

# **Covid-19: Bridging the Digital Divide in Education**



This is an independent report prepared by the Centre for Human Rights.

### **About the Centre for Human Rights**

The Centre for Human Rights, housed in Universal College Lahore, is a legal research institute that actively researches on issues of human rights, and works on legal policy, due process, rule of law, equality, non-discrimination, and criminal justice reforms in Pakistan. The Centre aims to provide legal analysis which are rights-based, human centric and aimed at enhancing the constitutional freedoms of equality and non-discrimination.

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## Executive Summary

Global pandemics are not a new phenomenon, neither are lockdowns and social distancing measures to combat public health emergencies unprecedented in the history of the world. However, the tripartite factors of (i) a global pandemic, (ii) prolonged lockdowns of physical premises and facilities, and (iii) the state of modern advances in technology, together present a hitherto unexplored and unique question. Specifically, what do pandemic-induced lockdowns entail for the state of the right to education, both nationally and globally? Evidently, the spread of the Covid-19 pandemic was accompanied by a rapid proliferation of virtual platforms for education. At the same time, ed tech companies rose to the crisis and made several, free-of-cost educational content available for students, teachers and schools on the internet.

Seemingly, this might appear as a tech-based education revolution which seamlessly converted physical classrooms to virtual ones. However, virtual learning has proven to be a tool of division, discrimination and heightened inequality amongst learners. Theoretically, virtual learning platforms exist for all to access and benefit from. However, practically, the mere existence of this option is insufficient to ensure that all learners are able to access them. Virtual learning is wholly contingent on access to the internet and an internet-enabled medium of access in the first place. Thus, during Covid-19 school closures, only those learners, teachers and educational institutions with access to the internet were able to reap the benefits of alternative virtual modes of learning. In Pakistan, many public schools and low-cost private school students suffered from a lack of access to the internet. During this pandemic, this directly resulted in them losing out on educational instruction. As a result, virtual learning in Pakistan and other countries resulted in a manifestly bipartite system of education where only those learners who had access to the internet and its enabling infrastructure were able to access their fundamental human right to education. The general digital divide in Pakistan, as well as the specific digital divide in education, predates the Covid-19 pandemic. However, this pandemic has acted as a catalyst which has significantly worsened the pre-existing problem of inequality in access to education. It has also made the inequality much more prominent, significant and adversely consequential. With the Covid-19 pandemic, the intensity, gravity and impact of the effects of this pre-existing digital divide in education have been extremely adverse, such that this violation of fundamental rights is made more urgent and extreme now more than ever.

This report aims to provide a normative framework to resolve this acute, foundational problem of lack of access to the internet for education. Using the key pillars of sustainability and foresight as guideposts, this report lays down a three-pronged structure to enable the recognition, realisation and entrenchment of a right to internet access for education. This report moves from laying down evidence of the gravity and intensity of the inequality in access to internet for learners in Pakistan during Covid-19, towards presenting a normative argument in favour of recognizing a right to internet access as an auxiliary right of education in the international human rights law machinery. The latter half of the report then explores the means and methods of domestic entrenchment of a right to internet access, and underlines the importance of combining a top-down international recognition of the right with a bottom-up domestic entrenchment framework to enable the optimum realisation of the right.

## Methodology

This report is broadly divided into three parts, and the research methodology for each is detailed separately below:

1. Part I documents the problem of the digital divide in education augmented by Covid-19 school closures in Pakistan. The data regarding the digital divide and access to remote learning synthesized in this Part is collected from various governmental and non-governmental, domestic and international, sources. The chronology of school closures in Pakistan, as nationally announced by the National Command and Operation Centre (NCOC) has been developed from a desk review of Pakistan's leading daily newspapers (*Dawn News, The Express Tribune*).
2. Part II uses the evidence presented in Part I to foreground and legitimize a normative argument in favour of recognizing a right to internet access as an auxiliary right of education in the existing corpus of international human rights law. This Part, thus, presents a preliminary framework advocating for the recognition of such a right. It delves into the prospective status of such a right in international human rights law, delineates its contours and highlights the important challenges towards recognition and enforcement of the same, thus providing multifarious stimuli for future research into this normative argument as well as guidelines for targeted advocacy efforts. To that end, this Part relies heavily on a literature review of arguments made in scholarly literature in international human rights law, but contextualises and adapts those pre-existing arguments to the current problem documented in Part I. Therefore, while some arguments made in the past have become redundant considering the ongoing crisis, others are flexible enough to extrapolate to the education crisis exacerbated by the Covid-19 pandemic. The argument advanced in Part II is limited to the purpose of making a hitherto absent preliminary contribution to advocate in favour of this right and delineate its starting points and contours. This argument is not intended to present a theoretical or abstract proposal for such a right, and neither will ways of recognition in the international human rights machinery be discussed. It is understood at the outset that the question of recognition of a new facet of an existing right is dependent on several extraneous factors, ranging from political will to international consensus, lobbying efforts and/or political pressure, amongst others. The argument presented in this

report is meant to trigger the broader debate in the international human rights framework because it is grounded on the premise that the law must be developed and adapted to cater to the inequalities exacerbated by Covid-19.

- Part III of this report identifies and analyses domestic means of entrenchment of a right to internet access, both independently and interlinked to existing human rights. Four methods of domestic entrenchment are analysed: constitutionalisation, legislative protection, judicial pronouncement, and incorporation into public policy frameworks. This Part engages in a comparative analysis of countries across the world which have incorporated such a right through each of the four means identified above. Each country selected for analysis has been chosen based on how clearly it has entrenched such a right within its domestic system. In addition, there are only a select number of countries which have formally entrenched the right, thus automatically limiting and determining the geographic spread of our research. This Part also analyses Pakistan’s existing legal and policy framework to determine where, if at all, such a right has been incorporated and evaluates prospective entrenchment through all the four methods identified. The following table identifies the countries studied and the respective means of entrenchment:

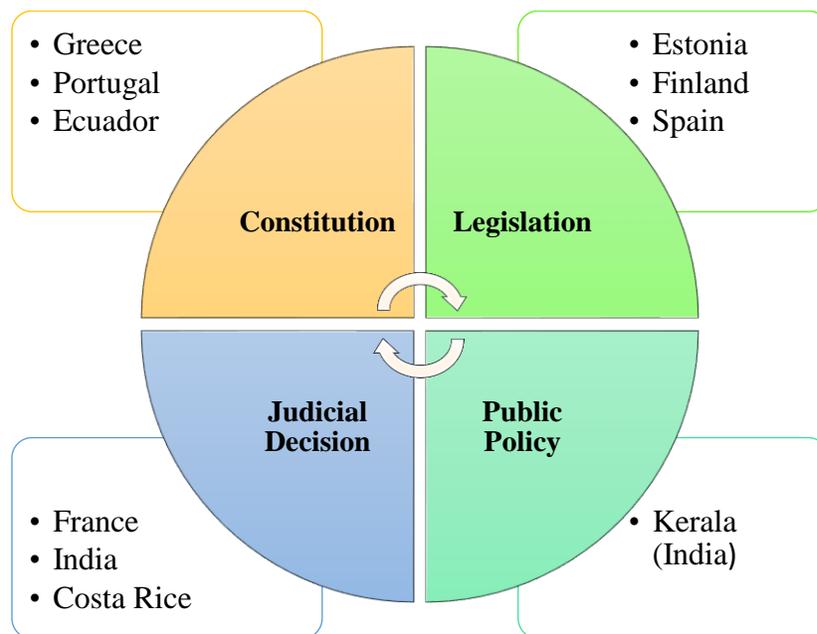


Figure 1: Methodology for Part III

**PART I**  
**UNDERSTANDING**  
**THE PROBLEM**

## Part I: Understanding the Problem

This Part of the report presents the acute problems faced by the education sector in Pakistan because of Covid-19, and especially as a direct consequence of Pakistan's stark digital divide. Evidence of Pakistan's digital divide will be used as factual basis for the normative argument advanced in Part II of this report. This Part also explores and considers the remote learning responses during Covid-19 in Pakistan, both on federal and provincial levels, to gauge the adequacy of these alternative methods of learning during the pandemic.

### 1.1: Covid-Induced Lockdowns and School Closures

The Covid-19 pandemic continues to produce reverberating effects in all walks of public and private lives. Healthcare systems across the world have been under constant threat and pressure. Unemployment has soared and economies across the world continue to crumble. In addition, this pandemic has also continued to [exacerbate](#) existing human rights violations, economic and social inequalities and discrimination.

Cognizant of these multifarious facets of Covid-induced and Covid-aggravated global crises, this report specifically focuses on the impact of lockdowns during this pandemic on the essence of the right to education. Lockdowns have been [imposed](#) and re-imposed in various parts of the world since March 2020. These lockdowns have affected [businesses](#), [places of employment](#) and [recreation](#), as well as means of domestic and international [transport](#). These lockdowns have also meant the [physical shutdowns of educational institutions](#) at all levels. Across the world, classes moved online at the beginning of the year 2020. However, virtual learning, where available, meant *a transition* in the mode of educational instruction and not a complete halt to any sort of instruction at all.

Virtual learning is wholly contingent on access to the Internet in the first place. Where there is no such access, there has been a long pause in educational instruction. Many countries, especially from the Global South, struggle in their ability to provide Internet access to all areas of the country, whether urban or rural. Therefore, while virtual learning presents numerous opportunities in the

education sector in times of global emergencies, these are laden with discrimination between the haves and have-nots of access to the internet and digital technologies.<sup>2</sup>

In Pakistan, the first case of Covid-19 was reported in Karachi in late February 2020. Since then, the pandemic has broadly been divided into four waves. The first wave started in March 2020, peaked in June 2020 and accounted for the highest death toll. The second wave began in early November 2020 and continued till January 2021. The third wave persisted between March 2021 and May 2021, with the fourth wave beginning in July 2021 and largely abating by September 2021.<sup>3</sup> During these four waves, the NCOC has been coordinating and syngerising the national response towards Covid-19, including decisions on closures of physical premises and facilities.<sup>4</sup>

The first phase of closure of educational institutions spanned a total of seven months, beginning in March 2020 till September 2020. The second phase began only two months later, in November 2020, with a shutdown for approximately two months. Furthermore, the third phase began in the second week of March 2021 and the closures remained in place till September 2021. Educational institutions across the country have been shut down for approximately 17 out of the last 21 months (inclusive of summer and winter vacations). The chart below illustrates the chronology of closures of educational institutions, as mandated by the central NCOC body.

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<sup>2</sup> Berkman Klein Centre for Internet & Society at Harvard and Global Network of Internet and Society Research Centres, 'Digital Ethics in Times of Crises: Covid-19 and Access to Education and Learning Spaces' (2021) <<https://cyber.harvard.edu/publication/digital-ethics-times-crisis-covid-19-and-access-education-and-learning-spaces>>.

