prasad v. State of Bihar, 1962 Supp. (3) S.C.R. 369, para 16***). The State too has implicitly admitted this principle in their affidavit and written submissions (Kindly see pg 3, para 7, Additional Affidavit of the State dated 23.10.2019).

90. Notwithstanding its claims to "incrementally" restoring communications networks based upon its assessment of the situation on the ground, even today, the State has continued to block the mobile and internet services of 4 million and 7 million persons respectively. This blanket and indiscriminate measure has been applied to an entire region, irrespective of the threat that any individual may pose to any interest or ground under Article 19(2). No explanation has been provided for this total prohibition. It is respectfully submitted that this measure fails the necessity prong, for the following reasons.

91. **Restrictions on movement already in place**: Since orders under S. 144 Cr.P.C. were already issued, which prevent the assembly of persons in public places, there was no need *to additionally* block communication, as people could no longer congregate.

92. **Blacklists and White Lists:** In its filings, the State has repeatedly argued that while there are only a "minuscule" number of people in Jammu and Kashmir who hold separatist views, there exist no "judicially discoverable or manageable standards" to "segregate" the separatists from the innocent people; and that therefore, it is proportionate to make the many suffer for the faults of a few. However, this claim is demonstrably false. The State Administration has the capacity to divide the mobile phone numbers registered in the State into "white lists" and "black lists", and has in fact already made such divisions previously. It has been reported that around 5000-6000 mobile phone numbers, belonging predominantly to state administration officials, and officers of the Jammu and Kashmir Police, Army and paramilitary forces, are on the "white list", i.e. their numbers had been unblocked; while the remaining numbers of the ordinary civilian population continue to be on the "black list" and hence, remain blocked. (Kindly see news report titled "J&K has 2 sets of cell-phone numbers — those on 'white list' work, ones on 'black list' don't" dated

26.09.2019 published by The Print on pg 31 of the Application for Additional Documents, IA 157241/2019 in WP (Civil) No. 1031 of 2019) Therefore, *despite* having this capability to ensure that persons with suspected links to militants are put on a "blacklist" and thereby prevented from communication, the Respondents have opted for the *more* restrictive option of blocking the mobile phones of an entire region. It is respectfully submitted that this amounts to treating all civilians as potential terrorists or militants, and violates their dignity without any basis for the same.

93. **Landlines and mobile phones for emergency services**: Without prejudice to the above, the State could have enabled the dialling of emergency numbers. Surprisingly, Order dated 04.08.2019, which imposes restrictions on Landlines, carves out an exception to the Landlines at the Airport (Old and New). It is to be borne in mind that access from landlines to Hospitals, Emergency Services and also to general public has been completely closed. There is no relationship between access to emergency numbers and the problem of preventing militancy and incitement of offences. To foresee that access to telecommunication to hospitals and essential services which also include blood banks would be a threat to national security is to destroy the rights granted by our constitution and nullify them by executive action which is clearly not permissible.

94. **Blocking of bulk SMSes:** SMSes are crucial to obtain one-time passwords for all kinds of transactions, such as banking services, as well as to receive crucial information such as roll numbers for examinations. The State could have adopted less restrictive measures such as blocking SMSes of persons with suspected or potential links to militants and separatists. Alternatively, the State could have blocked *bulk SMSes* instead of blocking all SMS if it was concerned about mass messages.

95. **Post facto prosecution or take down of harmful speech posted on the internet**: The restrictions imposed by the State are in the nature of prior restraint i.e. restraints that are placed on speech before it is spoken or uttered. Under the Indian Constitution, such prior restraints on speech are generally considered unconstitutional and the State carries a *"carries a heavy burden of showing justification for the imposition of such a restraint."* (***Kindly see S. Rangarajan v. P. Jagjivan, (1989) 2 SCC 574 Kindly see R. Rajagopal v. State of Tamil Nadu, (1994) 6 SCC 632, para 22 See also Brij Bhushan and Ors. v. The State of Delhi, 1950 Supp SCR 245, para 4; Express Newspapers***

v. Union of India (1961) ILLJ 339 SC). This Hon'ble Court in ***S. Rangarajan v. P. Jagjivan*, (1989) 2 SCC 574** has held that the State must justify such a prior restraint by demonstrating that the potential speech or expression *is* ***"inseparably locked up with the action contemplated like the equivalent of a "spark in a powder keg"*** such that the speech must certainly lead to the consequence of violence. In this context, the State has itself admitted that there exists only a miniscule minority of people in the State of Jammu and Kashmir who are likely to be instigated to commit acts violence. Therefore, the most people of the State posed no threat let alone an imminent threat to public order or incitement of violence. In this backdrop, the State could have resorted to post facto prosecution and/or targeted blocking and take down of the accounts and messages of 'miscreants' posting instigating content online. Instead, the State has pre-emptively blocked all internet activity of seven million population – by its own admission – simply to prevent a miniscule minority from acting.

96. In its filings, the State has argued that the nature of the internet is such that online content spreads extremely fast and on multiple channels; and that furthermore, there exists the "dark web" where contraband transactions can be conducted without scrutiny. It is respectfully submitted that these arguments are beside the point. *First*, the internet itself is an agnostic medium: while it can be used to spread fake news and rumours at great speed, it can *also* be used to debunk rumours and provide vital information in times of emergency, also with the same speed and effectiveness. To invoke the "misuse" of the internet to shut it down – as the State has done – is akin to shutting down highways because some drivers drive rashly and kill people. *Secondly*, the problems identified by the State apply across the board, and countries all over the world have developed targeted and proportionate responses to those problems. These include, for example, parental locks in the case of pornographic content, targeted blocking of websites (as indicated below), directions to intermediaries to filter content, and so on. In other words, while a vast majority of individuals use the internet for legitimate purposes, a small minority use it for illegitimate purposes. The State bears a heavy burden of justification if it is to argue that containing the latter requires restricting the rights of the former, *especially* when more targeted and limited options exist, and have been used all over the world. However – apart from simply invoking cross-border terrorism – the State has not demonstrated why more targeted measures would not work in the

present context. It is important to reiterate that this Hon'ble Court has rejected the argument that media such as the TV and internet owing to their nature would attract greater scope of restrictions under Article 19(2) (*Ministry of Information Broadcasting v. Cricket Association of Bengal & Ors (1995) 2 SCC 161, para 37 and 78; Shreya Singhal v. Union of India, (2015) 5 SCC 1, para 30-31*

97. In this context, it is pertinent to note that in the past, the Central Government has warned the State of Jammu and Kashmir to strictly follow Temporary Telecom Suspension Rules and that the blocking of internet leads to many services such as banking being hampered. (*Kindly see Letter dated 28.09.2018 issued by the Ministry of Communications, Government of India addressed to the Chief Secretary, Government of Jammu and Kashmir, at pg 216 of the Enclosed Compilation dated 3.12.2019*)

98. **Targeted blocking of websites**: Without prejudice to the above, the State could have resorted to blocking of certain websites (including social media), if the intention was to prevent incitement to violence. No justification has been offered for why the State resorted to a complete shutdown of all websites, which prevented persons from accessing government websites for availing government services, undertaking business activities, and (in the case of students) from using the internet for educational purposes. The targeted blocking of social media websites has been resorted to in the past even in the State of Jammu and Kashmir. (Kindly see Government Order no. Home/ISA/476 of 2017 dated 26.04.2017 issued by the Government of Jammu and Kashmir annexed herewith as pg 219 of the Enclosed Compilation, Government order no. C/CI Misc-4013/2017-7 dated 20.10.2018 issued by the Government of Bihar, annexed herewith as pg. 217 of the Compilation).

The State's Flawed Arguments on the Necessity Prong

99. A perusal of the State's affidavits and the arguments advanced before this Hon'ble Court indicate that two arguments have been put forward to justify the necessity of the blanket and indiscriminate communication shut-down: *first*, that no targeted or measured response was possible, as the State cannot differentiate between "separatists" (who may misuse telephones and internet) and "innocents" (who do not) (**a**); and *secondly*, that the restrictions are temporary and subject to regular review (**b**). The Petitioner and Interveners have pointed out above that these justifications cannot be accepted. Without prejudice to the arguments advanced above, a more detailed analysis follows.

(a) Inability to differentiate between separatists and civilians

100. In the present case, the State has restricted the freedom of speech of millions of innocent civilians, even though there is no proximate connection between their speech and the speech of the so called "anti-national" elements. Assuming – without conceding – the legitimacy of the objectives, the restrictions are overbroad and treat the entire population of J & K as "potential criminals".

101. It is respectfully submitted that the presumption of collective criminality has long been rejected in our law and jurisprudence: the colonial Criminal Tribes Act, which punished entire tribes and indigenous groups as being potentially criminal, was described as a blot on the Constitution, and was repealed shortly after independence. In ***ADM Jabalpur v. Shivkant Shukla,* (1976) 2 SCC 321,** Justice Beg justified the suspension of habeas corpus during the Emergency as flowing from a "jurisdiction of suspicion"; however, with the passage of the 44th Amendment and the overruling of ADM Jabalpur in ***KS Puttaswamy v. Union of India***, (2017) 10 SCC 1, it is respectfully submitted that the "presumption of criminality" and the "jurisdiction of suspicion" are no longer constitutionally valid; rights of citizens cannot be restricted without probable cause or suspicion.

102. The State has not engaged with the Petitioners' arguments, and has sought to justify the blocking of internet and mobile phones of 7 million persons simply by asserting that the there exist no "judicially discernible and manageable standards" to segregate the miscreants from the innocent. It has relied on the case of ***Babulal Parate v. State of Maharashtra*, (1961) 3 SCR 423** to argue that restrictions can be imposed on all persons. It is respectfully submitted that the case of *Babulal Parate* does not lay down a general proposition that the State can impose blanket restrictions. Moreover, a case in respect of s. 144 cannot be used to upend decades of free speech jurisprudence under Article 19, which makes it clear that the State cannot impose overbroad restrictions that speech that is not harmful or does not lead to incitement of violence. **(*Shreya Singhal vs Union of India, (2015) 5 SCC 1*, para 13; *Kameshwar Prasad v State of Bihar*, 1962 SCR Supl. (3) 369, para 16, S*uperintendent. Central Prison, Fatehgarh & Anr.* v. *Dr. Ram Manohar Lohia*, (1960) 2 SCR 821; *Romesh Thapar v. State of Madras*, 1950 SCR 594).**

103. Further, this Hon'ble Court has consistently held that the State has a duty to protect the freedom of speech and cannot simply state that it cannot provide such protection (***S Rangarajan v. P. Jagjivan, (1989) 2 SCC 574; Indibily***

Creative Pvt. Ltd. & Ors. v. Government of West Bengal, 2019 SCC Online SC 520) Therefore, the State must demonstrate evidence to establish that the State despite all its intelligence capabilities and state machinery cannot distinguish between innocents and criminals to impose bans on mobile phones of 40 lakh people and internet of 70 lakh people.

