

**IN THE SUPREME COURT OF INDIA
(CIVIL ORIGINAL JURISDICTION)
PUBLIC INTEREST LITIGATION**

I.A. No. _____ of 2020

in

WRIT PETITION (CIVIL) (Diary) No. 10817 of 2020

IN THE MATTER OF:

Foundation for Media Professionals

...Petitioner

VERSUS

Union Territory of Jammu
& Kashmir & Anr.

...Respondents

**RESPONSE OF THE PETITIONER TO THE NOTE PLACING
ADDITIONAL FACTS ON RECORD ON BEHALF OF RESPONDENT
NO. 1 ALONG WITH SUPPORTING AFFIDAVIT**

ADVOCATE FOR THE PETITIONER: SHADAN FARASAT

IN THE SUPREME COURT OF INDIA
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Place: New Delhi

Filed By:

Date: 07.05.2020

sharasat

**Shadan Farasat
Advocate for the Petitioner**

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**U.T. OF JAMMU &
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**RESPONSE OF THE PETITIONER TO THE NOTE PLACING
ADDITIONAL FACTS ON RECORD ON BEHALF OF RESPONDENT
ALONG WITH SUPPORTING AFFIDAVIT**

To,

The Hon'ble Chief Justice of India
And His Companion Judges
Of the Supreme Court of India

The Response of the Petitioner
above named

MOST RESPECTFULLY SHOWETH:

1. That the Petitioner Society filed the captioned Writ Petition challenging Order No. Home-21 (TSTS) of 2020 dated 26.03.2020 [**impugned order**] issued by Respondent No. 1, *inter alia*, restricting internet speed in mobile data services to 2G only in

Jammu & Kashmir for being violative of Articles 14, 19, 21, and 21A of the Constitution of India. The restriction on mobile internet speeds to 2G was continued through the passage of subsequent impugned orders, all of which have been challenged by the Petitioner in various interim applications, as detailed below:

- a. Order No. Home-21(TSTS) of 2020 dated 26.03.2020 [“impugned order”] challenged in the Petition
 - b. Order No. Home-22(TSTS) of 2020 dated 03.04.2020 [“second impugned order”] challenged in IA No. 48247/20
 - c. Order No. Home-28(TSTS) of 2020 dated 15.04.2020 [“third impugned order”] challenged in IA No. 48328/20.
 - d. Order No. Home-34 (TSTS) of 2020 dated 27.04.2020 [“fourth impugned order”] challenged in IA No. 48500/20.
2. That the contents of the captioned Writ Petition and accompanying applications as well as the Written Submissions filed by the Petitioner may be referred to and read as part and parcel of this response. The same are not being repeated here for the sake of brevity.
3. That this Hon’ble Court was pleased to hear all parties on 04.05.2020 and reserved orders on the same date. It is pertinent to note that at the end of the hearing, Respondent No. 1 expressly sought the liberty of this Hon’ble Court to file written submissions, which was declined. In spite of this express refusal, Respondent No. 1 filed a “Note” dated 06.05.2020 placing additional facts on record, two days after the hearing.

PRELIMINARY OBJECTIONS/SUBMISSIONS

4. The Petitioner vehemently objects to the filing of the Note for the following reasons:
 - a. First, this Hon’ble Court had orally refused the Respondent liberty to file additional materials. Therefore, it is humbly

submitted that the filing of this note, despite denial of permission by the Court, is improper.

- b.** Second, the note is unaccompanied by an application to file additional materials explaining reasons why material relating to facts that took place before the hearing on 04.05.2020 could not have been placed on record earlier. The inclusion of materials in this manner without them being contested and questioned in a hearing goes against the principle of natural justice.
 - c.** Third, the note is not accompanied by an affidavit. The purpose of an affidavit is to attest to the truthfulness of facts. In the absence of an affidavit to this effect, the facts of the Respondent cannot be taken on record. Further, it is also not clear who the author of the note is.
5. Without prejudice to the Petitioner's aforesaid submissions, since the Respondent has chosen to file the note, the Petitioner is constrained to file a short reply and seeks the leave of the Hon'ble Court to do so.
6. At the outset, it is submitted that Respondent's Note fails to address the following vital points, that were covered by the Petitioner in its written submissions and were raised again during oral arguments:
 - a.** The denial of the right to health under Article 21 of the people of Jammu and Kashmir, which is effectively being denied on account of the lockdown, due to the inability of the citizens to consult doctors for COVID-related and other medical ailments (including mental health problems) and/or get prescriptions through video-conferencing and telemedicine etc.
 - b.** The denial of the right to health under Article 21 because of the inability of doctors to download vital medical information, which is constantly evolving during the COVID-19 pandemic.
 - c.** The inability of children to access online education classes, which violates the right to education under Article 21A read with Article 14.
 - d.** The inability of students to access information and educational videos from the internet.