<sup>3</sup> For details on Pakistan's legal responses to the Covid-19 pandemic during these four waves, *see generally*, I Bin Haris, F Mehmood, S Aftab, H Ahmad, M Naveed, 'Pakistan: Legal Response to Covid-19', in Jeff King and Octávio LM Ferraz et al (eds), *The Oxford Compendium of National Legal Responses to Covid-19* (OUP 2021). doi: 10.1093/law-occ19/e25.013.25

<sup>4</sup> The chronology and timelines reflect the date of compilation of this report (September 2021). Current statistics and updates can be found at <https://ncoc.gov.pk/>.



Figure 2: Chronology of Closures of Educational Institutions due to Covid-19

Key:

- Closures of physical premises of educational institutions
- Summer and winter vacations
- Openings of physical premises of educational institutions

For the 21 months displayed in the figure above, the closures of educational institutes on account of Covid-19 represent approximately 64% of these 21 months inclusive of vacation days, and 35% exclusive of vacation days. The contention is not with the closures themselves, as they were necessarily mandated by the public health emergency and were a core component of the national effort to combat a global pandemic. However, the contention is with the adequacy and sustainability of the steps taken during these prolonged closures vis-à-vis education, both in 2020 as well as in 2021.

## 1.2. The Digital Divide in Pakistan

The term “digital divide” has been [defined](#) as the gap between different individuals and entities in terms of their access to information and communication technologies for different purposes. The global digital divide refers to the disparity in access to these technologies between developed, underdeveloped and developing countries. On national levels, this term is often used to denote the difference in access to these technologies among the various socio-economic strata within a country on the basis of gender<sup>5</sup>, income, class, geographic location and literacy, among other factors.

According to the Inclusive Internet Index 2020, Pakistan was [ranked](#) 76<sup>th</sup> out of 100 surveyed countries, ranking at 24 out of the 26 South-Asian countries surveyed. This overall index score is based on individual scores across four different indicators of inclusive access to the internet, namely, availability, affordability, relevance and readiness. Pakistan ranks 86<sup>th</sup> in the “availability” category, 57<sup>th</sup> in the “affordability” category, 71<sup>st</sup> in the relevance category and 64<sup>th</sup> in the readiness category. The Index notes the prominent reasons behind this lag as the largest gender gap in mobile and internet access, low levels of digital literacy and poor network quality.

The aforementioned evidence of the digital divide is corroborated by the [findings](#) of Freedom House on Freedom of the Net 2020. Out of 25 points, this report gives Pakistan a meagre 5 points in the category of “obstacles to access”. Freedom House also reports the results of a speed-testing company Ookla which ranked Pakistan’s mobile-internet download speed at 112<sup>th</sup> out of 138 surveyed countries, and its fixed-broadband speed at 159<sup>th</sup> out of 174 surveyed countries as of July 2020. It went on to note that broadband access was particularly inhibited in rural areas because of infrastructural limitations. Moreover, it recognised the digital divide as being based on geographic location, gender and socioeconomic status. The geographic digital divide was found to be rural-urban but also extending to a disparity between the eastern and western areas of Pakistan. Parts of western Pakistan were stated to lack internet access, due to political turmoil, underdevelopment and/or difficult topography.

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<sup>5</sup> On the gender digital divide in Pakistan, see Media Matters for Democracy and Association for Progressive Communication ‘*Women Disconnected: Feminist Case Studies on the Gender Digital Divide Amidst Covid-19*’ (January 2021).

In identifying some of the reasons behind obstacles to internet access, Freedom House states that access is out of reach for most of the population, especially exacerbated due to high taxes on internet services. It was further analysed that with the rise of Covid-19 in March 2020, pre-existing disparity in access to the internet became more evident. Moreover, according to [reports](#) by the World Bank, Pakistan is the third most disconnected country in the world with 65% of its population lacking access to the internet.

These international factual findings can further be supported through domestic sources as well, both governmental and private. As of October 2021, the Pakistan Telecommunications Authority has [reported](#) that the percentage of population connected to a cellular network was 85.33%, 3G/4G penetration stood at 48.19%, and broadband penetration at 49.53%.

A survey on online education in the context of the Covid-19 pandemic was carried out by Adnan and Anwar with a sample of 126 students from the higher education institute NUST in Pakistan.<sup>6</sup> 51.6% students reported that the unavailability and weak strength of signals were the major problems behind limited internet access and 11.1% felt that internet services were too expensive. 71.4% of students felt comfortable using computers and laptops for online learning. 61.1% of students reported ease in digital communication while 11.1% faced problems in doing the same. Due to the small sample of students and the fact that this survey was only administered in one university in Pakistan, the findings of this survey suffer from lack of geographical and socio-economic diversity as well as equitable representation of student perspectives across Pakistan. Therefore, this research report does not rely on this survey as definitive and/or conclusive evidence of the problems faced by higher education students on the question of internet access for virtual education during Covid-19 lockdowns.

However, the major findings of this survey can to a large extent be authenticated against the qualitative data identified by Adnan and Anwar. For example, they quoted Wains and Mahmood who highlighted the lack of access to fast, affordable, and reliable internet connectivity especially for the rural and marginalized communities of Pakistan. Adnan and Anwar also noted how previous studies had highlighted that there is no special budget allocated to incorporate the latest technology into education systems in Pakistan. The impact of this was that once the Covid-19

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<sup>6</sup> Muhammad Adnan and Kainat Anwar, 'Online Learning amid the COVID-19 Pandemic: Students' Perspectives' (2020) 2 45.

lockdown was announced, only a bleak minority of private education institutes were able to transfer learning online seamlessly. Most educational institutes were unable to adopt the technology required to conduct a smooth online learning programme. They also note that most students do not have access to reliable internet connections and those from underdeveloped regions of the country are deprived of access itself.

In a 2017 report on the status of integration of information communication technologies in public schools in the Khyber Pakhtunwa province of Pakistan, the authors concluded that the biggest strategic barrier to such integration was the lack of sufficient funding.<sup>7</sup> Other reasons cited were the cost of the requisite hardware and software, malfunctioning power supplies and internet connections and, internet illiteracy amongst teachers.<sup>8</sup>

*Before the onset of Covid-19, the digital divide in education existed but access to virtual platforms was just one of many means of educational instruction.*

Apart from the evidence of Pakistan's digital divide, both generally and specific to education, it is now a well-documented fact that this pre-existing digital divide has widened, worsened and exacerbated with the resort to remote learning during this pandemic. Before the onset of Covid-19, the digital divide in education existed but access to virtual platforms was just one of many means of educational instruction. However, this pre-existing divide has now become the basis of an aggravated education apartheid where Covid-19 lockdowns have meant that virtual learning is the only means of education left. This is no longer a subject of contemplation or an

unmanifested possibility. Rather, the heightened problems of remote learning during Covid-19 are now established facts as will be demonstrated through different quantitative and qualitative sources below.

- A. To demonstrate this heightened divide, the World Bank surveyed the extent of existing and predicted learning losses in Pakistan because of the pandemic.<sup>9</sup> The following are the key findings of the survey:

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<sup>7</sup> Shafaq Salam, Zeng Jianqiu, Zulfiqar Hussain Pathan and Wang Lei, 'Strategic Barriers in the Effective Integration of ICT in the Public Schools of Pakistan' (Association for Computing Machinery 2017).

<sup>8</sup> *ibid* 169.

<sup>9</sup> Koen Geven and Amer Hasan, 'Learning Losses in Pakistan Due to Covid-19 School Closures: A Technical Note on Simulation Results' (The World Bank 2020).

1. Approximately 930,000 additional children are expected to drop out from primary and secondary education due to school closures. This is an increase of 4.2% from the previous number of 22 million children who had dropped out before the pandemic.
2. Even in the most optimistic scenarios imagined for reopening of schools, it was predicted that there would be an overall loss of learning for every single student enrolled.
3. Learning poverty<sup>10</sup> has increased from 75% to 79%.
4. These well-predicted learning losses will become massive economic crises in the long run, as an average student will face a decrease in yearly earnings once they enter the labour market.

Specifically on the nature and extent of remote learning opportunities, the survey found out that only 30% of the surveyed households in Punjab were aware of remote learning options. This includes even low-tech tools like radio. Out of this dismal 30%, a further bleak 10% of households used these remote learning options on virtual platforms. One of the identified reasons behind these numbers was inequality in access to the internet as well as in ownership of internet-enabled devices.<sup>11</sup>

B. The Centre for Global Development conducted a phone survey of 1,211 households across Pakistan.<sup>12</sup> Their key findings on remote learning were as follows:

1. 66% of the surveyed households did not use any technology for education.
2. Richer households<sup>13</sup> were 39% more likely to use technology for education.
3. 23% of surveyed households watched the federal government's Teleschool programme.

C. According to a Gallup National Opinion Poll on Support and Opposition for Remote Learning, out of 2.4 million students in higher education, 80% reported problems in

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<sup>10</sup> Learning poverty is a reference to the proportion of children who do not read or understand a simple text by the age of 10 years.

<sup>11</sup> Amer Hasan (n 9) 7.

<sup>12</sup> Maryam Akmal and others, 'Covid-19 in Pakistan: A Phone Survey to Assess Education, Economic and Health-Related Outcomes' (Centre for Global Development 2020).

<sup>13</sup> This is a reference to those households making more than PKR 20,000 per week.

internet connectivity during online classes and 82% reported dismal quality of internet connections at their homes.<sup>14</sup>

- D. A global report on digital education by the Oxford University Press reported that by February 2021, 36% of schools surveyed globally had digital learning platforms in place, but that Pakistan followed a similar trajectory only for its private schools.<sup>15</sup>
- E. According to another Covid-19 impact assessment, it was reported that 63% of 1,188 surveyed parents of school-going children reported that they would not send their daughters back to school.<sup>16</sup> The report concluded that 60% of the 13 million children who did not return to school in September 2020 were girls, thereby highlighting how there is an increased ratio of female student drop-outs attributed to Covid-19 lockdowns which is emblematic of the gendered aspect to the digital divide in education.

From a perusal of the above quantitative and qualitative data, it is clear that Pakistan suffers from a marked digital divide. This broader digital divide in Pakistan has translated itself into a specific digital divide for learners in the country, where only a limited proportion of learners have access to the internet, can afford its costs and benefit from availability of wireless broadband connections. This has resulted in a highly discriminatory, unequal, regressive and bipartite state of education during Covid-19, in particular.

### 1.3. Remote Learning in Pakistan during Covid-19

The brunt of the adverse impacts of Covid-lockdowns on education was felt by students from low-income and/or rural households which lacked access to the internet and by those educational institutes belonging to either the public sector or low-cost private sector. This subsection, thus, highlights the non-internet based alternative modes of learning introduced at the state level in Pakistan.

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<sup>14</sup> Gallup Pakistan, 'National Opinion Poll on Support and Opposition for Remote (Online) Education' (2020).

<sup>15</sup> Oxford University Press, 'Education: The Journey Towards a Digital Revolution' (2021).

<sup>16</sup> 'More Girls Drop out and Schools Close Due to Covid-19 in Pakistan' (*Opportunity International Edufinance*) <<https://edufinance.org/latest/blog/2020/more-girls-dropout-and-school-close-due-to-covid-19-key-insights-from-covid-19-study-pakistan>> accessed 14 September 2021.