104. Indeed, a Constitution Bench of this Hon'ble Court has rejected the arguments of the State premised on collective criminality, or on an inability to distinguish between wrongdoers and innocents as recently in 2018 in ***KS Puttaswamy v. Union of India*, (2019) 1 SCC 1.** This Hon'ble Court struck down the circular mandating the linkage of SIM cards with AADHAAR Cards of the entire public on the ground merely on the ground that some people were indulging in duplication – and – categorically – that such duplication was being used in aid of terrorism:

> "500. At the outset, it may be mentioned that the respondents have not been able to show any statutory provision which permits the respondents to issue such a circular. It is administrative in nature. The respondents have, however, tried to justify the same on the ground that there have been numerous instances where non-verification of sim cards have posed serious security threats….
>
> … 503. We are of the opinion that not only such a circular lacks backing of a law, it fails to meet the requirement of proportionality as well. It does not meet "necessity stage" and "balancing stage" tests to check the primary menace which is in the mind of the respondent authorities. There can be other appropriate laws and less intrusive alternatives. For the misuse of such sim cards by a handful of persons, the entire population cannot be subjected to intrusion into their private lives. It also impinges upon the voluntary nature of the Aadhaar Scheme. We find it to be disproportionate and unreasonable State compulsion. It is to be borne in mind that every individual/resident subscribing to a sim card does not enjoy the subsidy benefit or services mentioned in Section 7 of the Act. (Emphasis Supplied).

105. In the same case, the Hon'ble Court also struck down a rule under the Prevention of Money Laundering (Maintenance of Records) Rules, 2005, requiring all persons to link their Bank accounts with AADHAAR that the

state had sought to justify as a means of preventing money laundering and black money:

> *"489. Mr Tushar Mehta, learned Additional Solicitor General, refuted the aforesaid submissions. He pointed out the objective with which the Prevention of Money-Laundering Act was enacted, namely, to curb money-laundering and black money, which is becoming a menace. Therefore, the amendment to Rules serves a legitimate State aim. He argued that the Rules are not arbitrary and satisfy the proportionality test also, having regard to the laudable objective which it seeks to serve.*
>
> *491. This Court has held in Ram Jethmalani v. Union of India [Ram Jethmalani v. Union of India, (2011) 8 SCC 1 : (2011) 3 SCC (Cri) 310] that revelation of bank details without prima facie ground of wrongdoing would be violative of right to privacy. The said decision has been approved in K.S. Puttaswamy [K.S. Puttaswamy v. Union of India, (2017) 10 SCC 1] . Under the garb of prevention of money-laundering or black money, there cannot be such a sweeping provision which targets every resident of the country as a suspicious person. Presumption of criminality is treated as disproportionate and arbitrary.*
>
> *492. Nobody would keep black money in the bank account. We accept the possibility of opening an account in an assumed name and keeping black money therein which can be laundered as well. However, the persons doing such an act, if at all, would be very few. More importantly, those having bank accounts with modest balance and routine transactions can be safely ruled out. Therefore, the provision in the present form does not meet the test of proportionality. Therefore, for checking this possible malice, there cannot be a mandatory provision for linking of every bank account.*
>
> *…495. The Rules are disproportionate for the following reasons:*
>
> *495.1. A mere ritualistic incantation of "money-laundering", "black money" does not satisfy the first test;*
>
> *495.2. No explanations have been given as to how mandatory linking of every bank account will eradicate/reduce the problems of "money-laundering" and "black money";*

495.3. There are alternative methods of KYC which the banks are already undertaking, the State has not discharged its burden as to why linking of Aadhaar is imperative. We may point out that RBI's own Master Direction (KYC Direction, 2016) No. DBR.AML.BC. No. 81/14.01.001/2015-16 allows using alternatives to Aadhaar to open bank accounts.

496. There may be legitimate State aim for such a move as it aims at prevention of money-laundering and black money. However, there has not been a serious thinking while making such a provision applicable for every bank account. Maintaining bank account in today's world has almost become a necessity. The Government itself has propagated the advantages thereof and is encouraging people to open the bank account making it possible to have one even with zero balance under the Pradhan Mantri Jan Dhan Yojana. The Government has taken various measures to give a boost to digital economy. Under these schemes, millions of persons, who are otherwise poor, are opening their bank accounts. They are also becoming habitual to the good practice of entering into transactions through their banks and even by using digital modes for operation of the bank accounts. Making the requirement of Aadhaar compulsory for all such and other persons in the name of checking money-laundering or black money is grossly disproportionate. There should have been a proper study about the methods adopted by persons who indulge in money-laundering, kinds of bank accounts which such persons maintain and target those bank accounts for the purpose of Aadhaar. It has not been done." (Emphasis Supplied)

106. It can therefore be seen that the arguments made by the State to justify mandatory Aadhaar linking to bank accounts and to mobile SIM Cards in the *Aadhaar* case were based on similar logic to what the State is invoking in the present case: the misuse of SIM Cards and of bank accounts by some people was used to justify a blanket infringement of privacy, imposed upon the innocent. This Hon'ble Court emphatically rejected this justification, noting that the violation of rights without reasonable cause of suspicion was *per se* unconstitutional, and that the State could not hide behind the argument that it was simply unable to tell the difference.

107. It is respectfully submitted that if this Hon'ble Court was to accept such an argument, it would turn the entire fundamental rights chapter into nothing more than a "parchment barrier": blanket and unrestricted infringements of fundamental rights could *always* be justified on the ground that the State is unable to discern who the offenders are and who the innocents are; the State' failure to fulfil its *own* duties under the Constitution, then, would become the *reason* why draconian and over-broad measures could be sanctioned.

108. Furthermore, as submitted above, in the present case, the State has produced no evidence to establish why criminals and innocents cannot be differentiated but has merely made an assertion to this effect and has failed to discharge its burden to justify not enforcing its constitutional duty to protect the freedom of speech of innocent civilians.

109. It is clear that the argument of the State is one of expediency and not one of necessity. In this context, it is important to recall this Hon'ble Court's dicta in In ***Rangarajan v. P. Jagjivan Ram*, (1989) 2 SCC 574 at page 599,** where it has been held:

> **53.** We end here as we began on this topic. Freedom of expression which is legitimate and constitutionally protected, cannot be held to ransom by an intolerant group of people. The fundamental freedom under Article 19(1)(a) can be reasonably **restricted only for the purposes mentioned in Article 19(2) and the restriction must be justified on the anvil of necessity and not the quicksand of convenience or expediency**. Open criticism of government policies and operations is not a ground for restricting expression. We must practice tolerance to the views of others. Intolerance is as much dangerous to democracy as to the person himself. (emphasis supplied)

(b) temporariness and periodic review of the Restrictions and availability of alternatives

110. The second justification provided by the State is that all restrictions are temporary and are being periodically reviewed by the State and authorities on the ground as per the ground situation and the same are temporary. (Affidavit of State dated 30.09.2019 and Affidavit of the State dated 23.10.2019).

111. It is submitted that the temporal duration of the restrictions is only one aspect of the proportionality enquiry and would not in and of itself make the measure proportionate (***State of Madras v. V.G. Row, 1952 SCR 549, para 15)***. Further, in the present case, the orders provide no time limits for the restrictions and the internet shut down that has crossed 115 days is one of the longest shutdowns in the country and the world. This Hon'ble Court has struck down restrictions in the absence of time limits. For instance, in ***Virendra v. State of Punjab,* 1958**

SCR 308, the Hon'ble Supreme Court struck down Section 3 of Punjab Special Powers (Press) Act, 1956 because in the absence of a time limit, an order which prohibited bringing into Punjab any notified publication for an indefinite period could not be considered a reasonable restriction. The relevant portion of the Court's holding is as follows:

> *"Although the exercise of the powers under s. 3(1) is subject to the same condition as to the satisfaction of the State Government or its delegate as is mentioned in s.2(1)(a), there is, however, no time limit for the operation of an order made under this section nor is there any provision made for any representation being made to the State Government. The absence of these safeguards in s. 3 clearly makes its provisions unreasonable." (page 327)*

In the absence of any time limit mentioned in the orders produced by the Respondents, the impugned restrictions should be considered indefinite and hence unconstitutional.

112. It is respectfully submitted that the tenor of the State's arguments on this count has been to treat fundamental rights as a gift from the government to the individual, so that a "gradual" or "incremental" restoration of these violated rights is taken as something creditworthy or benevolent. However, the stance adopted by the Respondent is reminiscent of the view upheld by the majority in **ADM Jabalpur v. Shivkanth Shukla 1976 2 SCC 521**, where the majority justified exclusion of judicial review in cases of preventive detention by appealing to executive benevolence in similar terms. The relevant extract of the judgement from Ray C.J.'s opinion is as follows:

> *"130. The provision for periodical review entrusted to the Government under section 16A(4) of the Act in the context of emergency provides a sufficient safeguard against the misuse of power of detention or arbitrary malafide detention during the emergency. The Government is in full possession of the grounds, materials and information relating to the individual detentions while exercising the power of review."*

113. In Beg J.'s opinion in **ADM Jabalpur**, the benevolence of executive authorities was similarly cited by the Attorney General to justify exclusion of judicial review and accepted by the Hon'ble Court. The relevant extracts of the judgement is as follows:

> "*147. The Attorney General's submission is that the risks of misuse of powers by the detaining officers and authorities, which are certainly there, must be presumed to have been overridden by the higher claims of national security which the proclamation of emergency denotes. It was pointed out that a citizen, or other*

> *person who may have been unfairly or illegally detained due to some unfortunate misapprehension or error, does not lose his remedy altogether. Only his right to move a Court for the enforcement of any of the rights conferred by Part III of the Constitution would be suspended for the time being. He could always approach higher Governmental authorities. All of them could not be so unreasonable as to deny redress in a case of genuine injustice…*
> *… 324-A. It seems to me that courts can safely act on the presumption that powers of preventive detention are not being abused.…But, the constitutional duty of every Government faced with threats of widespread disorder and chaos to meet it with appropriate steps cannot be denied. And, if one can refer to a matter of common knowledge, appearing from newspaper reports, a number of detenus arrested last year have already been released. This shows that the whole situation is periodically reviewed. Furthermore, we understand that the care and concern bestowed by the State authorities upon the welfare of detenus who are well-housed, well-fed, and well-treated, is almost maternal. Even parents have to take appropriate preventive action against those children who may threaten to burn down the house they live in*.

114. In the same vein, it is important to point out that the **Media Facilitation Centre** can hardly be considered adequate alternative to protect the right of press freedom under Article 19(1)(a). The Media Facilitation Centre suffers from the following infirmities:

i. The Media Centre which was initially set up in Hotel RK Sarovar Portico in Srinagar had only a limited number of 4/5 computer systems, and hence each journalist could access it for very little time to send their story as there was a long queue. This Centre with few more computer systems has now, only after almost 100 days of the communication shutdown, been shifted to Polo View area, where most of the media houses are located in Srinagar.

ii. The internet speed provided at the media centre is slow, so heavier files including images, videos, etc are impossible to send. Only short articles without any photos/videos are capable of transmission over the internet provided in the media centre. The role of internet is critical in journalism from Kashmir as photographs often tell the real story which is hard to refute or discredit, as compared to written narratives. Journalists have brought to light the problems with the media facilitation centre and how the internet is integral for reporting as most journalists do not have OB vans and V sets in Jammu and Kashmir (*Kindly see averments made in para 12* at pg 7 and *Transcript of Mirror Now interview of journalists at*

the Media Facilitation Center dated 22.08.2019, Additional Affidavit of the Petitioner, WP (Civil) 1031 of 2019 dated 03.09.2019 at pg 16-18;

iii. Information about who is being called using the phone and to whom emails are sent, has to be disclosed by the journalists at the Media Facilitation Center. There is thus an inbuilt monitoring and supervision of the information being shared through the Media Facilitation Centre. This exposes the journalists as well as their sources to a real danger of being identified for reporting facts which may not be favourable to the authorities. Thus the Media Facilitation Centre does not provide an enabling environment for the working of an independent and robust media.

iv. The Staffers and stringers of local media houses, who are operating in rural areas, have to come to Srinagar to file stories. No internet access was provided to journalists in rest of Kashmir Valley, as only one Media Facilitation Center was set up in Srinagar. This is the admitted case of the Respondent State of J&K, as stated in their Limited Affidavit dated 30.09.2019 in Para 17 at Page 8. (Kindly see the Network of Women in Media, India, (NWMI) Report, annexed at pg 2-22, Application for Additional Documents, IA 140969 dated 13.09.2019 filed by the Petitioner).