- e. The denial of the ability of the citizens of Jammu & Kashmir to work from home, which has repeatedly been emphasized by the Prime Minister in order to effectuate social distancing and reduce the impact of the virus.
- f. The impact of the impugned orders on the right to an occupation/profession and the right to livelihood under Article 19(1)(g) and Article 21, as the internet is needed to work from home to carry out any kind of economic activity or business during a lockdown. (The Hon'ble Prime Minister in his speech dated 19.03.2020 encouraged people to work from home).
- g. The inability of citizens to download the Aarogya Setu App, if they so desire. (In his most recent speech on 14.04.2020, the Hon'ble Prime Minister encouraged the public to download the Aarogya Setu Mobile App to help prevent the spread of the virus and to inspire others to download the app as well.)
- h. The inability of journalists to access information and videos in real time, which is a violation of Article 19(1)(a) of the Constitution.
- i. The inability of the citizens of Jammu & Kashmir to connect with their friends and family through video calls and access all forms of information and recreation (unlike the rest of the country), which is very important during a pandemic and has even been emphasized by the Hon'ble Prime Minister in his speech dated 29.03.2020. (@pg.24 of I.A. No. 48247/2020)
- j. Deprivation of the citizens of Jammu & Kashmir in contrast with the rest of India to whom all these facilities have been made available to mitigate the impact of the lockdown

PARA WISE REPLY

7. Without prejudice to the above, a para wise reply to the Note of the Respondent is as follows.
8. That the contents of para 1 are a matter of record and do not require a reply.
9. That the contents of para 2 are a matter of record and do not require a reply except to reiterate that this Hon'ble Court had

declined to grant liberty to Respondent No. 1 to file additional material. It is further reiterated that the “Note” pertains predominantly to facts that took place before the hearing on 04.05.2020. The Respondent has not filed an application explaining why this “Note” was not filed earlier. As such, for the reasons elaborated earlier and in this paragraph, it is submitted that the “Note” filed by Respondent No. 1 should not be taken on record.

10. That the contents of para 3 are denied as the facts sought to be brought on record do not establish that a restriction of the internet speed to 2G is suitable, necessary, or proportionate in light of the COVID-19 Pandemic. It is respectfully reiterated that the burden of establishing that the State’s legitimate interests in security are served, in a proportionate manner, by the restriction of internet speeds to 2G, lies upon the Respondent. In this context, para 3 only contains a bald assertion that “the medium of internet” is being used by forces across the border for (a) infiltration, and (b) indoctrination/incitement. In view of the fact that the persons responsible for such activities are evidently able to communicate with one another using 2G speeds, including the use of videos, para 3 shows no justification for the continued denial of 4G internet to the people of Jammu and Kashmir, in order to enable *them* to exercise their fundamental rights guaranteed under the Constitution.
11. In re *para 4*:
 - a. The Petitioner joins the Respondent in condemning all acts of terrorism and supports the State in its fight against terrorism. However, it is respectfully submitted that the facts brought on record by the Respondent in fact support the Petitioner’s

contention that the present restriction of the internet speed to 2G is not suitable to the Respondent Government's aim of preventing attacks by terrorists. All the incidents referred to by the Respondent have all taken place while the internet speed was restricted to 2G, and in fact incidents also took place when there were restrictions on tele-communication.