The category of students, their institutes and teachers falling on the wrong side of the digital divide

*The E-Taleem programme cannot be equated to virtual learning in the long-term primarily because this programme provides a passive and unilateral form of information sharing.*

were the primary subjects of the Federal Education Ministry's "[E-Taleem](#)" programme which was launched in the wake of the pandemic. The E-Taleem programme introduced a "Teleschool" as well as a "Radio school" which began the television broadcasting of pre-recorded lessons for Grades 1-12 from 8 am – 6 pm every day. While this television and radio programme was a laudable step taken to cater to an unprecedented, emergency plagued with uncertainties, the underlying rationale behind this report is to go beyond those short-term reactive measures. As an emergency short-term measure, this might have been adequate. However, educational instruction must be interactive, not passive. These unilateral, passive forms of information-sharing through television and radio are incomparable to

interactive, two-way virtual learning in the long-term. The former are no more than interim, transitory measures which should be directed towards the goal of ensuring virtual learning for all. The E-Taleem programme cannot be equated to virtual learning in the long-term primarily because this programme provides a passive and unilateral form of information sharing. In contrast, virtual learning and proper e-platforms provide interactive, two-way learning where a typical in-class instruction can be duplicated onto the virtual realm, with teachers directly engaging with their students, responding to queries, asking questions, etc.

In addition, the E-Taleem initiative also introduced digital platforms for learning in collaboration with ed tech enterprises. However, the initiative stopped at the point of releasing these platforms for all learners across Pakistan to access. The question of who was actually able to access and benefit from these is wholly contingent upon the extent of internet penetration in the country. As highlighted in the previous subsection, the digital divide in Pakistan is uncontroversial. Therefore, the mere existence of digital learning tools and platforms is insufficient to curb learning losses during a pandemic if it is not accompanied by a targeted effort to ensure access to the internet for learners in the first place. It is only if access to the internet and an internet-enabled device is present that these digital learning platforms can benefit their targeted audience, i.e., those learners who have not been going to physical classrooms because of the pandemic and their educational institutes have not been able to continue educational instruction through dedicated virtual learning

platforms. On the other hand, elite private schools were able to optimally benefit from ed tech learning options and made virtual learning possible for their students throughout the course of the pandemic.<sup>17</sup> Beyond access to virtual platforms, some elite private schools in the country additionally introduced high tech learning through [artificial intelligence powered educational materials](#), thus they were not just able to conduct virtual learning but also employ emerging technologies to enhance and optimize the virtual learning experience for their students. Therefore, the state of learning during the Covid-19 pandemic has been such that there is a marked, exacerbated divide amongst learners and the nature and extent of educational instruction received is based on their access to the internet and related technologies. This is the factual premise upon which this report bases the normative argument advanced in the next Part.

To conclude, Part I of this report highlights the extent of closures of educational institutions in Pakistan due to Covid-19 lockdowns, lays down evidence of the general and specific digital divide in education in Pakistan and presents a preliminary analysis of remote learning options made available during the pandemic.

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<sup>17</sup> See for example ‘Pakistan Private School Network Powers Online Learning with Microsoft Teams’ (*Microsoft Customers Stories*) <<https://customers.microsoft.com/EN-GB/story/1386028995135632568-the-city-school-network-education-microsoft365-en-pakistan>> accessed 13 November 2021.

**PART II**

**A RIGHT TO  
INTERNET ACCESS  
AS AN AUXILIARY  
RIGHT OF  
EDUCATION**

## **Part II: A Normative Argument for a Right to Internet Access as an Auxiliary Right of the Right to Education**

This Part presents a tripartite analysis in favour of recognizing a right to internet access specifically as an auxiliary right of the right to education in international human rights law (IHRL). Firstly, this Part examines the place of a right to internet access in the contemporary IHRL regime. Secondly, it explores arguments for and against recognizing internet access as a standalone and an auxiliary right respectively. Thirdly, this Part also analyses the prospective content of such a right and identifies potential roadblocks in its recognition and enforcement.

In addition to the aggravated necessity of recognizing internet access as an auxiliary right of education, there are three main reasons why IHRL is the appropriate international legal plane to ensure full and proper realisation of the right to education:

1. International recognition<sup>18</sup> sets a universal benchmark.
2. Evolution of an existing right on the international front helps shapes domestic jurisprudence within sovereign states. As will be seen in Part III of this report, various judicial decisions from across the world used the United Nations Special Rapporteur's report on freedom of expression to lend weight to developing domestic jurisprudence on internet access rights.
3. Recognition on the international level has the potential to act as a catalyst in the international human rights machinery in shaping the discourse surrounding a meaningful right to education in today's world. Recognition also ensures that the international human rights machinery is not static and can evolve with changes in technology and can adapt to global health emergencies.

### **2.1: Existing International Human Rights Law Frameworks protecting Right to Internet Access**

This section will identify the nature and extent of the entrenchment of a right to internet access in international human rights law, either explicitly or impliedly. This section will highlight both

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<sup>18</sup> On the phases of recognition of a 'new human right' in public international law, and the blurred lines between these phases depending on the context and rhetoric surrounding the discourse, *see generally* Kerstin von der Decken and Nikolaus Koch, 'Recognition of New Human Rights', *The Cambridge Handbook of New Human Rights* (First, Cambridge University Press 2020).

references to a generalized right to internet access as well as any contextualized indications to internet access vis-à-vis the right to education.

### *2.1.1 General Comment No. 13 of the Committee on Economic, Social and Cultural Rights (1999)*

This [general comment](#) provides interpretative guidance on Article 13 of the Covenant on Economic, Social and Cultural Rights (ICESCR) which enshrines the right to education for everyone. According to this interpretation, the right to education has four core tiers: availability, accessibility, acceptability, and adaptability. Judging the state of education worldwide during Covid-19 lockdowns against these interpretative yardsticks, it can be seen that virtual learning during Covid-19 lockdowns directly violates most of these tiers. Firstly, availability of a “*functioning educational institution*” (including buildings, sanitation, water, teachers and other facilities like libraries) is compromised by the very fact of the lockdowns. Secondly, the General Comment interprets accessibility as non-discriminatory in nature, covering both physical accessibility (explicitly including distance learning within its scope) and economic accessibility. However, by its very nature, virtual learning during a pandemic is discriminatory and economically inaccessible for a vast number of students. It is contingent upon access to and availability of the Internet. Therefore, virtual learning can never fulfil the accessibility tier because accessibility to education during a pandemic will always be discriminatory unless the underlying problem of internet access is resolved. On the acceptability tier, because virtual learning is a transition from traditional modes of in-person educational instruction, there are risks associated with its acceptance as a viable alternative which are further exacerbated due to low internet literacy rates amongst developing countries, for example.<sup>19</sup>

The fourth tier of the General Comment’s interpretation is “adaptability”, according to which, “*education has to be flexible so it can adapt to the needs of changing societies and communities and respond to the needs of students within their diverse social and cultural settings*”. This tier is the key to ensuring a meaningful right to education during this pandemic. One of the recommendations in the United Nations Sustainable Development Group’s [policy report](#) was to “*expand the definition of the right to education to include connectivity...remove barriers to*

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<sup>19</sup> Kamssu, A.J., Siekpe, J.S and Ellzy, J.A. (2004) ‘Shortcomings to Globalization: Using Internet Technology and Electronic Commerce in Developing Countries’ *The Journal of Developing Areas* 38(1): 151-169.

*connectivity...*”. It recommends putting principles of “equity and inclusion” at the centre of all digital learning schemes during the pandemic. While “adaptability” implies changing modes of instruction to keep up with the times, the Covid-19 times have been wholly unprecedented in the gravity of impact they have had. They have created an impetus not just to carve out innovative solutions to ensure adaptability in the short-term but also radical overhaul of entire education systems. Therefore, “adaptability” needs to be broadly construed in light of these facts, so it is interpreted as meaning the installation of permanent solutions which solve the problem of educational disparity at its roots. “Adaptability” needs to encompass both short-term emergency solutions to pandemic-induced lockdowns as well as long-term, resilient, and sustainable measures to ensure the uncertainty attached to the duration and intensity of Covid-19 is catered to the best possible extent.

Therefore, it is only through a holistic interpretation of “adaptability” that access to the internet can be said to be a core constituent of the right to education in the ICESCR. Neither the text of Article 13 nor this general comment incorporates any explicit reference to the internet as a prerequisite for the right to education. However, this interpretative guidance is one of the two authoritative indications in the corpus of international human rights law which posits a potential right of internet access in the context of the right to education.

### *2.1.2 United Nations Convention on the Rights of the Child<sup>20</sup>*

The United Nations Convention on the Rights of the Child (CRC) is a child-rights specific treaty signed in 1989, and coming into force in 1990. It is one of the most widely-ratified international treaties, with around 194 countries having ratified it, including Pakistan in 1990. The four [core principles](#) of the CRC are: non-discrimination, best interests of the child, the right to survival and development, and the views of the child.

The CRC contains no explicit reference to a right to internet access for children. However, there are two particular provisions in the CRC which can be read to encompass such a right, albeit impliedly.

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<sup>20</sup> UN General Assembly, *Convention on the Rights of the Child*, 20 November 1989, United Nations, Treaty Series, vol. 1577, p. 3.

Firstly, Article 24 enshrines the child's right to health. Within this provision is a list of specific aims which States Parties to the CRC undertake to implement in order to optimally enforce this right. Article 24(2)(e) reads as (emphasis added): *“To ensure that all segments of society, in particular parents and children, are informed, **have access to education** and are supported in the use of basic knowledge of child health and nutrition, the advantages of breastfeeding, hygiene and environmental sanitation and the prevention of accidents.”* While this provision is specifically placed in the context of the right to health, it can reasonably be construed as an indication of the crystallization of a right to access education. Because the term “access” is broad enough to encompass different means and methods of access, it can be interpreted to include access to the internet in order to access education. However, even if this provision is afforded such a generous interpretation, it is still limited to the context of healthcare rights and does not broadly extend to either a general right to internet access or a specific right to internet access for education.

Secondly, Article 28 of the CRC deals with the right to education. In particular, the following four sub-provisions of Article 28 signify the importance of access to education and outline particular duties of States Parties in progressively realising the right to education (emphasis added):

- A. Article 28(1)(b): *“Encourage the development of different forms of secondary education, including general and vocational education, make them **available and accessible** to every child, and take appropriate measures such as the introduction of free education and offering financial assistance in case of need.”*
- B. Article 28(1)(c): *“**Make higher education accessible to all on the basis of capacity by every appropriate means.**”*
- C. Article 28(1)(d): *“Make educational and vocational information and guidance available and **accessible to all children.**”*
- D. Article 28(1)(e): *“Take **measures to encourage regular attendance** at schools and the reduction of drop-out rates.”*
- E. Article 28(3): *“States Parties shall promote and encourage international cooperation in matters relating to education, in particular with a view to contributing to the elimination of ignorance and illiteracy throughout the world and facilitating access to scientific and technical knowledge **and modern teaching methods. In this regard, particular account shall be taken of the needs of developing countries.**”*

As shown by the text in bold in the above provisions, Article 28 prioritises availability and equal accessibility in education. In addition, it also enshrines a commitment on States Parties to encourage regular attendance and inculcate modern teaching methods in education. However, as with Article 24, there is no explicit recognition of a right to access the internet specifically for education. Nevertheless, there is space for deriving such a right from this provision which is sufficiently broadly-phrased and makes clear references to accessibility, equal accessibility for all as well as adaptation of teaching methods in accordance with technological advances.