It is submitted that the Media Facilitation Centre does not satisfy the need for an "enabling" environment for journalism, and falls foul of the Article 19 rights of journalists to report fearlessly and independently. The constitutional framework of rights is not subservient to needs of security and the Respondents are in continuous breach of the freedoms of the Press and media u/Art 19 and 21.

115. In this context, the Respondent State has in its Brief Status Report as on 20.11.2019, made a vague averment that e-kiosks were made available to people in the Kashmir Valley to access the internet. It is pertinent that in two Affidavits filed by the State of J&K on 30.09.2019 and 23.10.2019, no reference is made to any such e-kiosks. Thus, it would naturally mean that these e-kiosks only came about later than 23.10.2019, more than 2 months after the communication services were shutdown. It is also contested that such kiosks are accessible to the majority of the population in the Kashmir valley, as these seem to be catering more to the tourists and officials of the State than the people. This is evident from the location of the kiosks being largely inside

premier luxury hotels and State government offices. A perusal of the data of people using the kiosks also suggests that on an average, no more than ten times was internet accessed from one location. Thus, for a population of 7 million people, the State's action, despite being belated, falls severely short of its obligation to protect the rights of the residents of the Kashmir Valley.

116. Therefore, the fact that restrictions are temporary and are being reviewed periodically will not ipso facto render the restrictions constitutional. The proportionality standard continues to apply at all times, and with equal force.

(e) The measures fail the proportionality or balancing stage i.e. they are inherently disproportionate in terms of the harm caused

117. The final stage of the proportionality standard requires the Court to decide whether the State has successfully "balanced" the impact of the infringement of rights against the importance of the stated goal – *even if* all other prongs of the standard have been satisfied.

118. In this context, it is respectfully submitted that the restrictions imposed by the State - purportedly to save the life and property of the people –have themselves directly infringed the right to life and health under Article 21, and right to carry out business, profession and trade under Article 19(1)(g) of the people of the State:

i. Harm to human life: It is not enough for the State to merely claim that "no bullet has been fired", especially when deaths have taken place owing to the unreasonable restrictions imposed by the State. For instance, there have been reports of a boy, who was unaware of the imposition of a curfew, drowning in a river as he was being chased by security officials; a person dying owing to a snake bite that was not treated in time; persons being unable to reach hospitals in emergencies, as well as reports of a person dying due to asphyxiation because of tear gas fired at protestors. (For instance, Kindly see Application for Additional Documents IA 157241/2019 in WP (Civil) No. 1031 of 2019, pg 27-30 and pg 50-4; Compilation of Materials on Behalf of the Petitioner in WP 1164 of 2019, pg 12-15)

ii. Destruction of the Economy and the right to livelihood: All industries such as tourism, handicrafts, agriculture and construction have been severely impacted, with all activity coming to a standstill. There have been reports of large scale lay-offs, and businesses shutting down in the tourism industry owing to the restrictions on communication and

movement that have killed demand and made business impossible. (Kindly see WP (Civil) 1164 of 2019 at pgs 9 to 19 and 65 to 68; Application for Additional Documents, IA 157241/2019 in WP (Civil) No. 1031 of 2019,) As of 27.10.2019, pg 40-1) It has been reported that the economy, including the information technology sector, handicraft sector and tourism sector, has suffered a loss of Rs. 10,000 crore due to the shutdown. (*Kashmir businesses suffer ₹10,000 crore hit*, THE HINDU, 27.10.2019, Compilation of Materials on Behalf of the Petitioner in WP 1164 of 2019, tendered on 26.11.2019, pg 1-3). In the absence of the internet, businesses have also been unable to pay interests on their loans and GST and other taxes.

iii. Deprivation of the right to life under Article 21: There have also been reports of persons in the absence of internet, being unable to access health care services such as Ayushman Bharat, get regular check-ups for cancer treatments and other ailments and access reports and medicines from doctors outside the State (Kindly see WP (Civil) 1164 of 2019 at pgs 19 to 22).

119. The State in its reply affidavit has neither specifically denied nor engaged with the detailed facts brought on record by the Petitioner. In fact, the status reports brought on record by the State are conspicuously silent about the impact of the restrictions on industries other than the apple industry, the impact on the health care sector and the deaths caused during the shutdown.

120. Lastly, it is respectfully submitted that both parties are *ad idem* as to the numerous advantages of the internet; and that the internet today in "Digital India" must be considered a fundamental right which is indispensable for the conduct of business, education and health services. Thus, merely because the internet is capable of misuse by a "miniscule minority" cannot mean the State can block the internet for 7 million people in ignorance of its manifold benefits. The State must in turn regulate its misuse in the ways outlined above.

121. Furthermore, this Hon'ble Court ought to take judicial notice of the well-publicized facts of the abrogation of special status to the State of Jammu and Kashmir on 05.08.2019 and the debate relating to it in Parliament. This was a momentous occasion that necessitated vigorous debate among people of Jammu and Kashmir and for a democratic appraisal of the pros and cons of such a move at a time and it was necessary for writers, poets, intellectuals, and indeed common people to engage on the subject and to inform each other in

furtherance of the democratic spirit. It was also necessary for the people of the State to reach out to members of parliament belonging to the State and indeed to members belonging to other states to ensure there is a vigorous, and serious debate on the issue. This process of public reason, within and outside the legislature, is fundamental to a democratic society. The fact that the authorities did not deem it fit to review or relax the telecom restrictions and prohibitory orders which were in force on 04.08.2019 after the issuance of the first Presidential order i.e. C.O. 272 and after the introduction of the resolution for C.O. 273, in effect abrogating the special status for the State, indicates manifest non-application of mind. The restrictions, even if at the time were constitutional, they ceased to have constitutional validity on 05.08.2019, to the extent that they were antithetical to the values of a democratic society. The authorities made no arrangements whatsoever such that this process of public reason can freely happen with free participation from the common people of the State of Jammu and Kashmir.

122. It is respectfully submitted that the impact upon core fundamental rights is widespread and severe. By contrast, the State has repeatedly failed to prove that its draconian measures are necessary to achieve the goal of peace and security, and has not even shown that there is any rational relationship between shutting down communication and preserving peace and security. It is therefore clear that the final prong also goes against the State.

III. THE COMMUNICATION LOCKDOWN ALSO FAILS THE TEST OF OVER-BREADTH

123. The actions of the State government by blocking all forms of communication for every person in the region also betray the careful distinction drawn between "advocacy" and "incitement", which is at the heart of Indian free speech jurisprudence.

124. The distinction between discussion, advocacy, and incitement was most recently clarified in ***Shreya Singhal vs Union of India, (2015) 5 SCC 1*, para 13**. *As Shreya* Singhal pointed out, "discussion" and "advocacy" of even subversive speech is permitted under the Constitution; what is not permitted is "incitement to violence."

125. It is respectfully submitted that these are not pedantic distinctions, but are underpinned by two core values of the Indian Constitution: autonomy and dignity. The principles of autonomy and dignity require that citizens are to be treated as mature individuals, who possess the capacity and the faculty to

receive and assess speech on its own terms. Barring exceptional situations such as shouting "Fire!" in a crowded theatre or inciting a mob to immediate and tangible violence, it is not for the State to interfere and dictate how citizens are to engage with each other. The remedy for speech that the State considers undesirable is not censorship, but counter-speech. This understanding is at the heart of both *Shreya Singhal* and *Rangarajan*, which used the phrase "spark in a powder keg." As Justice Brandeis of the US Supreme Court – whose views were endorsed in *Shreya Singhal* – put it:

> *Those who won our independence believed that the final end of the State was to make men free to develop their faculties, and that, in its government, the deliberative forces should prevail over the arbitrary. They valued liberty both as an end, and as a means. They believed liberty to be the secret of happiness, and courage to be the secret of liberty. They believed that freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth; that, without free speech and assembly, discussion would be futile; that, with them, discussion affords ordinarily adequate protection against the dissemination of noxious doctrine; that the greatest menace to freedom is an inert people; that public discussion is a political duty, and that this should be a fundamental principle of ... government.* ***They recognized the risks to which all human institutions are subject. But they knew that order cannot be secured merely through fear of punishment for its infraction; that it is hazardous to discourage thought, hope and imagination; that fear breeds repression; that repression breeds hate; that hate menaces stable government; that the path of safety lies in the opportunity to discuss freely supposed grievances and proposed remedies, and that the fitting remedy for evil counsels is good ones.*** *Believing in the power of reason as applied through public discussion, they eschewed silence coerced by law --* ***the argument of force in its worst form****.*
>
> *... The wide difference between advocacy and incitement, between preparation and attempt, between assembling and conspiracy, must be borne in mind. In order to support a finding of clear and present danger, it must be shown either that immediate serious violence was to be expected or was advocated, or that the past conduct furnished reason to believe that such advocacy was then contemplated.*
>
> *Those who won our independence by revolution were not cowards. They did not fear political change. They did not exalt order at the cost of liberty. To courageous, self-reliant men, with confidence in the power of free and fearless reasoning applied through the processes of popular government, no danger flowing from speech can be deemed clear and present unless the incidence of the evil apprehended is so imminent that it may befall* ***before there is opportunity for full discussion.*** *If there be time to expose through discussion the falsehood and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence.* ***Only an emergency can justify repression****. Such must be the rule if authority is to be reconciled with freedom.*

126. Indeed, even before Justice Brandeis articulated this insight, Mahatma Gandhi had formulated it in the pages of *Young India* in 1922:

> *".... assemblies of people [ought to be able to] discuss even revolutionary projects, the State relying upon the force of public opinion and the civil police, not the savage military at its disposal, to crush any actual outbreak of revolution that is designed to confound public opinion and the State representing it."*

127. It is respectfully submitted that these critical distinctions have been completely undermined by the State, with its blanket and indiscriminate communication lockdown. This is fatal to the case of the State, as it demonstrates beyond cavil that the restriction suffers from the vice of "over-breadth." As this Hon'ble Court held in **Chintaman Rao v State of MP, *1950 SCR 759*:**

> *The law ... cannot be held valid because the language employed is wide enough to cover restrictions both within and without the limits of constitutionally permissible legislative action affecting the right. So long as the possibility of its being applied for purposes not sanctioned by the Constitution cannot be ruled out, it must be held to be wholly void.*

128. Similarly, persons have the right to peacefully express and protest which cannot be take away. For instance, a Constitution Bench of this Hon'ble Court held in ***Kameshwar Prasad v State of Bihar*, 1962 SCR Supl. (3) 369, para 16** while striking down a Rule that banned all demonstrations by public servants, "the vice of the rule, in our opinion, consists in this that it lays a ban on every type of demonstration--be the same however innocent and however incapable of causing a breach of public tranquility and does not confine itself to those forms of demonstrations which might lead to that result." Indeed, this Court categorically rejected the government's contention that government servants, *as a class*, could be prohibited from demonstrating because of the nature of their job. Rather, the Court held that only specific *acts* that bore a proximate relationship with public disorder could be restricted. Thus, our Constitution does not recognise *blanket* restrictions upon the freedom of speech and expression to be reasonable; reasonableness requires that the restrictions be *narrow and targeted*, and proscribe *specific and concrete* acts that bear a proximate relationship with public disorder.