- b.** It is submitted that Annexure R-1 cannot be taken on record since it does not make clear what the document is and who the issuing authority is and whether the authority is the authority competent to comment on the contents of the document.
- c.** Similarly, as submitted by the Petitioner in their rejoinder and Written Submissions, apart from the fact that militancy was highest in the region prior to the introduction of high speed internet, even when incidents of terrorism in the post 3G/4G era were higher than the figures mentioned in the para under reply, Respondent No. 1 did not restrict internet services to 2G for such an extended and unprecedented duration of time.
- d.** In any case, the mere outlining of terror threats in and of itself without the Respondent explaining the suitability of restricting the internet to 2G speed to prevent such attacks. It would also imply that the internet at 3G or 4G speed can never be restored in the region until the threat of terrorism is neutralized. Indeed, this consequence goes against the Telecom Suspension Rules, 2017 as well as the spirit of this Hon'ble Court's judgment in ***Anuradha Bhasin v Union of India, (2020) SCC Online SC 25 (@pg 134-135 of the Petition)*** which envisages that restrictions on the internet are not indefinite but temporary and in response to urgent or emergency situations and restricted in their territorial scope. Therefore, any spike in

terrorist activities must be met with internet suspension orders tailored in their territorial scope and time duration. The Petitioner has already brought on record such tailored orders passed by the Respondent in respect of Kulgam district recently (**@pg 53-54, IA No. 48328/2020**). It is vehemently submitted that a blanket restriction of speed of internet across the entire territory cannot pass the test of constitutionality under Article 19 and Article 21.

- e. In this context, it is respectfully reiterated that a non-tailored, non-temporal blanket restriction of internet speed across the entire territory, where an overwhelming percentage of citizens have nothing to do with terrorists or terrorism, effectively treats these citizens as a form of “collateral damage” by compelling them to forego their fundamental rights (in the midst of a lockdown and a global pandemic) because of terrorist actions that they are neither responsible for, nor sympathise with. For this reason, citing *specific* terrorist incidents in order to justify *blanket* restrictions upon the internet (both temporally and geographically) is *per se* disproportionate, and is equivalent to denying access to a basic public utility (such as, for example, electricity or water) on the logic that the said utility is also used by terrorists.
12. In re para 5:
- a. The Petitioner strongly objects to annexure R-2 in so far as it is not clear what kind of document it is and which authority has issued such a document as well as the date of a document. In

the absence of such information, such a document cannot be taken on record.

- b.** In any case, the Respondent has merely made assertions about the increase in propaganda without any evidence to support their claim.
- c.** Without prejudice to the above, it is submitted that the issue in this case is whether the presence of propaganda material on the internet merits a *blanket* restriction of internet speed to 2G across the region. The answer lies in a comparative assessment of the uses of the internet, an otherwise agnostic medium. While propaganda may be spread on the internet, the internet is an equally important medium to swiftly check propaganda and misinformation among impressionable youth. Blocking access to the internet, therefore, stifles the government's own ability to win the struggle against terrorism by countering propaganda in an equally speedy and efficacious manner. Further, 3G/4G speed internet is necessary for all kinds of activities and has become indispensable for education, research, tele-medicine and for the purpose of work from home during the COVID pandemic. Finally, research by experts in the field cited by the Petitioner shows that internet shutdowns have a counterproductive impact of creating resentment and rendering non-violent demonstrations violent (@pg 27-33, IA No. 48328/20; @para 81, written submissions of the Petitioner). On the other hand, experts cited by the Respondents themselves have not advocated blanket restrictions on the internet or internet speed as a response to tackle propaganda.

- d. It is submitted that any restrictions on the internet cannot be made only keeping in mind the minuscule minority population of militants or persons who are likely to be influenced by propaganda but must also address the needs of the large civilian population that require the internet, as a public utility, for the purposes of their livelihood, education and health – all of which are vital fundamental rights guaranteed by the Constitution.
 - e. Accordingly, the Respondent ought to have justified why the less restrictive alternatives pointed out by the Petitioners including targeted blocking of website/applications where propaganda/recruitment websites are uploaded – including blocking the handles or IP addresses that are used for spreading the said propaganda – and the use of swift take down orders of content that incites violence along with prosecution of such persons, the ban on 3G/4G internet on unverified SIM Cards could not have been resorted to. It is pertinent to note that the expert cited by the Respondent, Prof. Gregory S. McNeal, has himself advocated targeted blocking of websites, and has not made any recommendations regarding an internet shut down or a restriction in internet speeds.
13. In re *para 6*: the Petitioner objects to the facts sought to be brought through Annexure R-3. First, the Respondent has only annexed the first page of an online news report which does not mention or elaborate the facts mentioned by the Respondent in para 6. Further, the State, unlike Petitioners in writs, is the custodian of facts that it seeks to plead. Therefore, the reliance of the State on a secondary source is improper. In any case, as submitted by the