### *2.1.3 Report of the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression 2011<sup>21</sup>*

At the time this report was published, it was hailed as a United Nations declaration affirming that internet access was a human right.<sup>22</sup> However, its reception as such is misleading.<sup>23</sup> The report did not declare internet access to be a freestanding, independent human right and even if it did, it would have had no binding authority. Reports produced by UN Special Rapporteurs have only persuasive value in international human rights law.

The substance of the report itself is, however, emblematic of how strongly internet access has been and continues to be intertwined with the rights to freedom of expression and opinion. The scope of this report was clearly delineated to be within the conceptual and legal frameworks of the rights to freedom of expression and opinion.<sup>24</sup> Therefore, it is clear at the outset that the report does not intend to advocate for a separate right to internet access. The report's prime value lies in the interpretative guidance it provides for Article 19 of the International Covenant on Civil and Political Rights (ICCPR). Article 19 protects everyone's right to hold opinions and freely express

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<sup>21</sup> Frank La Rue, 'Report of the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression' (Human Rights Council, United Nations General Assembly 2011).

<sup>22</sup> Adam Clark Estes, 'The U.N. Declares Internet Access a Human Right' (*The Atlantic*, 6 June 2011) <<https://www.theatlantic.com/technology/archive/2011/06/united-nations-wikileaks-internet-human-rights/351462/>> accessed 1 January 2021; 'U.N. Report Declares Internet Access a Human Right' *Wired* <<https://www.wired.com/2011/06/internet-a-human-right/>> accessed 1 January 2021; Nicholas Jackson, 'United Nations Declares Internet Access a Basic Human Right' (*The Atlantic*, 3 June 2011) <<https://www.theatlantic.com/technology/archive/2011/06/united-nations-declares-internet-access-a-basic-human-right/239911/>> accessed 1 January 2021.

<sup>23</sup> See also: Łukasz Szoszkiewicz, 'Internet Access as a New Human Right? State of the Art on the Threshold of 2020' 50.

<sup>24</sup> Frank La Rue (n 21) para 1.

themselves.<sup>25</sup> According to the report, the reference to “*any other media of his choice*” in Article 19(2) is broad and flexible enough to encompass within its purview technological developments like the internet.<sup>26</sup> This interpretation has been widely endorsed by the scholarship on Article 19 and/or a right to internet access<sup>27</sup> as well as subsequent resolutions of the United Nations Human Rights Council<sup>28</sup>. Article 19 of the Universal Declaration on Human Rights protects the same right to freedom of expression and opinion. It uses the same language of “*through any media*”<sup>29</sup> and is therefore, considered to also fit the internet within its scope. Moreover, the protection of the right of expression and opinion in regional instruments like the European Convention on Human Rights (Article 10) and the American Convention on Human Rights (Article 13) are also commonly understood to be inclusive of the protection of internet access to achieving that substantive right.<sup>30</sup>

The Special Rapporteur has outlined that access to the internet has two dimensions.<sup>31</sup> The first imposes a type of negative obligation and guarantees access to online content without undue, unjustified and disproportionate restrictions by states.<sup>32</sup> The second, which is important for purposes of the present research, hints at a positive obligation in terms of the “*availability of the necessary infrastructure and information communication technologies, such as cables, modems, computers and software, to access the Internet in the first place*”.<sup>33</sup> This second dimension is generalized and not restricted to the specific context of the rights of freedom of opinion and expression. Therefore, this may be an indication of the crystallisation of a positive obligation, albeit progressively realizable, on states to ensure that the necessary infrastructure for accessing

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<sup>25</sup> Article 19(2) reads as: “*Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.*”

<sup>26</sup> Frank La Rue (n 21) para 21.

<sup>27</sup> Başak Çalı, ‘The Case for the Right to Meaningful Access to the Internet as a Human Right in International Law’, *The Cambridge Handbook of New Human Rights* (First, Cambridge University Press 2020); Molly Land, ‘Toward an International Law of the Internet’ (2013) 54 *Harvard International Law Journal* 393.

<sup>28</sup> Human Rights Council, ‘Promotion and Protection of All Human Rights, Civil, Political, Economic, Social and Cultural Rights, Including the Right to Development’, *Twentieth session* (2012); Human Rights Council, ‘Promotion and Protection of All Human Rights, Civil, Political, Economic, Social and Cultural Rights, Including the Right to Development’, *Thirty-second session* (2016).

<sup>29</sup> Article 19 reads as: “*Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.*”

<sup>30</sup> See for example: Qerim Qerimi, ‘Bridge over Troubled Water: An Emerging Right to Access to the Internet’ [2017] *International Review of Law* 1, 8.

<sup>31</sup> Frank La Rue (n 21) para 3.

<sup>32</sup> *ibid.*

<sup>33</sup> *ibid.*

the internet is made available for everyone. The Special Rapporteur points out that achieving universal access to the internet is not an instantly realizable goal, but states are required to “*adopt effective and concrete policies and strategies...to make the Internet widely available, accessible and affordable to all*”.<sup>34</sup>

Moreover, the report also states that the freedom of opinion and expression is not only a freestanding fundamental right but also an “enabler” of other economic, social and cultural rights.<sup>35</sup> Therefore, if the freedom of expression and opinion can be guaranteed inclusive of all the means to achieve it (i.e., internet access), the by-product would be a solidification of the implementation of other rights, including the right to education. Therefore, this report can be seen to stand as persuasive authority for asserting that the right to internet access is a core constituent of the means to achieving the rights to freedom of expression and opinion. However, by logical and practical corollary, once internet access itself is guaranteed, that access can be used to steer the progressive realization of economic, social, and cultural rights like education. Theoretically, however, the scope of the report is narrow. It is not a strong international human rights framework which advocates for or guarantees a right to internet access in the specific context of the right to education.

#### *2.1.4. The Charter of Human Rights and Principles for the Internet*<sup>36</sup>

This Charter has been drafted by the Internet Rights and Principles Dynamic Coalition which works to solidify the protection of human rights online and is based at the United Nations Internet Governance Forum. This Charter lays down the following ten rights and principles for human rights on the internet:

- i. Universality and Equality
- ii. Rights and Social Justice
- iii. Accessibility
- iv. Expression and Association
- v. Privacy and Data Protection

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<sup>34</sup> *ibid* 66.

<sup>35</sup> *ibid* 22.

<sup>36</sup> Internet Rights and Principles Coalition, ‘The Charter of Human Rights and Principles for the Internet’ (Internet Governance Forum United Nations, August 2014).

- vi. Life, Liberty and Security
- vii. Diversity
- viii. Network Equality
- ix. Standards and Regulations
- x. Governance

For the purposes of this report, the principle of “accessibility” is particularly important. The Charter recognises that this principle underpins all other rights in the Charter.<sup>37</sup> Closely intertwined with this principle of accessibility is the right to non-discrimination in internet access, use and governance which is also enshrined in the Charter.<sup>38</sup> This interdependence is a response to the digital divide and calls for active, positive measures to bridge it, especially for the disadvantaged groups in society. Moreover, according to scholarship on accessibility rights in the context of the Convention on the Rights of Persons with Disabilities (CRPD), there is an inextricable connection between the accessibility norm enshrined explicitly in the CRPD and the core aim of realising equality enshrined in the general corpus of IHRL.<sup>39</sup> While this discourse is specific to the context of the CRPD, it has, as Broderick suggests, a much wide-ranging impact on formation of new human rights.<sup>40</sup> In the context of the present report, it lends weight to the normative argument being advanced in favour of recognizing a right to access the internet as a core constituent of the right to education in order to protect the broader rights to equality and non-discrimination in IHRL.

Although technically non-binding for international actors, the Charter is a useful guidepost. It consolidates the major rights to be protected on the internet and incorporates a positive duty on states to ensure that the starting point for the protection of these rights, i.e., access to the internet in the first place, is guaranteed to the largest extent possible.

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<sup>37</sup> *ibid* 13.

<sup>38</sup> *ibid* 14.

<sup>39</sup> See generally Andrea Broderick, ‘Of Rights and Obligations: The Birth of Accessibility’ (2020) 24 *The International Journal of Human Rights* 393.

<sup>40</sup> *ibid* 407.

### *2.1.5 Relevance of Existing Frameworks for Protection of the Right to Education during a Pandemic*

The limiting factor for the existing IHRL frameworks highlighted above and the current literature on the right to internet access is their somewhat exclusive focus on the right to internet access primarily in connection with the right to freedom of expression and in some cases, with the right to assembly and connection as well. Therefore, the stimulus for suggesting a right to internet in

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majority of the scholarship is premised on promoting and ensuring the freedom of speech and expression.<sup>41</sup> Education features as a subsidiary right or an unintended by-product, at most. This may be because the complete inaccessibility of the physical buildings of educational institutions for uncertain, prolonged periods of time was never fathomed to be a possibility before Covid-19. This is an existing gap in the research on this topic which this report seeks to fill. The Covid-19 lockdowns have created a unique impetus for exploring and understanding the viability of an auxiliary right to internet access as derived specifically from the right to education. Therefore, the following section is devoted to analysing the relative viability of such an auxiliary right in comparison with a new independent right to internet access.

### **2.2. Separate Righthood versus Auxiliary Righthood**

The preceding section has demonstrated that in the existing corpus of international human rights law, there is neither a binding entrenchment of internet access as a separate human right, nor has it been definitively made a core constituent of the existing right to education. Considering this gap, this section will focus on how such a recognition can normatively occur. The theoretical strengths

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<sup>41</sup> Stephen Tully, 'A Human Right to Access the Internet? Problems and Prospects' (2014) 14 Human Rights Law Review 175; Łukasz Szoszkiewicz (n 23); Qerim Qerimi (n 30); Molly Land (n 27).

and practical feasibilities of separate righthood for internet access as well as auxiliary righthood in the context of the right to education will be analysed.

Separate righthood for internet access refers to the proposition that the importance, value and role of the internet are such that they call for the international recognition of a new, independent, freestanding right to the internet. On the other hand, auxiliary righthood<sup>42</sup> posits internet access not as a standalone right but rather, as an attached right of an already existing human right. It has been defined as a secondary human right which has all the protections and restrictions of the primary right it is attached to.<sup>43</sup> For example, the Frank La Rue report discussed in the preceding section postulates internet access as a derived right of the right to freedom of expression and opinion.<sup>44</sup> Being an auxiliary right also means it can be derogated from on the same grounds as are permitted for the primary right of freedom of expression and opinion. This report examines the scope of claiming auxiliary righthood of internet access for the right to education. While the advantages and disadvantages of granting separate righthood to internet access have been the subject of extensive scholarly debate, its potential as an auxiliary right for education has been barely examined, if at all.