129. The State's filings demonstrate that it has completely failed to adhere to this basic principle. The State makes repeated mention of the use of communication networks to disseminate "provocative speeches", "baseless rumours", "inflammation of passions", and "doctored videos and morphed

images." However, by the State's own admission, it is only a "minuscule" number of individuals who use the internet for such purposes. The vast majority – as argued above – use it for entirely legitimate purposes; it is crucial to note that at a time of tremendous upheaval in the state of Jammu and Kashmir – by virtue of the change in its constitutional status due to the events of August 5 – there was a *heightened* public interest that existed in a thorough discussion and debate about the changes that had occurred. This included, as well, the right to dissent and the right to protest the changes. The communication lock-down, however, prevented – and continues to prevent – individuals from expressing their views about so fundamental and far-reaching an impact upon their lives – a right that is guaranteed to them by virtue of Article 19(1)(a) of the Constitution – on the ground that a minuscule number might misuse the internet. It is respectfully submitted that such a justification fails the over-breadth standard.

IV. THE ACTIONS OF THE STATE HAVE CREATED A CHILLING EFFECT ON THE MEDIA AND CITIZENS

130. This Hon'ble Court has consistently recognised that laws should not be used in a matter that it has a chilling effect on speech and expression. In the present case, as argued above, the expanse of the restrictions imposed is such that it takes within its fold innocent speech that does even remotely endanger public order or security of the State. Such blanket restrictions pose a risk in allowing great discretion to Executive authorities to misuse and abuse the restrictions which would induce a chilling effect on citizens and journalists. (**Kindly see *Shreya Singhal v. Union of India, (2015) 5 SCC 1, paras 87-94; R. Rajagopal* v. *State of Tamil Nadu* (1994) 6 SCC 632, para 19)**. In the case of *S. Khushboo v. Kanniammal,* (2010) 5 SCC 600, this Hon'ble Court struck down criminal defamation proceedings instituted against the Petitioner:

> "47. In the present case, the substance of the controversy does not really touch on whether premarital sex is socially acceptable. Instead, the real issue of concern is the disproportionate response to the appellant's remarks. *If the complainants vehemently disagreed with the appellant's views, then they should have contested her views through the news media or any other public platform. The law should not be used in a manner that has chilling effects on the "freedom of speech and expression*".

131. It is submitted that journalists in the Kashmir Valley, apart from the debilitating communication shutdown, were also subjected to severe restrictions on movement and on using photographs to report. Further, security

forces and the State police took coercive action against those who spoke out in the media, thereby casting a chilling effect induced by the fear of retaliation on exercising one's right to freedom of speech and expression. Some of these restrictions are as follows:

i. The Editor of the Kashmir Times newspaper travelled to Srinagar from Jammu on 28.08.2019, and in the Additional Affidavit filed by the Petitioner dated 03.09.2019 in Paras 3-5 at Page 2-3, it is recorded that he was not allowed to enter the Downtown area of Srinagar to report about the situation on the ground. He was also not permitted to take any photographs. Further, the difficulty faced by journalists in traveling from one place to the other, including the arbitrary seizure of motorbikes, is documented in the said Additional Affidavit.

ii. The Network of Women in India (NWMI) Report, documents the kind of curbs and restrictions that local journalists were subjected to in the Kashmir Valley by the Respondents. It records, *"Journalists also operate under the ever-real threat of retribution for any adverse reports. Journalists who file reports based on verified information, are summoned by the police for questioning about their sources. As a result, most journalists we spoke to said they were forced to practice self-censorship"* *"Several journalists in Srinagar and in the districts have been detained for brief periods, summoned to police stations and/or received visits from various arms of the police or investigating agencies with pressures to reveal their sources. However they prefer not to talk publicly about their experiences or escalate the issue lest it invite reprisals."* *"The overall atmosphere of intimidation has increased trauma and stress. There is palpable fear due to intimidation of various kinds. Journalists have been summoned to police stations and/or received visits from the CID over various stories, demanding that sources be revealed. There is a very real apprehension of being booked under the sweeping and draconian PSA, UAPA or other counterterror provisions. This has contributed to a high level of self-censorship. The blockade of communication has added to this sense of insecurity"* (Kindly see Annexure AD-1 @ Pg 2-22 of Additional Documents filed by Petitioner dated 12.09.2019)

iii. It was also widely reported that one Dr. Omar Salim was detained immediately after he had given an interview to the BBC about the

impending health crisis in the Valley due to the shutdown of internet and telecom services. This reveals the tolerance of the Respondent State to any kind of negative news reporting about the condition in the Kashmir Valley, and explains the chilling effect on free speech in Kashmir. (Kindly see true typed copy of the news report dated 27.08.2019 carried by The Telegraph, titled, "Kashmiri doctor arrested after warning blackout could cause deaths", annexed as Annexure PA-2 in the Additional Affidavit of the Petitioner dated 03.09.2019)

iv. That the Respondent State has coerced persons to sign a Bond under Section 107 Cr.P.C. vide which restrictions are placed on speaking to the media. Such measures reveal the intention of the Respondent State to curb the free flow of information in the media, which is an unconstitutional fetter on Press freedoms. A Telegraph report dated 20.10.2019 about the bond, which was handed over during the hearing is annexed herein at Page 205 of the enclosed Compilation.

v. Censorship of photos and videos: That photo-journalists and video-graphers have reported to being frequently hauled up by either the police or security forces and in several instances the photographs and videos shot by them have been forcefully deleted. A video-grapher working for a foreign news agency, who requested anonymity out of fear, told the Editor-in-Chief of Kashmir Times during his Srinagar visit from 28.08.2019 to 31.08.2019 that his video footage had been completely erased by the security forces. Photo-journalists and videographers are frequently required to show their recorded footage of the situation to those manning the security check-points in the city and its outskirts, in order to be able to carry the footage to their homes/offices. Thus, videos and photographs are often subject to censorship and clearance by security forces. (Kindly see affidavit dated 03.09.2019 filed by the Petitioner in WP (Civil 1031 of 2019)

132. Therefore, it is submitted that the ecosystem of executive discretion wherein restrictions are being imposed and re-imposed at the whim of officials on the ground has had a chilling effect on the speech of journalists and citizens.

V. THE STATE'S ARGUMENTS CAN ONLY BE ADVANCED WITHIN THE FRAMEWORK OF A PROCLAMATION UNDER ARTICLE 352 OF THE CONSTITUTION

133. It is respectfully submitted that the State's only argument in support of a blanket and indiscriminate communication lockdown – despite conceding that only a "minuscule minority" of people misuse communications infrastructure for nefarious purposes – is that it is incapable of distinguishing between the innocent and the guilty. It has been submitted above that this argument is without any merit whatsoever.

134. It is respectfully reiterated that the concept of individual responsibility and autonomy is at the heart of our legal order. Individuals cannot be punished – or have their rights restricted – because other individuals are committing illegal activities, and the Government is unable to tell the difference. In other words, the government's justification departs from a fundamental principle of constitutionalism and the rule of law – that the rights of a largely innocent population cannot be suspended for the misdeeds of a few: indeed, that is the very meaning of "proportionality" and "reasonableness".

135. Admittedly, however, there exist an exceptional set of circumstances where such a step might be necessary: for example, during a time of War. In such a situation, the State is permitted to depart from the basic principle of individual responsibility and from the prohibition of blanket and indiscriminate infringements of rights; it is allowed, instead, to *suspend* (many of the) fundamental rights in any part of the *territory* of India. This is accomplished through a formal proclamation of Emergency under Article 352 of the Constitution.

136. It is respectfully submitted that *precisely* because of its exceptional character, a proclamation of Emergency is accompanied by a heavy set of safeguards (such as Parliamentary ratification within a stipulated amount of time). The existence of Article 352 of the Constitution indicates that the framers were aware that, in the life of a nation, circumstances may arise when fundamental rights in a part of India would have to be temporarily suspended; but at the same time, this was to be invoked in the rarest of rare circumstances.

137. The Constitution, therefore, establishes a binary legal regime: a state of normalcy, and the state of exception under Article 352. Under the state of normalcy, the default principles of individual responsibility, prohibition upon blanket infringement of rights, and strong judicial review, apply. Under the State of Emergency, the threshold is lowered, and certain rights are suspended.

138. It is respectfully submitted that the argument that a communication lock-down had to be imposed across the entire Kashmir Valley because the government

was unable to distinguish between the innocent and guilty users of communication infrastructure, and because of the existence of cross-border terrorism, is nothing more than an argument for the *effective suspension of rights in a given territory*. This *ipso facto* follows from the nature of the restriction: instead of the targeted shut-down of the communications of persons against whom there is reasonable cause of suspicion, the State has shut down the communication on the basis of *territorial boundaries*. This means that the ability to exercise fundamental rights *in that specific territory* has been taken away; it should be obvious that this is the exact definition of a "suspension" of rights within an area. To elaborate in more specific terms:

a. First, the blockade was applied to all communication channels including landline services, which only allow one to one communication and cannot be used for mass mobilization. In contrast, other states such as Bihar have only blocked access to mass messaging platforms such as Facebook, WhatsApp, Twitter etc. in situations where there is a threat to public order

b. Second, the communication blockade applies to all individuals, institutions and organizations, except certain government officials, even if there is no reason to suspect them for disrupting public order. The Order dated 04.08.2019 annexed by Respondent No.12 in its additional affidavit dated 23.10.2019 directs indefinite suspension of all landline connections in the Kashmir Valley region, and it solely carves out an exception for the airport and not for any other essential facilities such as hospitals or banks. Further, the Respondents have could have selectively blacklisted and blocked telecom services for known/suspected terrorists. At the very least, they should have whitelisted the phone numbers of accredited journalists, doctors etc.

c. Third, an all encompassing communication blockade was imposed by the Respondents in addition to the prohibition of public gatherings and free movement of persons under Section 144, Code of Criminal Procedure, 1973 and large scale preventive detention of individuals. When viewed together, these restrictions cumulatively amount to a suspension of the fundamental rights guaranteed by Article 19 of the Constitution.