Petitioner in paragraph 11 and 12, merely by mentioning the ills that the internet can be used for does not absolve the State of justifying why the restriction is the least restrictive alternative and is proportionate in light of the indispensability of the internet for the civilian population in Kashmir. It is noted, in addition, that the averments in paragraph 6 are generic in nature: information warfare, conducted over the internet, is a condition of the modern world, carried out by nation-States across the globe. There is no evidence to demonstrate that restricting access to the internet for millions of people is a suitable or an effective way of countering information warfare. Indeed, as the Petitioner has shown, the available evidence points the other way.

14. In re para 7 - it is reiterated that the Hon'ble Court had orally refused the Respondent liberty to file additional materials and therefore the filing of this note is improper. Further, the note is not accompanied by an application for filing additional documents to explain why these documents could not have been filed before the hearing. In the same vein, the Respondent cannot plead additional facts in the absence of an affidavit.
15. In conclusion it is submitted that the 'additional facts' sought to be brought on record by the Respondent do not aid the Respondent in satisfying the issues in the case:
 - a. The impugned orders do not have the sanction of law inasmuch as they are ultra vires Rules 2(2), 2(5), and 2(6) of the Telecom Suspension Rules.

b. Proportionality:

- (i) *First*, there exists no rational nexus between the restriction of internet to 2G speed and security of the State and public order
- (ii) *Second*, there exist less restrictive alternatives other than a blanket restriction on internet speed for the entire UT population to tackle propaganda and recruitment over the internet (targeted blocking and take down orders) as well as use of the internet by terrorists (ban on use of unverified pre-paid SIMs, surveillance and tracking as per law). The State has failed to justify why the same cannot be resorted to.
- (iii) *Third*, the Respondent in their counter affidavit and during oral arguments have incorrectly and inconsistently contended that civilians can access video applications, chatbots webpages for the purposes of research, education/instruction, telemedicine, information on 2G speed. Therefore, the Respondent's assessment at the fourth stage of the proportionality test that the restriction on the speed of internet does not have an adverse impact on the rights of civilians in Kashmir is incorrect. It is submitted that 3G/4G speed internet is indispensable especially during the pandemic and lockdown and therefore, the restrictions have a deleterious impact on the rights under Article 19, 21 and 21A of people of Jammu and Kashmir and are evidently disproportionate.

16. It is thus humbly submitted that in light of the above, the prayers of the Writ Petition may be allowed.

Filed by:

Sfarasat

Place: New Delhi
Date: 07.05.2020

Shadan Farasat
Advocate for the Petitioner

IN THE SUPREME COURT OF INDIA

CIVIL ORIGINAL JURISDICTION

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AND IN THE MATTER OF:

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AFFIDAVIT

I, Paranjoy Guha Thakurta S/o Late Pranab Guha Thakurta, aged about 64 years, the authorised representative of Foundation For Media Professionals, having its registered office at A-101, Shatabdi Rail Vihar, Sector-62, Noida-201301, presently at Gurgaon do hereby state on solemn affirmation as under:

1. That I am the Authorised Representative of the Petitioner in the above-mentioned Petition and as such I am conversant with the facts and circumstance of the present case.
2. That the contents of the accompanying reply are true and correct to the best of my knowledge and belief, information derived from the record of the case and the

legal submissions made therein are as per the advice of the counsel and are believed to be true and correct.

3. That the **Annexures** are true copies of the respective Originals.
4. The averments of facts stated herein above are true to the best of my knowledge and belief and no part of it is false and no material has been concealed thereof.



DEPONENT

Verification:

Verified at Gurgaon on this 07/05/2020 that the contents of my above affidavit are true and correct and no part of has been concealed thereof.



DEPONENT