### *2.2.1. Internet Access as a Separate Human Right*

This subsection will analyse commonly propounded arguments for and against recognizing internet access as a new, independent right.

The theoretical justification for proposing a new right to internet access often highlights gaps in protection under existing human rights and uses these gaps to assert a call for adequate human rights-based protection which corresponds to modern technological developments.<sup>45</sup> Therefore, advocates of separate righthood argue that because the internet is a vital part of modern life, it demands protection and recognition as a human right. If left unprotected, supporters argue it would perpetuate and deepen existing inequalities and disparities.<sup>46</sup> On a procedural note, critics have

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<sup>42</sup> Auxiliary righthood has also been referred to interchangeably as “*derived righthood*” or “*implied righthood*” in this report.

<sup>43</sup> Ryan Shandler and Daphna Canetti, ‘A Reality of Vulnerability and Dependence: Internet Access as a Human Right’ (2019) 52 Israel Law Review 77, 94.

<sup>44</sup> Frank La Rue (n 21).

<sup>45</sup> See for example Başak Çalı (n 27) 278.

<sup>46</sup> *ibid* 280.

pointed out that even if such a momentum for recognition were to be accepted, the actual recognition and operationalisation of a new human right requires a significant amount of time, international consensus and resources.<sup>47</sup> On the substantive aspect of a new, separate right, it has been pointed out that deriving a stand-alone right also requires a clear demonstration of the right's universal importance, relevance and feasibility.<sup>48</sup>

One commonly advanced argument against the recognition of a right to internet access is that it would impose heavy positive obligations upon governments.<sup>49</sup> However, such arguments have been readily and easily rebutted by reference to the less onerous duty of progressive realization of positive rights, as opposed to the stricter obligation of immediate enforceability of negative rights. Positive rights require active governmental steps to be taken towards their realization. However, progressive realization entails implementation of a right in accordance with the resources available to a country. It also recognises that the nature and extent of enforcement of positive rights depends on a multitude of culturally variable factors. If the argument that internet access should not be recognised as a human right because it imposes a significant burden on a state to provide internet access is accepted, it would mean that existing positive human rights like healthcare and education should also be trivialized and unrecognized. One defender of a right to internet access specifically analogises the response to this criticism by stating that the right to healthcare relies upon the presence of doctors, hospitals, staff and supplies as well.<sup>50</sup> However, where the presence of such facilities and professionals is limited, it is said that the rate of progressive realization of the right to healthcare is slow and/or requires more active governmental steps. The absence of indicators to prove adequate protection of the right to healthcare does not automatically entail a redundancy or futility of the right itself. In fact, it shows the flexible nature of implementation of the right, i.e., progressive realization.

Moreover, adding to the above criticism, others have argued that imposing a duty on governments to provide their citizens with access to the internet may constitute a “*disproportionate redirection of already scarce resources*”.<sup>51</sup> Covid-19 and its devastating aftershocks are sufficient incentive to counter this argument of disproportionality. Covid-19 has already caused recessions in global

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<sup>47</sup> Łukasz Szoszkiewicz (n 23) 49.

<sup>48</sup> Başak Çalı (n 27) 278.

<sup>49</sup> *ibid* 282; Ryan Shandler and Daphna Canetti (n 43) 97.

<sup>50</sup> Ryan Shandler and Daphna Canetti (n 43) 96.

<sup>51</sup> Başak Çalı (n 27) 281.

economies, with ever-increasing proportions of national budgets being spent on health care and vaccination efforts. However, it is also true that there has been an international realization of the importance of the internet for education, information, connectivity and even health care.<sup>52</sup> Therefore, spending on the provision of internet access would not be an unnecessary and escapable “redirection” of resources as much as it would be a sustainable investment of a state’s resources for a robust educational recovery from a pandemic. Without adequate interventions by governments to realize the right to education during Covid-19, the learning losses sustained over the past sixteen months are likely to culminate into national education emergencies.<sup>53</sup> Therefore, deployment of resources, infrastructure, policies and investment at this time to address existing learning losses and prevent future ones is fiscally more sustainable and proportionate than attempting to address and counter a wide-scale, national education emergency in the imminent future.

Critics of a possible right to internet access sometimes also point out to the absence of internet penetration in developing countries as a justification against declaring internet access a human right.<sup>54</sup> However, recognition of a right to internet access is meant to be a starting point in bridging precisely that same digital divide between countries. Once entrenched as a human right, it imposes positive obligations on governments to take active measures to realise the right and thereby, contribute towards enhancing internet penetration rates. The status quo, therefore, cannot be used as cogent justification to assert impracticality or unfeasibility. Altering the status quo is the long-term aim of guaranteeing such a right in the first place.

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<sup>52</sup> Tom Wheeler, ‘COVID-19 Has Taught Us the Internet Is Critical and Needs Public Interest Oversight’ (*Brookings*, 29 April 2020) <<https://www.brookings.edu/blog/techtank/2020/04/29/covid-19-has-taught-us-the-internet-is-critical-and-needs-public-interest-oversight/>> accessed 6 January 2021; ‘Covid-19 Shows We Need More than Basic Internet Access — We Need Meaningful Connectivity’ (*World Wide Web Foundation*, 27 May 2020) <<https://webfoundation.org/2020/05/covid-19-shows-we-need-more-than-basic-internet-access-we-need-meaningful-connectivity/>> accessed 6 January 2021; ‘How Does Digital Technology Help in the Fight against COVID-19?’ <<https://blogs.worldbank.org/developmenttalk/how-does-digital-technology-help-fight-against-covid-19>> accessed 6 January 2021.

<sup>53</sup> ‘Brazil: Failure to Respond to Education Emergency | Human Rights Watch’ <[https://www.hrw.org/news/2021/06/11/brazil-failure-respond-education-emergency?utm\\_campaign=later-linkinbio-humanrightswatch&utm\\_content=later-17965657&utm\\_medium=social&utm\\_source=linkin.bio](https://www.hrw.org/news/2021/06/11/brazil-failure-respond-education-emergency?utm_campaign=later-linkinbio-humanrightswatch&utm_content=later-17965657&utm_medium=social&utm_source=linkin.bio)> accessed 13 November 2021.

<sup>54</sup> Ryan Shandler and Daphna Canetti (n 43) 96.

Finally, it has been argued in the context of accessibility rights for persons with disabilities, that a right to anything is not disjunctive from a right to access it.<sup>55</sup> Therefore, extrapolating this argument to the context of this report, a right to education is inclusive of the right to access it, and the correlative obligation on the duty-bearer (the state) to protect access in this context. Thus, the proper place for the right of “access to something” lies in the state’s obligations for upholding the primary right protecting that “something”. This is why a standalone right to internet access is unworkable for the specific context of concretising the existing right to education. As will be explored in the following subsection, a right to access education through the internet should be read into the existing right to education instead of being made the subject of an independent right.

### *2.2.2. Internet Access as an Auxiliary Right of the Right to Education*

Vince Cerf, often called the “Father of the Internet”, famously [stated](#) in a New York Times Op-Ed from 2012 that technology is an enabler of rights and not a right in itself. Taking the ethos of this statement forward, it may not be apt to categorize internet access as a new right in and of itself, but it can still be categorized as a secondary “enabler” right for various other primary rights. However, even as an “enabler of rights”, internet access should be recognised as a right, albeit a secondary one. Proponents of auxiliary righthood for internet access argue that because internet access is instrumentally necessary for freedom of expression, for example, it should be protected by virtue of that connection. Therefore, auxiliary/implied righthood seeks to expand the existing scope of a human right and its associated obligations.<sup>56</sup>

Because auxiliary righthood does not seek to create space and momentum for a new human right, its theoretical justifications and practical effects are relatively less controversial. In expanding the scope of application of an existing right, auxiliary righthood seeks to provide a human rights-based protection in response to new developments and challenges within existing frameworks. One of the theoretical downsides to auxiliary righthood is that dependence between internet access and the relevant primary right cannot logically be shown if there is low internet penetration.<sup>57</sup>

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<sup>55</sup> See generally Gian Maria Greco, ‘On Accessibility as a Human Right, with an Application to Media Accessibility’, *Researching Audio Descriptions. New Approaches* (Palgrave 2016).

<sup>56</sup> Başak Çalı (n 27) 277.

<sup>57</sup> Ryan Shandler and Daphna Canetti (n 43) 96.

Considering the state of the right to education during the pandemic, the circumstances have demanded that internet access, at the very least, be treated as an auxiliary right of the right to education. Arguments for auxiliary righthood for internet access have been made in the past, but they have always been tied up to the primary rights of freedom of expression and opinion, of connection, information and/or assembly.<sup>58</sup> Furthermore, these arguments have mostly been made to assert negative duties associated with these primary rights. Internet access has never been argued to be an implied right of the right to education specifically, and neither has it been argued to assert the positive duties associated with this right. This is at least partly because the factual urgency for such an argument has been hitherto absent. While school closures have accompanied previous pandemics like the Spanish flu, however, the alternative learning methods used then were the product of limited technological advancement of that time. For example, in the city of Los Angeles, while schools remained closed, a [mail-in educational correspondence](#) course was used in lieu of in-person instruction. According to country-wide [reports](#) from the US, at-home learning was marked by minimal schoolwork and instead, children kept busy at home with chores or a job. However, the situation is different today because easily available technological tools have made learning possible in a virtual environment. With this possibility comes a previously absent opportunity during a pandemic – the ability to continue active, interactive education instruction from the confines of homes.

However, during Covid-19 lockdowns, the essence of the right to education has been severely compromised wherever there has been a lack of internet access for learners, teachers, and educational institutions. The internet is instrumentally necessary for education in this pandemic because it is the closest possible option to the actual physical classroom. Through evolving applications and technologies, the physical classroom can be converted seamlessly into a virtual classroom and enable interactive educational instruction even in a pandemic. Investing resources and time in connecting the right to education with a right to internet is more sustainable than any other non-tech option of ensuring the right to education amidst global emergencies in the modern world. Delay in mobilizing resources to establish the right to internet will have multifarious trickle-down effects. The lack of access to education will continue to lead to high drop-out rates from schools, an increase in child labour, an increase in rates of child marriages and higher chances of

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<sup>58</sup> See for example Brian Skepys, ‘Is There A Human Right to the Internet?’ (2012) 5 Journal of Politics and Law; 15.

juvenile delinquency, and will continue to increase the numbers, gravity and intensity of various societal menaces as well as adversely impact the mental and physical well-being of students. In addition, the heightened digital divide in education will exacerbate existing inequalities in the pedagogies of education. For example, standardized examinations across the world will produce highly discriminatory results because a student learning in a virtual classroom is likely to perform better than one learning through pre-recorded television or radio programmes.

Therefore, it is proposed that the international community declare and read in a right to internet access within the framework of the existing human right to education for everyone. In the shorter term, such a recognition is not only less controversial but is also more viable as it escapes the thorny questions that arise with the proposition of an altogether new human right. In the long term, recognition as an auxiliary right could be a useful starting point for the crystallisation of a separate right of internet access as well. It can be used as a prelude to the latter and/or a means to garner adequate international consensus for recognition as a freestanding right.