139. Petitioners reiterate that it is not their case that the State is *never* entitled to do this. It is their case, however, that the State cannot speak with a forked tongue: it cannot, on the one hand, insist that everything is "normal" in the Kashmir

Valley, while on the other, justify the suspension of rights across the board *without* going through the legal and constitutional requirements of an Emergency Proclamation under Article 352. Indeed, it is a settled principle of law that one cannot do indirectly what cannot be done directly (*Quando aliquid prohibetur ex directo, prohibetur et per obliquum*). In the present case, if a proclamation of emergency was issued by Respondent No.1 under Article 352, it would expire within one month unless it was approved through a special resolution by both Houses of Parliament. By suspending fundamental rights guaranteed by Article 19 without a proclamation of emergency, the Respondents have circumvented the safeguard available through parliamentary scrutiny under Article 352. Therefore, the Respondents have achieved indirectly what they may not have been able to achieve directly.

140. The following analogy may be drawn. In a certain neighbourhood, thefts have occurred. The State is unable to catch the thief, and so – to prevent future thefts – it rounds up every individual in the neighbourhood, and puts them under lock and key. Needless to say, no constitutional democracy would countenance such an action. The situation is precisely the same here: under *ordinary circumstances*, it is simply not open to the State to make the argument that it is making. However, our Constitution – as indicated above – does not recognise anything outside the "ordinary" and the "state of exception" – to trigger which, Article 352 is a constitutional necessity.

141. Indeed, in paragraph 12 of its additional affidavit dated 23.10.2019, Respondent No.12 has stated that the impugned restrictions have been imposed because of cross-border terrorism and *"terrorist outfits who not only physically penetrate the Indian borders but also digitally penetrate to take advantage of certain local situation in the State of J&K."* It is submitted that if the threat to the security of India by such external aggression is grave enough to necessitate suspension of fundamental rights guaranteed by Article 19, Respondent No.1 must declare a state of emergency under Article 352.

142. This fundamental proposition was articulated most recently by the High Court of Hong Kong, in November 2019, while considering the constitutionality of a prohibition upon the wearing of face masks, ostensibly for the purpose of preventing violent protests (**Kwok Wing Hang v Chief Executive in Council, [2019] HKCFI 2820**. The case was heard – and judgment delivered – in the backdrop of significant violence and large-scale mass protests in Hong Kong. One of the arguments made before the Court was that as public security was at

stake, it should adopt a hands-off approach. Rejecting this argument, the Court held in paragraph 108 that:

> *In times of a public emergency officially proclaimed and in accordance with the other requirements of s 5 of the HKBORO, measures may be adopted under the ERO which derogate from the Bill of Rights (even so, excepting the specified non-derogable provisions and discrimination on the prohibited grounds). Subject to the conditions of s 5 (including that the derogations are limited to those strictly required by the exigencies of the situation), this may have the effect of temporarily suspending the relevant human rights norms ... in other situations, measures adopted under the ERO may not derogate from the Bill of Rights, which means that if any such measure has the effect of restricting fundamental rights, then like any other restriction in normal times, it has to satisfy the twin requirements that the restriction is prescribed by law and meets the proportionality test.*

143. It is respectfully submitted, therefore, that if the State has effectively suspended fundamental rights – which, it is respectfully submitted, it has in the present case – then such a move can only be justified within the constitutional Emergency regulation framework (Article 352). In the absence of a proclamation under Article 352, this Hon'ble Court must apply the standard of proportionality, which – as pointed out above – *ipso facto* rules out blanket, indiscriminate, and non-targeted infringements of fundamental rights.

144. It is respectfully submitted that, as a matter of fact, the State's own filings betray the fact that it is attempting to make an Emergency-based argument. In its Additional Affidavit dated 23.10.2019, the State argues that "... J&K has its own State-specific geopolitical relevance ... [with] its long-standing history of terrorism from across the border." This stand is made even clearer in paragraph 16 of the Written Submissions dated 23 November 2019, where the State argues that "it is submitted that the situation presented before this Hon'ble Court is **unprecedented and one of its kind** pertaining to a State having troubled legacy due to anti-national and anti-humanity activities of miniscule people..." (sic) Consequently, it is clear that the State – entirely aware that its actions cannot be justified were this Hon'ble Court to apply its normal proportionality review – is taking the argument that the situation in Jammu and Kashmir is "unprecedented and one of its kind", and which requires a departure from the general principles of proportionality, the rule of law, and the prohibition against non-targeted, blanket, and indiscriminate violations of rights. This – it is respectfully submitted – is exactly what it means to "eat one's cake and have it too." The State cannot have it both ways: it cannot urge

this Court to depart from normal standards of proportionality on the basis that this is an "unprecedented" situation on the one hand, while decline to invoke the Constitutional framework of accountability that has been specifically designed for such exceptional and "unprecedented" situations on the other.

VI. THE RESTRICTIONS IMPOSED U/S 144 CRPC ON ALL CIVILIANS ARE VIOLATIVE OF ARTICLES 19 AND 21 OF THE CONSTITUTION

145. In the present case, by the State's own admission in the Status Report dated 20.11.2019, on the intervening night of 4th and 5th August, 2019, orders u/s 144 were imposed across 96.5% of the State of Jammu and Kashmir (195 out of 202 police stations). As per the limited orders produced by the restrictions imposed were all pervasive, imposing prohibitions on all public movement, closure of schools and public transport which resulted in the shutting down of all activity in the region. Further, there have also been reports of executive authorities arbitrarily imposing restrictions on movement on the ground.

146. Such pervasive restrictions amount to a violation of Article 19 and 21. In *Kharak Singh vs The State of U. P. & Others*. AIR 1963 SC 1295, Justice Subbarao held as under:

> "*In A. K. Gopalan's case (1), it is described to mean liberty relating to or concerning the person or body of the individual; and personal liberty in this sense is the antithesis of physical restraint or coercion. The expression is wide enough to take in a night to be free from restrictions placed on his movements. The expression "coercion" in the modern age cannot be construed in a narrow sense. In an uncivilized society where there are no inhibitions, only physical restraints may detract from personal liberty, but as civilization advances the psychological restraints are more. effective than physical ones. The scientific methods used to condition a man's mind are in a real sense physical restraints, for they engender physical fear channelling one's actions through anticipated and expected groves. So also the creation of conditions which necessarily engender inhibitions and fear complexes can be described as physical restraints. Further, the right to personal liberty takes in not only a right to be free from restrictions placed on his movements, but also free from encroachments on his private life. It is true our Constitution does not expressly declare a right to privacy as a fundamental right, but the said right is an essential ingredient of personal liberty. Every democratic country sanctifies domestic life; it is expected to give him rest, physical happiness, peace of mind and security. In the last resort, a person's house, where lie lives with his family, is his "castle" : it is his rampart against encroachment on his personal liberty. The pregnant words of that famous Judge, Frankfurter J., in Wolf v. Colorado (1), pointing out the importance of the security of one's privacy against arbitrary intrusion by the police, could have no less application to an Indian home as to an American one. If physical restraints on a person's movements affect his personal liberty, physical*

encroachments on his private life would affect it in a larger degree. Indeed, nothing is more deleterious to a man's physical happiness and health than a calculated interference with his privacy. We would, therefore, define the right of personal liberty in Art. 21 as a right of an individual to be free from restrictions or encroachments on his person, whether those restrictions or encroachments are directly imposed or indirectly brought about by calculated measures. If so understood, all the acts of surveillance under, Regulation 236 infringe the fund- amental right of the petitioner under Art. 21 of the Constitution.

This leads US to the second question, namely, whether the petitioner's fundamental right under Art. 19 (1) (d) is also infringed. What is the content of the said fundamental right? It is argued for the State that it means only that a person can move physically from one point to another without any restraint.' This argument ignores the adverb "freely" in cl. (d). If that adverb is not in the clause, there may be some justification for this Contention; but the adverb "freely" gives a larger content to the freedom Mere movement unobstructed by physical restrictions cannot in itself be the object of a person's travel. A person travels ordinarily in quest of some objective. He goes to a place to enjoy, to do business, to meet friends, to have secret and intimate consultations with 0thers and to do many other such things. If a man is shadowed, his movements are obviously constricted. He can move physically, but it can only be a movement of an automation. How could a movement under the scrutinizing gaze of the policemen be described as a free movement? The whole country is his jail. The freedom of movement in cl. (d) therefore must be a movement in a free country, i. e., in a country where he can do whatever he likes, speak to whomsoever he wants, meet people of his own choice without any apprehension, subject of course to the law of social control. The petitioner under the shadow of surveillance is certainly deprived of this freedom. He can move physically, but he cannot do so freely, for all his activities are watched and noted. The shroud of surveillance cast upon him perforce engender inhibitions in him and he cannot act freely as he would like to do. We would, therefore, hold that the entire Regulation 236 offends also Art. 19 (1) (d) of the Constitution." (emphasis supplied.)

(Justice Subbarao's dissenting opinion extracted above is now good law following the nine-judge bench pronouncement in ***Puttaswamy v. Union of India***, **(2017) 10 SCC 1**)

147. It is submitted that first, an adverse inference must be drawn against the State for not producing all orders issued u/s 144 CrPC (**A**) and without prejudice, the restrictions cannot be considered reasonable restrictions under Article 19 and 21 (**B**)

(A) AN ADVERSE INFERENCE MUST BE DRAWN AGAINST THE STATE FOR FAILURE TO PRODUCE ALL ORDERS ISSUED U/S 144 CRPC

148. The Respondents have tendered inadequate assistance to this Hon'ble Court by failing to produce all the orders issued u/s 144 CrPC despite the order of this Hon'ble Court dated 16.10.2019. It is respectfully submitted that under the Constitution of India, restrictions upon fundamental rights can be imposed under "law". As this Hon'ble Court has had occasion to observe, "*before a law can become operative it must be promulgated or published. It must be broadcast in some recognisable way so that all men may know what it is ... the thought that a decision reached in the secret recesses of a chamber to which the public have no access and to which even their accredited representatives have no access and of which they can normally know nothing, can nevertheless affect their lives, liberty and property by the mere passing of a Resolution without anything more is abhorrent to civilised man. It shocks his conscience.*" (***Kindly see Harla v State of Rajasthan*, 1952 SCR 110**). In other words, a secret law is no law at all: the people whose lives and liberty are affected cannot be left in the dark about the legal basis of the restrictions upon their conduct. It is respectfully submitted that this is an essential and non-derogable principle of the rule of law, and is at the heart of the evolution of Indian constitutional culture from a "culture of authority to a culture of justification" (***Kindly See Kalpana Mehta v. Union of India (2018) 7 SCC 1***).

149. *Secondly*, it is respectfully submitted that all restrictions under Article 19 and 21 are subject to judicial review. It is therefore not enough for the State to produce only a few orders when the State must For judicial review to have any meaning, the Petitioners must be in a position to challenge – and this Hon'ble Court must be in a position to review – the legal basis upon which rights are purported to be restricted.

150. It is not open to the State to argue that the disclosure of the very law that is infringing citizens' fundamental rights will affect a right or a legitimate interest of its own. At the very least, in any event, the State must explain the precise nature of the prejudice that will be caused to a right or legitimate interest. (***Kindly see Ram Jethmalani* v. *Union of India*, 2011 8 SCC 1, para 63, 65, 80, 82, 90; *Manoharlal Sharma v. Narendra Damodardas Modi, (2019) 3 SCC 25*, para 26)** The State has not made any such effort in this case.