### [2.3. Defining the Contours of an Auxiliary Right to Internet Access](#)

This section will critically examine and consolidate the contours of the proposed right to internet access as a derived right of the right to education. While the following analysis is specific to the status of internet access as an auxiliary right, it is equally applicable and relevant to postulating a separate right of internet access as well. The following subsections will define, prospectively, the substantive content of such a right, the elements it should incorporate and the reasons for doing so. The challenges associated with the proposed substance will be identified, in addition to foreseeable roadblocks to implementation, specifically for the purpose of providing stimuli for future research in this area. The governing rationale for this section is that theoretical clarity and precision is a prelude to effective practical enforcement.

#### *2.3.1. Substance of a Right to Internet Access*

First and foremost, it is important to underscore that the proposed right to internet access must contain an **affirmative obligation** to provide internet access<sup>59</sup>, in addition to a negative duty not

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<sup>59</sup> On affirmative obligations associated with categorizing internet access as a positive right, *see*: Stephen Tully, 'A Human Right to Access the Internet? Problems and Prospects' (2014) 14 Human Rights Law Review 175, 180.

to deprive people of connection to the internet. The latter duty has crystallised in the existing corpus of international human rights law<sup>60</sup>, especially in relation to civil and political rights. Therefore, the focus of this subsection will be on delineating the substantive content of a positive aspect to this right. This focus is notwithstanding the accepted understanding that a right of internet access will only be substantively holistic if it contains a combination of positive and negative duties on states.<sup>61</sup>

On affirmative obligations associated with internet access, it is important that access be enabled through the development of relevant **infrastructure**<sup>62</sup>, including broadband cables, availability of internet signals and wireless connectivity. Enabling infrastructure should also include access to IT-enabled devices like laptops, computers and/or mobile phones. Without the relevant infrastructure, a right to internet access would be toothless. Therefore, the right's delineation itself should include a positive obligation on governments enshrining a resource commitment towards developing of infrastructure conducive to enabling internet access for its citizens. In implementing such an obligation, it is vital to encourage and provide incentives for private sector participation which can enable the realization of the internet access right at a better speed. Regulatory mechanisms like pricing regimes, universal service requirements and/or licensing agreements<sup>63</sup> can be negotiated with the private sector to this end. In building infrastructure through public-private partnerships, affordability should be a guiding factor, especially in middle and low-income countries.

Moreover, it is also vital to ensure that a right to internet access contains an **obligation of non-discrimination** on governments.<sup>64</sup> Such an obligation should exist to ensure that special measures are taken to provide internet access for disabled end-users<sup>65</sup>, that particular attention is paid to the need of vulnerable and socially disadvantaged groups.<sup>66</sup> Such an obligation is particularly important in the context of education during a pandemic. There are certain groups of global

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<sup>60</sup> Qerim Qerimi (n 30) 1.

<sup>61</sup> On the importance of combining positive and negative duties in a right to internet access, *see generally*: Ivar A. Hartmann, 'A Right to Free Internet: On Internet Access and Social Rights', (2013) 13 *Journal of High Technology Law* 297; Qerim Qerimi (n 30).

<sup>62</sup> Stephen Tully (n 59) 181.

<sup>63</sup> *ibid.*

<sup>64</sup> Internet Rights and Principles Coalition (n 36) 14.

<sup>65</sup> Stephen Tully (n 59) 181.

<sup>66</sup> Molly Land (n 27) 421.

populations, like female students, students from low-income households and students with disabilities, who have borne the brunt of the adverse effects of Covid-19 lockdowns on access to education. There is a special need for governments to undertake an obligation to take positive, active measures to protect the basic human rights of these already disadvantaged, vulnerable groups of society. Therefore, positing a right to internet access as an auxiliary right of the right to education must include a non-discrimination clause, which should not be framed solely in terms of a negative obligation but also inculcate a positive duty on governments to take special steps to ensure internet access to these specific groups. Without a goal providing for equality of access, a right to internet access will be rendered of little use to the groups which have suffered the most due to lack of internet access. Here, an analogy can be drawn from scholarly work interpreting Article 19(2) of the International Covenant on Civil and Political Rights protecting the right to freedom of expression and opinion. It has been pointed out that Article 19(2) “*provides a basis for an individual right to access specific technologies when no adequate means are available for the individual to achieve his or her communication goals*”.<sup>67</sup> This same reasoning can be extrapolated to the context of education during the Covid-19 pandemic. The recognised right to education should provide a basis for an individual right to access a specific means of education (i.e., the internet) when no adequate means are available for an individual learner (due to physical closures of educational institutions) to achieve their education goals.

Furthermore, it is significant to ensure that governments take on a responsibility to promote, ensure and advance **internet literacy and training** programmes in their progressive realization of an auxiliary right to internet. This is of special importance in the context of education for younger students who need to be properly equipped to be able to use the internet for virtual learning. It is also important for students of other age groups who have historically relied on learning through physical material like textbooks and/or worksheets in classroom settings.

### ***2.3.2. Foreseeable Roadblocks in Implementation of a Right to Internet Access***

This subsection will identify and analyse the principal roadblocks in the progressive realization of a right to internet access, should it be recognised as such in international human rights law.

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<sup>67</sup> *ibid* 422.

Securing a right to internet access is one aspect of a larger problem, but it is the first step in the right direction. Social norms will need to evolve and adapt as well. Possible hostile reactions in various communities to internet access should not be underestimated in gauging the efficacy and practicality of such a right, even in the short-term. This problem of a “cultural mistrust”<sup>68</sup> can, however, be potentially mitigated through increased community-level awareness campaigns which highlight the benefits derived from internet use, especially in a global pandemic and its aftermath.

Taking the point that securing access itself only guarantees one aspect of a complex problem, it should be noted that internet access is potentially open to misuse and abuse. Recognizing and enabling a right to internet as a constituent element of the right to education means recognizing and resolving problems of cyber vulnerability, especially for more vulnerable, younger students. Therefore, internet literacy should be a core component of such a right and safeguard mechanisms like those proposed by the Internet Rights and Principles Coalition should be firmly entrenched. The anonymity of cyberspace and the low cost of entry enables this arena to be largely unregulated by governmental powers. Proposing virtual learning as a long-term solution to minimize the current and future effects of the pandemic is not blind to the threats and challenges of regulating cyberspace. The right to digital data protection and freedom from surveillance also must be accounted for in public policy frameworks implementing the proposed right to internet access for education.<sup>69</sup> Nevertheless, questions of abuse and misuse of the internet are secondary questions for the purposes of this research because illegal activities on the internet are separately criminalized under various legal systems. Moreover, the prospect of abuse does not infringe upon the momentum to recognise a positive right to provide internet access in the first place. The potential for abuse can be criminalized, controlled and/or sanctioned but theoretically, it should not affect the progressive realization of this positive right.

Like any other human right, a right to internet access would also, in certain instances, be needed to be balanced with other competing rights, claims or concerns. These could include data protection, intellectual property and privacy rights<sup>70</sup>, among others.<sup>71</sup> However, the existence of

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<sup>68</sup> Adam Shoemaker, ‘Is There a Crisis in International Learning? The “Three Freedoms” Paradox’ (2011) 41 *Cambridge Journal of Education* 67, 71.

<sup>69</sup> On the pressing concerns regarding surveillance technologies in education, *see* Global Network of Internet and Society Research Centres (n 2) 22.

<sup>70</sup> *ibid* 11.

<sup>71</sup> Stephen Tully (n 59) 194.

competing interests or rights cannot in and of itself deprive internet access of its character as a human right. While a fair balance might need to be struck in various individual circumstances, such balancing exercises are part and parcel of the international human rights frameworks and machineries.

Finally, and perhaps of most concern to underdeveloped or developing countries, is the problem of costs. Enabling internet access for all citizens everywhere involves incurring significant financial expenditures. Such a duty may tend to overburden economically unstable countries and governments. They require international cooperation, aid, and expertise in the realization of the right to internet access.

#### **2.4 Combining International Recognition with Domestic Enforcement**

So far, the discussion has centered around building a normative argument in favour of recognizing an auxiliary right to internet access as part of the existing right to education in international human rights law. However, while human rights are regulated internationally, when it comes to sovereign nations, they are enforced and implemented primarily through a state's own laws and/or constitution. International recognition provides a universal standard or yardstick for the substantive obligation associated with any positive human right. However, creating a holistic obligation on states means combining this top-down international recognition with a bottom-up domestic entrenchment and enforcement of the right in question.<sup>72</sup> The focus of Part III of this report is therefore, on the analysis of the possible methods of entrenching a right to internet access in Pakistan, through a comparative study with other countries which have already entrenched the right in one way or another.

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<sup>72</sup> Başak Çalı (n 27) 283.

**PART III**

**METHODS OF**

**ENTRENCHMENT OF A**

**RIGHT TO INTERNET**

**ACCESS IN PAKISTAN**

## Part III: Methods of Entrenchment of a Right to Internet Access in Pakistan

### 3.1: Constitutional Protection

This section will engage in a comparative study of the constitutional protections of the right to internet access in various countries. At the time of writing, there are three countries which have constitutionalised the right to internet access (Greece, Portugal and Ecuador). In particular, the textual framing of the right to internet access will be highlighted to analyse the extent to which the right imposes positive and/or negative duties on the states concerned. After discussing the constitutional protections in these three countries, this section will conclude with an analysis of how a right to internet access can be incorporated within the Fundamental Rights enshrined in the Pakistani constitution, specifically the right to education.

Before moving on to discuss the aforementioned, it is imperative to briefly discuss the pending constitutional bills on the right to internet access in Italy.<sup>73</sup> In 2015, two constitutional bills were introduced in the Italian parliament. The first bill (No. 1317) proposed the incorporation of a right to internet access within the existing civil right protecting freedom of speech. The second bill (No. 1561) proposed the incorporation of a right to internet access within the existing social right to education. It has been argued that the latter proposal would be the best option because it would take out internet access from the limited context of a negative freedom within the exclusive scope of application of free speech.<sup>74</sup> Moreover, constitutional protection imposing a positive duty to provide internet access would be unique in the current status quo of constitutional protections of the right, which overwhelmingly couch it in negative terms.<sup>75</sup> This scholarly preference is in line with the normative argument made in Part II of this report. Internet access has, more often than not, been exclusively attached to the context of civil and political, negatively framed rights. However, the education emergency created by the Covid-19 pandemic constitutes a strong impetus to entrench and protect the positive duty-incurring aspect of such a right as well, in the context of education specifically. If the Constitutional Bill. No. 1561 is passed by the Italian parliament; Italy will become the first country to have constitutionalised a positive right to internet access as an

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<sup>73</sup> For an academic analysis of the pending constitutional bills, *see generally* Oreste Pollicino, 'The Right to Internet Access: Quid Iuris?', *The Cambridge Handbook of New Human Rights* (1st edn, Cambridge University Press 2020).

<sup>74</sup> *ibid* 271.

<sup>75</sup> *ibid*.

auxiliary right of the right to education. That is precisely the normative argument this report also seeks to make.