151. In any event, the few orders of the State under s. 144 CrPC produced reveal that the basis for the restrictions is "law and order". The State cannot now withhold the material supporting these orders on the ground of "national security", as these are distinct and separate terms, with very different legal

meanings. Moreover, as the State now *has* revealed some of the orders, it cannot now turn around and claim that other orders – passed under the same rules – cannot be revealed.

152. Most importantly, the Petitioners have the right to access all orders and materials on the basis of which the impugned orders have been passed. It is submitted that such material is necessary for parties to effectively litigate their case before the Hon'ble Court. Denial of the same amounts to a violation of the right of access to justice, and the right under Article 32. **(*Kindly see Yashwant Sinha v. Central Bureau of Investigation (2019) 6 SCC 1 (para 40-1*).** In ***Ram Jethmalani & Ors. v. Union of India, (2011) 8 SCC 1*,** this Hon'ble Court placed the duty on the State to produce materials in its custody in writ petitions:

> "*75. In order that the right guaranteed by clause (1) of Article 32 be meaningful, and particularly because such petitions seek the protection of fundamental rights, it is imperative that in such proceedings the petitioners are not denied the information necessary for them to properly articulate the case and be heard, especially where such information is in the possession of the State. To deny access to such information, without citing any constitutional principle or enumerated grounds of constitutional prohibition, would be to thwart the right granted by clause (1) of Article 32*
>
> *76. Further, inasmuch as, by history and tradition of common law, judicial proceedings are substantively, though not necessarily fully, adversarial, both parties bear the responsibility of placing all the relevant information, analyses, and facts before this Court as completely as possible. In most situations, it is the State which may have more comprehensive information that is relevant to the matters at hand in such proceedings. However, some agents of the State may perceive that because these proceedings are adversarial in nature, the duty and burden to furnish all the necessary information rests upon the petitioners, and hence the State has no obligation to fully furnish such information. Some agents of the State may also seek to cast the events and facts in a light that is favourable to the Government in the immediate context of the proceedings, even though such actions do not lead to rendering of complete justice in the task of protection of fundamental rights. To that extent, both the petitioners and this Court would be handicapped in proceedings under clause (1) of Article 32.*
>
> *77. It is necessary for us to note that the burden of asserting, and proving, by relevant evidence a claim in judicial proceedings would ordinarily be placed upon the proponent of such a claim; however, the burden of protection of fundamental rights is primarily the duty of the State. Consequently, unless constitutional grounds exist, the State may not act in a manner that hinders this Court from rendering complete justice in such proceedings. Withholding of*

> *information from the petitioners, or seeking to cast the relevant events and facts in a light favourable to the State in the context of the proceedings, even though ultimately detrimental to the essential task of protecting fundamental rights, would be destructive to the guarantee in clause (1) of Article 32, and substantially eviscerate the capacity of this Court in exercising its powers contained in clause (2) of Article 32, and those traceable to other provisions of the Constitution and broader jurisprudence of constitutionalism, in upholding fundamental rights enshrined in Part III.*
>
> *....78. In the task of upholding of fundamental rights, the State cannot be an adversary. The State has the duty, generally, to reveal all the facts and information in its possession to the Court, and also provide the same to the petitioners. This is so, because the petitioners would also then be enabled to bring to light facts and the law that may be relevant for the Court in rendering its decision. In proceedings such as those under Article 32, both the petitioner and the State, have to necessarily be the eyes and ears of the Court. Blinding the petitioner would substantially detract from the integrity of the process of judicial decision-making in Article 32 proceedings, especially where the issue is of upholding of fundamental rights*." (Emphasis supplied)

In the same vein, the withholding of such information would also violate the petitioner's and public's right to know under Article 19(1)(a). (***Ram Jethmalani v. Union of India, (2011) 8 SCC 1, para 79)***

153. In the present case, the State has failed to produce the orders despite a direction by this Hon'ble Court by order dated 16.10.2019 to do so. The State has provided no reasons for disobeying the order of this Hon'ble Court. This will perhaps be the first time in the history of this Hon'ble Court that it has to decide the constitutionality of certain orders without access to the same.

154. It is respectfully submitted that the peculiar conduct of the State must result in an adverse inference against the State:

> "*22.. Indeed, if the Government meant business it should have the courage to produce the report on which Ex. J. was based, which has been deliberately suppressed despite our orders to produce the same. We are, therefore, compelled to draw an adverse inference against the State Government to the effect that if the materials on which the report was based had been produced it would have exploded the case of the Government and disclosed the real state of affairs viz. that the appellant's institute does fulfil all the conditions imposed by the State.*
>
> *25. Normally, this Court does not grant costs in such cases but having regard to the manner in which the State Government has behaved and exhibited its reluctance to perform a constitutional duty and has also tried to disobey our orders for production of certain documents, we must impose a heavy cost on the State*."

(***Managing Board***, ***Milli Talimi Mission v. State of Bihar***, **(1984) 4 SCC 500)**

155. Therefore, it is respectfully submitted that an adverse inference must be drawn against the State and it must be presumed that all restrictions other than the orders produced were imposed without formal orders u/s 144 CrPC and therefore were invalid under Article 19 and 21 for not being backed by "law".

(B) WITHOUT PREJUDICE, THE RESTRICTIONS ARE NOT REASONABLE RESTRICTIONS UNDER ARTICLE 19 AND 21

156. This Hon'ble Court has held that the orders passed u/s 144 are amendable to judicial review (***Gulam Abbas v. State of UP,*** **(1982) 1 SCC 71, para 27;** ***Madhu Limaye*****, para 24;** ***Babulal Parate*** **(supra), para 22;** ***In Re Ramlila Maidan*** **(supra) para 56**) and such orders must satisfy the following conditions:

a. Restrictions must be imposed in pursuance of grounds specifically provided under Article 19. (***Madhu Limaye v. Sub Divisional Magistrate, (1970) 3 SCC 746, para 24; In Re Ram Lila Maidan Incident, (2012) 5 SCC 1, para 30, 54*****)**, and,

b. It must be issued only in cases of emergency where that the threat to public order is *imminent* and *genuine* and not merely *likely*. (**Kindly see** ***Babulal Parate v. State of Maharashtra, (1961) 3 SCR 423, para 25; Madhu Limaye v. Sub Divisional Magistrate*** **(supra),** ***para 24*****),** ***In Re Ramlila Maidan Incident, para 58-59, 221)***

c. The measures imposed must be the least restrictive or the least invasive measure available. (***In Ramlila Maidan Incident, (supra) para 28, 179***), and,

d. The orders as a general rule must be issued against the wrongdoer and not against innocent civilians merely on grounds of convenience and expediency (***Madhu Limaye (supra), para 24; Gulam Abbas v. State of UP, (1982) 1 SCC 71, para 27***).

157. This Hon'ble Court has also consistently held that orders u/s 144 must satisfy the statutory requirement of stating the material facts which demonstrate the urgency and imminence of the threat which necessitate such action in the order itself. (***In Re Ramlila Maidan Incident*****, supra, para 221;** ***PT Chandra, Editor, Tribune v. The Crown,*** **ILR 1942 23 Lah 510 at pg 514;** ***Babulal Parate, para 22; Madhu Limaye, para 28; Acharya Jagdishwaranand Avadhuta & Ors. v. Commissioner of Police & Anr. (1983) 4 SCC 522, para 16)***.

158. The orders issued by the Magistrate that restrict liberty and freedoms of persons must speak for themselves. However, the orders produced in the present case are vague, suffer from non-application of mind and do not fulfil the aforementioned conditions:

159. **<u>(a) Order No. 100-DMS/PS of 2019 dated 05.08.2019 in respect of District Srinagar[1]</u>**

i. The order is bereft of any material facts that demonstrate the threat was imminent - it merely states that some persons have constantly engaged in attempts to disturb public order and tranquillity. However, the order does not state any facts to show that these attempts are imminent. On the other hand the order imposes restrictions on the apprehension that such practices are *likely* to disturb public order. Thus, the Magistrate has misinformed himself as to the test under s. 144 to be that of likelihood as opposed immediacy and imminence. (*Babulal Parate,* para 25).

ii. The order is overbroad: The order takes with in its fold the need to prevent "provocative speeches and baseless rumours." Mere discussion and advocacy cannot be restricted under Article 19(1)(a). It is only when speech certainly leads to incitement to violence or offence can restrictions be imposed. (*Superintendent. Central Prison, Fatehgarh & Anr*. v. *Dr. Ram Manohar Lohia*, (1960) 2 SCR 821; *Shreya Singhal* v. *Union of India*, (2015) 5 SCC 1, para 13; *Kameshwar Prasad & Ors*. v. *State of Bihar*, 1962 Supp (3) SCR 369).

iii. The order fails the test of least restrictive measure: The order by prohibiting "every kind of public gathering or movement of public and transport" and not creating any exception for movement of 5 or more persons, prohibits all kinds of movement. The order cites no material facts to demonstrate that the situation was grave enough to impose a prohibition on all movement and speech of all persons.

160. **<u>Order No. 66-DMC/Adm of 2019 dated 04.08.2019 in respect of district Kupwara[2]</u>**

i. The order imposes restrictions in pursuance of "law and order," which is not a valid ground for restricting fundamental rights under Article 19.

ii. Without prejudice, the order provides no material facts but states "in view of the current law and order scenario and as a precautionary measure,

[1] Pg 20 of the Affidavit of the State dated 23.10.2019.
[2] Pg 21 of the Affidavit of the State dated 23.10.2019.

restrictions are hereby imposed." Words such as "current scenario" are utterly vague and cannot constitute "material facts" that demonstrate a threat was imminent. The acceptance of such vague phrases as material facts would result in a Magistrate having unbridled discretion.

iii. The order fails the test of least restrictive measure: The order by stating that there shall be "no movement of public, conduct of public meeting or rallies and all education institutes shall remain closed" and by not creating any exception for movement of 5 or more persons, prohibits all kinds of movement. The order cites no material facts to demonstrate that the situation was grave enough to impose a prohibition on all movement and speech of all persons. Further, the order does not provide any exception for medical emergencies, funerals and cremations and thus prevents the citizenry from carrying out essential activities to protect their right to life and liberty under Article 21.

161. <u>Order dated 05.08.2019 in respect of District Bandipora</u>[3]

i. The order lists breach of peace and law and order as a ground to restrict movement which are not valid grounds to impose restrictions under Article 19.

ii. Without prejudice, the order mentions no material facts such as the events or actions which will lead to be breach of public order but instead adverts to the "prevailing situation in the State" to restrict all movement. The order does not explain what the prevailing situation and if accepted would give Magistrates a license to impose district wise restrictions without any facts whatsoever.

iii. Moreover, the District Magistrate did not carry out an independent assessment or inquiry to evaluate if an order was necessary but merely relied on the recommendation of Sr. Superintendent of the Police to impose the restrictions.

iv. The order is not the least restrictive measure: the order prohibits the movement of the entire public. Further, the exceptions it creates are unworkable: (i) movement is allowed subject to the permission of the District Magistrate but the orders itself prevent persons from approaching the District Magistrate (ii) further the order exempts emergency services and ambulances but the people have no way to call them in the absence of phones.

[3] Pg 22 of the Affidavit of the State dated 23.10.2019.

a) The State has failed to justify any imminent threat requiring the imposition of s. 144 orders throughout the State

162. The impugned orders by merely referring to some "prevailing" or "current" scenario reveal absolutely no application on mind on part of the District Magistrates to ascertain the imminence of the threat as well as the necessity to prohibit all public movement. The State in its written submissions has sought to argue that the prevailing situation could be gauged from the history of terrorism as well as comments made by certain political leaders and other persons on social media (Kindly see Written Submissions of the State). It is submitted that such post facto material cannot be relied upon for the following reasons.

163. The orders do not make any reference to such material sought to be relied on by the State. Even though a Magistrate may rely on facts in his or her personal knowledge to impose restrictions u/s 144, this Hon'ble Court has maintained since prior to the enforcement of the Constitution that material facts must be recorded in the order. (*Babulal Parate; Madhu Limaye)*. In the absence of such a reference, it would be possible for the State to bring any material at the stage of adjudication to justify the order irrespective of whether the material was in fact in the personal knowledge of the Magistrate or obtained through an inquiry by the Magistrate or available in the public domain. Accordingly, it is a well-established principle of law that the Court cannot go beyond the order passed by the District Magistrate and the State cannot try and improve the order passed through the affidavit (*Kindly see Ram Manohar Lohia v. State of Bihar, (1966) 1 SCR 709, para 56*). In the present case, the orders are being sought to be improved through written and oral submissions.

164. It is completely fallacious for the State to refer to the absence of material facts as a "hyper technical argument" (pg 18 of the Written submission of the State). It is also fallacious for the State to claim that the Magistrate could not have repeated the comments in the order so as to propagate the same, indeed it was possible for the Magistrate to reference them without reproducing their content.

165. The words "prevailing situation" or "current" situation do not amount to material facts as the Court cannot be expected to fill these gaps in orders by taking notice of prevailing political events to discern whether a threat was genuine or not. In fact, this Hon'ble Court has held that it would be *improper* for the Court, in order to uphold an order, to have to take a view that a political

event would entail violence from a particular set of people. (*Ram Bahadur Rai v. State of Bihar,* (1975) 3 SCC 710, para 16).

166. Without prejudice to the above, the twitter comments posted do not establish a threat to security as several of those comments were made much before August 4/5th such as January 15, 2019; February 2, 2019, April 22, 2019, April 02, 2019, March 29, 2019, April 6, 2019, April 1, 2019, April 3, 2019, April 01, 2019, February 25, 2019, July 19, 2019, and so on which did not result in violence and therefore could not amount to an imminent threat.

167. Further, it is unclear as to how all District magistrates were certain that the measures in respect of Article 370 would pass muster in the Parliament so as to conclude that threat was imminent.

168. There also exists a contradiction in the stand of the State in that they have argued that it was clear that the calls on social media would have resulted in "mass mobilisation of public with an intention and preparation for violent backlash" so as to justify the imposition of s. 144 and at the same time argue that it was a miniscule minority/people who were responsible for disrupting peace in the State. (kindly see pgs 17, 18 of the Written Submissions of the State). As it is only a miniscule minority of people who are responsible for violations of public order, it is not clear how these comments would have resulted in mass mobilisation to justify such sweeping restrictions u/s 144 CrPC. Indeed, the people of Kashmir are capable of exercising the right of autonomy, accorded to all citizens of India that require the State to respects their ability to make up their minds and not be influenced by the miniscule minority seeking to disrupt public order and the security of the State.

169. Further, if these were the facts that weighed with the Magistrate, it was possible for the Magistrate to take less restrictive measures such as taking the persons making those comments into detention or having their social media accounts suspended instead of prohibiting the movement of all persons.

b) <u>The State failed to adopt the least restrictive measures available</u>

170. The State has completely failed to justify why least restrictive measures were not available and the State had to resort to a complete prohibition of *all* movement of *all* civilians. This is especially important in view of the fact that:

i. Approximately 50,000 additional troops were moved to the State bringing the officer to civilian ratio in the State reportedly to 1:8. Therefore, the Army could have swiftly responded to breaches of public order and security.

ii. The District Magistrate could have passed an order preventing congregations of four or more persons, as is common practice, which would have allowed persons to go about their lives for daily essentials also have prevented any violent demonstrations. (The Magistrate for instance had passed an order in Kargil restricting the movement of 4 or more persons which is distinct from the orders produced by the State which ban all public movement and not just assembly or congregations. Kindly see pg 226 of the joint compilation)

iii. The order should have been addressed only to persons who pose a genuine threat to public order as opposed to common civilians. The language of s.144 makes clear that the action should be directed against the wrongdoer and should not take within its fold the wronged or civilians so as to interfere with their fundamental rights. In *Ghulam Abbas* v. *State of Uttar Pradesh*, (1982) 1 SCC 71, this Hon'ble Court held that "It would not be a proper exercise of discretion on the part of the Executive Magistrate to interfere with the lawful exercise of the right by a party on a consideration that those who threaten to interfere constitute a large majority and it would be more convenient for the administration to impose restrictions which would affect only a minor section of the community rather than prevent a larger section more vociferous and militant." In the present case, the civilians greatly outnumber persons threatening security; the State has itself admitted that it is a "miniscule minority" of persons and the State cannot cite its inability to control a minority of persons to put a State under lockdown.

iv. The cases of *Babulal Parate and Madhu Limaye,* cannot be taken to be authority for a general proposition that the State can impose restrictions u/s 144 against the general public. Instead, the State must establish that it was impossible for the State to distinguish between the wrongdoer and civilians. The State has in its written submissions however, merely asserts that there exist no standards to differentiate people. (pg 22 of the Written Submissions of the State). This is an assertion unsupported by evidence. Moreover, in the present case, the State has stated that the actions of the miniscule minority had to be prevent from causing violence. The State has enough resources at its disposal in the form of intelligence inputs, police and army records of militants that allow them to identify persons with criminal antecedents and militancy backgrounds who will disrupt

public order. For the State to still impose such widespread restrictions in each district to restrict a miniscule minority is clearly an argument of convenience and expedience and not necessity.

c) The State Action is a disproportionate restriction on the rights of citizens

171. The State has imposed restrictions have been imposed by the Respondents on the movement of the Citizens. These restrictions have not only lead to closure of schools, but also, private hospitals, business establishments etc. The rights under Article 19 have completely been extinguished, that too by mere executive instructions, which cannot be considered to be law, within the meaning of the said term. It is submitted that the blanket prohibition on movement by *executive fiat* in the name of security of the people have had a severe impact on the rights under Article 19 and 21 of the Constitution:

i. *Right to information and knowledge under Article 19(1)(a):* Both persons inside and outside the state of Jammu and Kashmir have a right to access information about the happenings of the State and travel to the State for this purpose. The State must facilitate such access to information. (*Ministry of Information Broadcasting, (1995) 2 SCC 161*). In the present case, persons including the petitioner have been arbitrarily refused the right to enter the State and they have been forced to seek permission of this Hon'ble Court to travel.

ii. *Right to livelihood under Article 21 and Article 19(1)(g)* - All core industries such as tourism, manufacture, agriculture, construction have come to a standstill. There have been layoffs and reports of businesses shutting down especially in the Information technology, handicrafts and tourism sectors. The total loss to the economy is pegged at Rs. 175 crore per day. (*Kindly see pgs 9-19, 65 to 68, pg 71-73 of the main petition*). Further, after 84 days of the shutdown, the loss has been pegged at Rs. 10,000 crore. Today the shutdown has reached the 102nd day (Kindly see Additional Compilation at pg 1, pg 4 to 7)

iii. *Right to life under Article 21:* There have been at least five deaths that are a result of the restrictions: asphyxiation as a result of tear gas, inability to access emergency medicine, pellet firing, death by drowning of a boy who was running away from security forces. Therefore, the State cannot simply claim that no bullets have been fired and absolve itself of responsibility. (Kindly see, Additional Compilation at pgs 12 to 15)

iv. *Right to health under Article 21:* The prohibition on movement in the absence of clear exceptions for health related needs have prevented persons from accessing hospitals for emergency as well as periodic treatment. This is evidenced from the fact that the number of patients visiting hospitals since the shutdown is lower compared to those of pervious months. There have been reports of shortages of foods and essential medicines. Patients have been unable to avail of the central health insurance scheme Ayushman Bharat due to the absence of internet. (*Kindly see pg 19-24 and pg 108-136 of the Main petition*)

v. *Right to education:* School Students have been deprived of education for over 3 months but have still been forced to write board exams. Further students have also been unable to prepare for their entrance exams, thus jeopardising their careers. (Kindly see Additional Compilation handed over on 26.11.2019 by the Petitioner in *Ghulam Nabi Azad* at pgs 23 to 24)**.**

172. In light of their clarity of purpose and impact, it is clear that orders u/s 144 CrPC have been imposed by an overzealous executive to prevent all forms of protests or discussions, unmindful of their disproportionate impact on the rights of citizens. However, the State cannot prevent lawful discussions and demonstrations by civilians. **(*In Re Ramlila Maidan Incident, 2012 5 SCC 1, Kameshwar Prasad v. State of Bihar, supra, para 16*).**

173. The State has not produced any orders demonstrating the removal of these restrictions but has sought to argue that these restrictions were gradually removed. It is submitted that the gradual removal of restrictions would not *ipso facto* render the restrictions constitutional, especially when their imposition in the first place was not justified.

174. In conclusion, it is submitted that in light of the above mentioned arguments, it is submitted that the State has failed to justify its restrictions as reasonable under the Constitution. The actions of the State amount to a clear abrogation of fundamental rights of the people of Jammu and Kashmir under the Constitution which is prohibited under the Constitution.

VII. THE STATE HAS VIOLATED ITS DUTY TO PROTECT THE FUNDAMENTAL RIGHTS OF ITS CITIZENS

175. It is well established that rights carry correlative duties on other persons including the State. This Hon'ble Court has consistently recognised that the fundamental rights under part III have a positive character that must be given an expansive interpretation. (*Maneka Gandhi v. Union of India, (1978) 1 SCC*

248, para 5) In the same vein, this Hon'ble Court has held that the State has a positive duty to ensure that fundamental rights are realised. (*M. Nagaraj v. Union of India, (2006) 8 SCC 212, para 26; S Rangarajan v. P. Jagjivan,* (1989) 2 SCC 574*)* For instance, in *Indibily Creative Pvt. Ltd. & Ors.* v. Government of West Bengal, 2019 SCC Online SC 520 this Hon'ble Court held:

> "*50. The freedoms which are guaranteed by Article 19 are universal. Article 19(1) stipulates that all citizens shall have the freedoms which it recognises. Political freedoms impose a restraining influence on the state by carving out an area in which the state shall not interfere. Hence, these freedoms are perceived to impose obligations of restraint on the state. But, apart from imposing 'negative' restraints on the state these freedoms impose a positive mandate as well. In its capacity as a public authority enforcing the rule of law, the state must ensure that conditions in which these freedoms flourish are maintained. In the space reserved for the free exercise of speech and expression, the state cannot look askance when organized interests threaten the existence of freedom. The state is duty bound to ensure the prevalence of conditions in which of those freedoms can be exercised. The instruments of the state must be utilized to effectuate the exercise of freedom…*"

176. Thus, where a State is taking action in pursuance of an interest such as security of the State, it must be equally mindful of its obligation to protect rights that may be collaterally impacted as a result of its action.