### 3.1.1: Greece

Greece was the first country to include a right to internet access within its constitution. Article 5A was inserted into the [constitution of Greece](#) in 2001.

#### Article 5A Constitution of Greece

- 1. All persons are entitled to information, as specified by law. Restrictions to this right may be imposed by law only insofar as they are absolutely necessary and justified for reasons of national security, of combating crime or of protecting rights and interests of third parties.*
- 2. All persons are entitled to participate in the Information Society. Facilitation of access to electronically handled information, as well as of the production, exchange and diffusion thereof constitutes an obligation of the State, always in observance of the guarantees of articles 9, 9A and 19.*

According to Article 5A, all citizens of Greece have a “right to information” and a “right to participate in the Information Society”. Article 5A (2) is particularly relevant as it obliges the state to facilitate access to electronically transmitted information, which can be interpreted to mean information available on the Internet. Apart from access, the provision also obliges the state to facilitate production, diffusion, and exchange of information on the Internet. The exceptions to the right enshrined in Article 5A (2) relate to the inviolability of the private and family lives of individuals<sup>76</sup>, data protection rights<sup>77</sup> and secrecy of all individual communication<sup>78</sup>.

There are three noteworthy aspects to the framing of this provision. Firstly, it imposes a positive obligation on the government of Greece to “facilitate” access to electronically transmitted information. Secondly, the exceptions indicated in the provision signify a duty on the government to balance internet access with other potentially competing, constitutionally protected rights and

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<sup>76</sup> Constitution of Greece, Article 9.

<sup>77</sup> Constitution of Greece, Article 9A.

<sup>78</sup> Constitution of Greece, Article 19.

guarantees mentioned. Therefore, the right to internet access is not unfettered but subject to legal limitations. Thirdly, this right, while framed as a positive obligation, is placed in the context of the right to information which can further be subject to restrictions imposed by law by reason of national security, among others. Therefore, this placement raises questions about the extent to which a right to internet access can be claimed by citizens against their government. Being relegated to the context of “right to information” could potentially limit the scope of its application. However, the chapter in which Article 5 is placed is titled “Individual and Social Rights”. There is no distinction in the Constitution of Greece between so-called positive (social, economic, cultural) and negative rights (civil and political) which exist in the framework of international human rights law. Rather, all individual rights are bundled together in a single chapter on social rights.

### 3.1.2: Portugal

In the [Portuguese Constitution](#), a right to internet access is contained in Article 35 titled “Use of Information Technology”. This article is contained in the chapter on “Personal Rights, Freedoms and Guarantees” which in turn is a component of the Part titled “Fundamental Rights and Duties”. It is pertinent to note that the Portuguese Constitution differentiates between economic, social, and cultural rights (Title III Part I) and personal rights, freedoms and guarantees (Title II Part I) but both are encapsulated under the same general heading of fundamental rights.

Article 35 is divided into seven further sub-articles which focus on a right of access to all computerised data concerning an individual, legal definitions of the concept of personal data, prohibiting third party access to personal data, among others. For the purposes of the present research, Article 35(6) is important.

#### Article 35 (6) Constitution of Portugal

*Everyone shall be guaranteed free access to public-use computer networks, and the law shall define both the rules that shall apply to cross-border data flows and the appropriate means for protecting personal data and such other data as may justifiably be safeguarded in the national interest.*

This provision guarantees individuals free access to public-use IT networks. It does not impose a positive obligation upon the state to facilitate citizens’ general access to the internet, as in the Greek constitutional provision examined above. Rather, access is guaranteed in the limited context of public-use IT networks. Moreover, the context of this comparatively limited internet access right is data protection guarantees in the use of IT which imposes a bundle of negative obligations on the state as specified in Article 35.

### 3.1.3: Ecuador

Ecuador constitutionalised a right to internet access in 2008 through Articles 16 and 17 of its [constitution](#). These articles are contained in the section on “Information and Communications”. Therefore, the contextual framing under the pre-existing right to information is like that of Greece, as examined above.

#### Article 16 Constitution of Ecuador

*All persons, individually or collectively, have the right to:*

- 1. Free, intercultural, inclusive, diverse and participatory communication in all spheres of social interaction, by any means or form, in their own language and with their own symbols.*
- 2. Universal access to information and communication technologies.*
- 3. The creation of media and access, under equal conditions, to use of radio spectrum frequencies for the management of public, private and community radio and television stations and to free bands for the use of wireless networks.*
- 4. Access and use of all forms of visual, auditory, sensory and other communication that make it possible to include persons with disabilities.*
- 5. Become part of participation spaces as provided for by the Constitution in the field of communication.*

#### Article 17 Constitution of Ecuador

*The State shall foster plurality and diversity in communication and, for this purpose, shall:*

- 1. Guarantee the allocation, by means of transparent methods and in equal conditions, of radio spectrum frequencies for the management of public, private and community radio and television stations, as well as the access to free bands for the use of wireless networks and shall make sure that, when they are used, the general welfare of the community prevails.*
- 2. Facilitate the creation and strengthening of public, private and community media, as well as universal access to information and communication technologies, especially for persons and community groups that do not have this access or have only limited access to them.*
- 3. Not permit the oligopolistic or monopolistic ownership, whether direct or indirect, of the media and use of frequencies.*

Article 16(2) guarantees all persons a right to “*universal access to information and communication technologies*”. On the text itself, there is no specific mention of internet access per se but the reference to the plural word “technologies” is indicative of the internet’s inclusion within its purview. Articles 16 and 17 contain relatively more detail than the Greek and Portuguese provisions examined above on the content of this right. Firstly, the Ecuadorian constitutional provisions guarantee citizens that access to free bands for the use of wireless networks would be created under equal conditions.<sup>79</sup> Secondly, they guarantee access and use which is inclusive of and possible for disabled end-users.<sup>80</sup> Thirdly, they impose a general positive obligation on the state to foster plurality and diversity in communication.<sup>81</sup> Finally, they enshrine a positive state duty to facilitate universal access to communication technologies, especially for people or groups who have no or limited access.<sup>82</sup>

In comparison to the text of the Greek and Portuguese provisions, Ecuador’s constitutional protection of the right to internet is broader, with state obligations precisely delineated and a constitutional protection afforded to disadvantaged and vulnerable groups of the society. Moreover, the right is couched in terms of “universal access” which seems to cover facilitation of both public and private wireless networks, as opposed to Portugal’s limited focus on public use IT networks. This guarantee is especially important considering that social distancing, isolation and quarantine measures imposed during this pandemic practically mean that people spent and/or have been spending the majority of their time at home, making the need for reliable and affordable broadband access for private use even more imminent.

#### ***3.1.4: Constitutional Protection in Pakistan***

This subsection will explain the structure of fundamental rights enshrined in the [Constitution of Pakistan](#) and examine whether internet access has been constitutionalised as a separate or auxiliary right. It will then analyse whether internet access can be accommodated within the existing text of the right to education or whether the prospects for a constitutional amendment introducing internet access as an auxiliary right of the right to education are more realistic.

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<sup>79</sup> Constitution of Ecuador, Article 16(3).

<sup>80</sup> Constitution of Ecuador, Article 16(4).

<sup>81</sup> Constitution of Ecuador, Article 17.

<sup>82</sup> Constitution of Ecuador, Article 17(2).

The Constitution of Pakistan differentiates between “Fundamental Rights”<sup>83</sup> and “Principles of Policy”<sup>84</sup>, the key point of distinction being justiciability. While fundamental rights enshrined in the Constitution of Pakistan are justiciable, principles of policy are not. By subjecting fundamental rights to judicial review, the constitution seeks to ensure that these rights cannot be violated at the whims of the legislature and/or executive. Therefore, the underlying rationale behind guaranteeing a set of fundamental rights by enshrining them in the constitution is to ensure that these rights are paramount to ordinary law.<sup>85</sup>

A right to internet access has not been constitutionalised as a fundamental right or even as a principle of policy in the constitution of Pakistan. Therefore, the question is: can a right to internet access be accommodated within the existing right of the right to education in the constitution of Pakistan?

The right to education was granted the status of a fundamental right in the Pakistani constitution in April 2010. Before that, it had existed as a non-justiciable principle of policy enshrined in Article 37 of the Constitution requiring the state to, *inter alia*,

- (a) *promote, with special care, the educational and economic interests of backward classes or areas.*
- (b) *remove illiteracy and provide free and compulsory education within minimum possible period; and*
- (c) *make technical and professional education generally available and higher education equally accessible to all on the basis of merit.*

Article 25A of the Constitution, inserted in 2010, now reads as:

*“Right to Education. – The State shall provide free and compulsory education to all children of the age of five to sixteen years in such manner as may be determined by law.”*

The fundamental right to education therefore imposes a positive obligation on the state to provide free and compulsory education for a specific age group, with the precise manner of implementing this obligation being relegated to the realm of the legislature. Therefore, Article 25A is not self-

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<sup>83</sup> Constitution of Pakistan, Part II Chapter 1.

<sup>84</sup> Constitution of Pakistan, Part II Chapter 2.

<sup>85</sup> Justice Fazal Karim, *Judicial Review of Public Actions*, vol 2 (Second, Pakistan Law House 2018) 743.

executory and requires the implementation via law promulgated by the provincial governments of Pakistan, as the subject of education was devolved to the provinces with the [18<sup>th</sup> amendment](#) to the Constitution of Pakistan.<sup>86</sup>

For this report, the precise question is not the nature, extent and quality of implementation of this right to education but rather whether internet access can be read into this existing right. Because Article 25A leaves the precise manner of implementation to the provincial legislatures, there is little room for reading in a right to internet access as an auxiliary right of this right to education. Had Article 25A been drafted so that the phrase “*in such manner as may be determined by law*” was replaced with the phrase “*through all means necessary*”, a right to internet access could have been read in as one of the necessary means to guarantee the right to education during Covid-19 lockdowns. It will be examined in detail in subsection 3.3.4 the extent to which a right to internet access has been protected through judicial pronouncements in Pakistan, both in the specific context of education and otherwise.

The next question is: what are the prospects of proposing a sub-article to Article 25A which explicitly guarantees internet access to protect the right to education? The process for amending the constitution is contained in Article 239 of the Constitution. While a Bill to amend the constitution can originate in either House of Parliament, it needs a two-thirds majority of that House in which it is introduced to be able to kickstart the legislative process. When transmitted to the other House, it further requires a two-thirds majority to be passed. The requirement of a two-thirds majority in the legislature means that introducing an amendment to the constitution is perhaps not the most achievable short-term goal in the pursuit of guaranteeing a right to internet access for education in Pakistan. Obtaining such a large majority is a time-consuming goal pervaded with problems of political unwillingness. However, a constitutional amendment should not be thought of as an impossibility altogether as such amendments have historically been used to steer important changes to the constitution to ensure that it remains a living instrument, and not static in character.

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<sup>86</sup> *ibid* 1384.