177. In the present case, the prohibition has been purportedly imposed to prevent consequences that would ensue as a result of the State's decision to revoke Article 370.[4] The State, thus had ample notice of the possible need to impose restrictions and therefore should have prepared by making adequate provisions in advance for persons to be able to access health care services, and preserve their right to livelihood and the right to education.

178. The State must demonstrate that all precautions were taken to ensure that citizens' rights are still respected. In the present case, the orders themselves demonstrate that no realistic exceptions for the purposes of accessing health care and emergency services were provided. Any action in respect of shortage of food and medicines has been taken *post facto* after the shortage has occurred instead of preventing a shortage. Further, even any economic measures have been taken *post facto* and that too have been limited to the apple trade whereas the economic impact has been adverse across all sectors.

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[4] Affidavit of the State dated 30.09.2019.

179. In the same vein, the "media facilitation centre" and "internet kiosks" set up in select locations can in no serve as a substitute for internet that is indispensable to all actions that one takes in their daily lives. In any case, as outlined above these facilities have are no substitute for the rights u/Art. 19(1)(a) of the Press and the residents of the Kashmir Valley.

180. The absence of any preparedness on part of the State to protect rights under Article 19 and 21 amounts to a violation of those rights. In such a scenario, where the State had the knowledge and capacity to make provisions to protect those rights, the State cannot write off the violation of rights of the citizens of Jammu and Kashmir as "mere inconveniences." Moreover, this Hon'ble Court has held that the abrogation of the right of even one person is enough to trigger redress under the Constitution.

VIII. THE RESTRICTIONS VIOLATE THE INDIA'S OBLIGATIONS UNDER THE INTERNATIONAL CONVENTION ON CIVIL AND POLITICAL RIGHTS (ICCPR)

181. The State in its affidavit has itself adverted to Article 19 of the International Covenant on Civil and Political Rights (hereinafter, "ICCPR") to claim that rights are subject to restrictions such as National Security and Public Order. (Additional Affidavit of the State dated 23.10.2019, pg 3). However, the United Nations Human Rights Committee has clearly stated that the measures must conform to the proportionality test and must not be overbroad (United Nations Human Rights Committee, General Comment No. 34) Moreover, the State must demonstrate the *precise nature* of threat that the speech of a person poses to public order and national security. For instance, in the case of **Jong-Kyu Sohn v. Republic of Korea, Communication No. 518/1992,** the United Nations Human Rights committee held as follows:

> *"10.4 The Committee observes that any restriction of the freedom of expression pursuant to paragraph 3 of article 19 must cumulatively meet the following conditions: it must be provided for by law, it must address one of the aims enumerated in paragraph 3(a) and (b) of article 19, and must be necessary to achieve the legitimate purpose.* ***While the State party has stated that the restrictions were justified in order to protect national security and public order and that they were provided for by law, under article 13(2) of the Labour Dispute Adjustment Act, the Committee must still determine whether the measures taken against the author were necessary for the purpose stated.*** *The Committee notes that the State party has invoked national security and public order by reference to the general nature of the labour movement and by alleging that the statement issued by the author in collaboration with others was a disguise for the incitement to a national strike.*

> *The Committee considers that the* ***State party has failed to specify the precise nature of the threat which it contends that the author's exercise of freedom of expression posed and finds that none of the arguments advanced by the State party suffice to render the restriction of the author's right to freedom of expression compatible with paragraph 3 of article 19****"* (emphasis supplied)

Even in the present case, the State has been unable to explain what precise threat the speech of all citizens of the State of Jammu and Kashmir posed to any ground under Article 19(2) to merit banning the communication of all citizens when less restrictive measures were available.

182. Further, the UN Human Rights Committee in its 102nd Session held in Geneva in July 2011 issued General Comment No. 34 (hereinafter referred to as "GC 34") , wherein the freedoms of the press under the ICCPR were detailed. The GC 34 states, inter-alia, that:

i. *The free communication of information and ideas about public and political issues between citizens, candidates and elected representatives is essential. This implies a free press and other media able to comment on public issues without censorship or restraint and to inform public opinion. The public also has a corresponding right to receive media output.*

ii. *State parties should take account of the extent to which developments in information and communication technologies, such as internet and mobile based electronic information dissemination systems, have substantially changed communication practices around the world. There is now a global network for exchanging ideas and opinions that does not necessarily rely on the traditional mass media intermediaries. States parties should take all necessary steps to foster the independence of these new media and to ensure access of individuals thereto.*

iii. *A free, uncensored and unhindered press or other media is essential in any society to ensure freedom of opinion and expression and the enjoyment of other Covenant rights. It constitutes one of the cornerstones of a democratic society.*

iv. *Any restrictions on the operation of websites, blogs or any other internet-based, electronic or other such information dissemination system, including systems to support such communication, such as internet service providers or search engines, are only permissible to the extent that they are compatible with paragraph 3 of Article 19 of the International Covenant on Civil and Political Rights, governing the*

restrictions that may be imposed on the exercise of the right to freedom of expression. Permissible restrictions generally should be content-specific; generic bans on the operation of certain sites and systems are not compatible with paragraph 3. It is also inconsistent with paragraph 3 to prohibit a site or an information dissemination system from publishing material solely on the basis that it may be critical of the government or the political social system espoused by the government. (emphasis supplied)

183. Thus, the State is in violation of even its international obligations that it has itself adverted to.

IX. THE STATE HAS FAILED TO PLACE THE CORRECT AND COMPLETE FACTUAL POSITION BEFORE THIS HON'BLE COURT

184. As stated above in paras ___, this Hon'ble Court has held that it is the duty of the State to bring on record facts that it is the custodian of which petitioners do not have access to especially in writ petitions of public importance filed under Article 32 of the Constitution.

185. It is submitted that in the present case, the State has not discharged this duty. Instead the State has provided incomplete and misleading facts to the Government through cryptic status reports. For instance, the following fallacies can be seen in the Status Report dated 20.11.2019 that the State handed over:

i. **Restrictions in Ladakh:** For Ladakh, PS Wise Restriction/relaxation has been shown to be 7 throughout, i.e. all PSs were always relaxed (Pg. 17). But there are orders that show that in Kargil District, orders under S. 144 were imposed. (Kindly see order dated 08.08.2019 handed over in court and annexed at pg 226 of the enclosed compilation dated 03.12.2019)

ii. **Mobile Phones:** The State in its charts has stated that 100% mobile phones have been restored which is grossly inaccurate as the prepaid mobile phone connections (estimated number: 40,00,000) have not been restored.

iii. **SMSes**: The status report of the State makes no mention about SMSes or internet being blocked despite the same being blocked for over a 115 days at the present time.

iv. **Destruction of the economy**: the petitioner in WP (Civil) 1164 of 2019 has brought on material from credible newspaper reports showing the extent of damage and losses cause to the Fruit Growing, IT Industry, Tourism, Crafts and Construction and Manufacturing industry (Kindly

see Writ Petition (Civil)1164 of 2019 at pgs 65-69). The State has not at all engaged with these facts and is silent on the State's response to the losses caused to this industry.

v. **School Attendance:** The State has claimed that school attendance has been 99.84% and 99.7% students during examinations. The State has failed to mention that the exams were held despite protests of the students that they had been unable to finish syllabus and go to tuition because of the shutdown. Further, students had to come to school in the absence of public transport and the students faced severe hardships to write exams. The data on school attendance on non-examination days has been concealed by the State.

vi. **Movement:** The state has said there are no restrictions on movement but has also admitted that there are night time restrictions. The State has not controverted the specific submissions of the petitioners that even in places where there are no s.144 orders, the movement of people is being restricted arbitrarily on the ground. (Kindly see pg 32, WP (Civil) 1164 of 2019)

vii. **Health care services and essentials**: The State has provided only absolute numbers to argue that the health care services are easily accessible. However, absolute numbers without an average reference point to determine whether the number of patients has gone below average, are meaningless. Further the State has only provided statistics in respect of hospitals in Srinagar which is most well connected and has not provided any information about the status of healthcare facilities in the rest of Kashmir.

186. The submission that the State has "conferred" rights by its move on 05th August, 2019, is false and misleading. Some examples of laws which shall now be extended to J&K, which the State has cited in its Status Report, are:

i. **Protection of Women from Domestic Violence Act** : Pertinent to note that the J&K Protection of Women from Domestic Violence Act was already enacted in J&K in 2010 and the present move of the Union of India will not confer any new rights in that regard.

ii. **Juvenile Justice Act**: Pertinent to note that the J&K Juvenile Justice Act was already enacted in 2013 and the present move of the Union of India will not confer any new rights in that regard.

iii. **Right to Education Act**: Pertinent to note that J&K has a more comprehensive School Education Act and Private Colleges Act which were enacted in 2002, much prior to the RTE law in the rest of India (2009). Thus the present move of the Union of India will not confer any new rights in that regard.

iv. The Status Report also submits that Manual Scavenging will now stop in the State of J&K. It is here pertinent to point out that as per a report dated September 2019 published by The Hindu, data from just 18 States reveals that there are more than 54,000 manual scavengers in India. 11 States have not even shared their data. A copy of The Hindu's report is now annexed at Page 235 of the enclosed compilation dated 03.12.2019.

It is also pertinent to note that from March 2015 to January 2016, and again from April 2016 to June 2018, the BJP and PDP alliance had formed government in the State of J&K. All necessary statutory changes / promulgations could have therefore been made through the proper legislative process by the State government, if it so desired.

X. PLEADINGS OF THE STATE ATTACKING THE PETITIONER IN WP (C) 1031 OF 2019 ARE MALAFIDE AND INCORRECT

166. The Petitioner in WP (C) 1031/2019 in her Rejoinder Affidavit dated 12.10.2019 in Para 8 @ Pg 5 stated that a truncated copy of the Srinagar edition of Kashmir Times is being published from 11.10.2019. Despite the categorical and specific averment to that effect, at Para 10 @ Pg 4 of Additional Affidavit of State of J&K dated 23.10.2019 and again at Para 12 @ Pg 6, baseless allegation has been made that the Petitioner is choosing of her own volition to not print the paper, and it also alludes motives to the Petitioner.

i) The Petitioner's counsel, during arguments on 06.11.2019 pointed out that the Respondent State had not read the averment in the Rejoinder Affidavit. Yet, on 21.11.2019 it was argued by the Respondent State that the Petitioner is deliberately not printing the newspaper. Para 10 @ Pg 17 of the Brief Status Report dated 20.11.2019 again states that Petitioner is not publishing from Srinagar. It is pertinent to recollect that copies of the published newspaper were also shown to the Hon'ble Court on 06.11.2019, but the personal attack on the Petitioner still continued.

ii) That the Petitioner should be falsely and wrongly accused of having illegitimate motives, solely because she exercised her right to constitutional remedy under Article 32 of The Constitution of India to

protect her Fundamental Rights, is in itself a shocking commentary about the manner in which the Respondent State views rights and liberties of its citizens. Such baseless and scurrilous attacks are an affront to the longstanding legacy and practice of this Hon'ble Court to treat writ petition u/Art. 32 of the Constitution with utmost seriousness, urgency and care.

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