On the importance of constitutional amendments, the Supreme Court of Pakistan commented as follows<sup>87</sup>:

Parliament has full freedom to make any amendment in the Constitution as long as salient features and basic characteristics of the Constitution providing for Federalism, Parliamentary Democracy and Islamic provisions are untouched and are allowed to remain intact as they are...the object being to keep the Constitution alive and in line with the pace of progress, aspiration, will, needs and demands of the people. The Constitution cannot be made static and stoic. It must progress, blossom and flower. A rigid Constitution having no provision for amendment is likely to suffer crack by violence or Constitutional deviation.

Therefore, a valid argument is made for the introduction of new rights in the Constitution to ensure that it is a progressive document which can accommodate temporal and technological changes. However, on a practical level, this recommendation is wholly determined by existing political will and agendas.

Apart from Article 25A, there is room for a potential emergence of internet access rights from the principle of policy enshrined in Article 37(c) as reproduced above. Article 37(c) commits the state to make higher education “equally accessible” for all on the basis of merit. Even though this commitment is specific to the context of higher education, it is wide enough to potentially cover a right to internet access in the pursuit of protecting equal access to higher education for all. However, as a principle of policy, it is non-justiciable as such and cannot *ipso facto* be used as the constitutional basis for arguing a fundamental rights’ violation. Nevertheless, it does provide concrete policy basis for the state to work towards the goal of equal accessibility in higher education, specifically through ensuring equal accessibility of the internet and its enabling infrastructure for all.

### **3.2. Legislative Protection**

In this section, the right to internet access as protected by legislation in various countries will be analysed. For the purposes of this research, the countries chosen for this comparative study are

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<sup>87</sup> Mahmood Khan Achakzai v Federation of Pakistan, PLD 1997 SC 426. *See also*, Dewan Textile Mills Ltd v Federation of Pakistan, PLD 1976 Karachi 1368, para (d); Muhammad Bachal Memon v Govt of Sindh, 1987 PLD 296 Karachi High Court, para 15; District Bar Association Rawalpindi v Federation of Pakistan, PLD 2015 SC 401.

Estonia, Finland and Spain. These countries are chosen because their legislation enshrines a right to internet access most clearly. While rights related to the internet are enshrined in various other legislation across the world, this report aims to examine whether a right to access itself has been entrenched in legislation, and to what extent. Finally, this section will map out the laws in Pakistan relating to the internet and examine whether a right to internet access is explicitly or implicitly entrenched in them.

### 3.2.1: Estonia

In Estonia, internet access is guaranteed through a twofold legal framework. The first relevant piece of legislation is section 33 of the [Public Information Act 2000](#).

#### Section 33 Public Information Act 2000 (Estonia)

*Access to data communication network: Every person shall be afforded the opportunity to have free access to public information through the Internet in public libraries, pursuant to the procedure provided for in the Public Libraries Act.*

Through this provision, all citizens of Estonia are guaranteed free access to public information in public libraries through the Internet. The scope of application of this legislative guarantee is thus, limited. It operates in the specific context of guaranteeing free access to the internet in public libraries. In that way, it is a specific version of Portugal's constitutional protection of internet access in public-use IT networks.

However, the second relevant piece of legislation, the [Electronic Communications Act 2000](#), has a much wider sphere of coverage. Chapter 7 of the said Act enshrines universal service obligations.

#### Section 69 Electronic Communications Act 2000 (Estonia)

*A universal service is a set of services which conforms to the technical and quality requirements established by the European Union law, which is of specified quality and available to all end-users requesting it to the extent provided for in this Chapter, regardless of the location of the end-user, uniformly and at an affordable price. The following are universal services:*

- 1) connection to a communications network in a fixed location enabling telephone services;*
- 2) public pay-phone service or other publicly accessible communications service enabling calls;*
- 3) the availability of a universal electronic public number directory and directory enquiry services.*

Section 70(3) then specifies the internet to be a universal public service under the definition of Section 69.

#### Section 70(3) Electronic Communications Act 2000 (Estonia)

*The connection to a communications network specified in clause 69 1) of this Act must enable...the use of data communication services at data rates sufficient to permit functional Internet access, taking into account the hardware and software used by most of the end-users.*

Therefore, Estonia has legislatively enshrined a positive obligation on the state to provide free internet access at public libraries and a positive obligation on service providers to provide universal internet services. The point of distinction with regards to the duty-bearers is important because in the Public Information Act, the state is under a limited obligation but in the Electronic Communications Act, the duty-bearing party are the service providers and operators in Estonia.

Even though there is no established causality between the promulgation of the above legislation with internet penetration rates in Estonia, it is pertinent to highlight that Estonia continues to be one of the [most connected](#) countries in the world with regard to internet access, and Estonian internet users face very few obstacles when it comes to accessing the internet.

#### *3.2.2: Finland*

In 2009, an amendment was made to Finland's [Communication Market Act 2003](#). A new paragraph was inserted in Section 60c imposing a universal service obligation for functional internet access. The then Minister of Communications [explained](#) the rationale for the insertion of this new right as follows: “...we considered the role of the Internet in Finns’ everyday life. Internet services are no longer just for entertainment...Finland has worked hard to develop an information society and a couple of years ago we realised not everyone had access.”

Therefore, as is evident from the above statement, the governmental understanding behind legislatively guaranteeing internet access was to ensure and promote equality of access for all; especially considering the Internet’s vital role in everyday lives of all citizens.

It is important to note that this legislative amendment does not impose a positive obligation directly on the state. Rather, it mandates private telecommunications companies to offer individuals a

broadband connection for functional internet access. A [Decree](#) by the Ministry of Transport and Communications on the Minimum Rate of Functional Internet Access as a Service further substantiates and supplements this provision by establishing the minimum bandwidth for a broadband connection to be 1 Mbps.

### *3.2.3. Spain*

Article 52 of a Spanish Law titled “[Sustainable Economy](#)” encompasses broadband connection as an integral part of universal service.

It specifically stipulates that the minimum speed of such connections should be 1 Mbit per second. It imposes a twofold obligation on the government. Firstly, the government is under a duty to establish conditions for public network broadband access and update the minimum speed stipulation in accordance with changing needs of the time.<sup>88</sup> Secondly, specific government departments are obliged to guarantee affordability of this universal service, especially by setting a maximum price cap.<sup>89</sup>

While the direction to provide the universal service is understood to be for broadband service providers, this law imposes two significant positive obligations on the government as well to better monitor and regulate the efficacy and affordability of internet access. In this regard, the Spanish law goes a step further than the universal service stipulation in the Finnish law examined above.

### *3.2.4. Legislative Protection in Pakistan*

Pakistan does not have a legislatively guaranteed right to access the internet. However, usage of the internet itself is regulated by various laws. For example, the Prevention of Electronic Crimes Act 2016<sup>90</sup> contains a legal framework defining various kinds of electronic crimes, mechanisms for investigation of these crimes, their prosecution and adjudication. However, the focus is exclusively on accountability for cybercrimes, rather than providing the right to access the cyberspace in the first place. In a similar vein, the [Electronic Transaction Ordinance 2002](#)

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<sup>88</sup> Sustainable Economy, Article 52(1).

<sup>89</sup> Sustainable Economy, Article 52(2).

<sup>90</sup> Prevention of Electronic Crimes Act, 2016 (Act No.XL of 2016)

recognises and facilitates communications and transactions in electronic form. The [Personal Data Protection Bill 2020](#) enshrines a legal regime of newly introduced data protection laws on the internet. However, all these laws pertain to issues that arise when access to the internet is present in the first place. Access itself is assumed in the rationale behind the promulgation of aforesaid laws. That is not to delegitimize the value, worth and relevance of these laws in regulating cyberspace. However, they have no worth in putting the state and/or telecommunications providers under any sort of positive obligation to ensure access to the internet more generally or even for special, disadvantaged groups.

There is, however, some semblance of a positive duty enshrined in the [Pakistan Telecommunications Act 2006](#). The PTA is a statutory authority whose primary function is to regulate the establishment, operation and maintenance of telecommunication systems and provision of telecommunication services in Pakistan According to section 4 of this Act, the Pakistan Telecommunications Authority's (PTA) functions include:

1. The promotion and protection of the interests of users of telecommunication services.<sup>91</sup>
2. The promotion of availability of wide range of high quality, efficient, cost-effective and competitive telecommunications services.<sup>92</sup>
3. The promotion of rapid modernization of telecommunications services and systems.<sup>93</sup>

In May 2021, the PTA started focusing on improving telecommunication services in areas full of tourism potential in line with the Government's vision of promoting tourism across the country. To this end, a 4G Base Transceiver Station has been installed at K2 Base camp area of Concordia. PTA is also working on improving the telecommunication services in South Waziristan where 3G data sites have been upgraded to 4G (February 2021). Commendably, in the wake of the Covid-19 pandemic, the PTA also directed PTCL to enhance the broadband services network in erstwhile FATA districts of KPK province to facilitate people of the area for online education and other web-based services (December 2020). Therefore, in light of the PTA's vision, statutory functions and ongoing efforts to ensure broadband inclusivity across the country, the PTA is the best-placed national statutory body to be charged with implementing the right to internet access for students

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<sup>91</sup> Pakistan Telecommunications Act 2006, section 4(c).

<sup>92</sup> Pakistan Telecommunications Act 2006, section 4(d).

<sup>93</sup> Pakistan Telecommunications Act 2006, section 4(e).

across Pakistan. There is a positive obligation on the PTA to promote the availability and affordability of quality telecommunications services across the country. This obligation is particularly crucial in the context of Covid-19 lockdowns, which have directly resulted in physical closures of educational institutions. The next most viable, sustainable, interactive and active form of educational instruction is thus remote learning using virtual educational platforms and mechanisms. These remote learning opportunities can only become readily available to the masses if easy access to the internet is provided for students, regardless of their geographical location and/or socio-economic status

### **3.3. Judicial Protection**

In this section, the judicial protection afforded to a right to internet access will be examined in a comparative context, using the judgments of the apex courts of France, Costa Rica, and India. These jurisdictions have been chosen because of the clear discussion of a right to internet access in their jurisprudence. Case law of courts in Pakistan on the subject matter will also be analysed to assess the nature and extent to which a right to internet access has been recognised.

#### ***3.3.1: France***

In 2009, the Constitutional Council of France (its highest constitutional authority) gave a [ruling](#) on whether an independent body could withhold internet access as a sanction, specifically the implications of such a penalty on the fundamental right of freedom of expression and communication. Specifically, the Court examined the Intellectual Property Code to determine whether it breached basic rights guaranteed in French law.<sup>94</sup>

In the judgment, the Court interpreted the fundamental rights of freedom of expression and communication to extend to technological developments in communication.<sup>95</sup> The Court determined whether an administrative authority could lawfully restrict individuals' access to the internet. It held that such restrictions were unconstitutional because decisions which restrict the population's freedom to communicate should not be taken by non-judicial authorities.<sup>96</sup> The ratio

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<sup>94</sup> Constitutional Council of France (2009), *Decision No. 2009-580 DC*, paragraphs 1, 4, 6 and 12.

<sup>95</sup> *ibid*, paragraph 12.

<sup>96</sup> *ibid*, paragraphs 15, 16 and 28.

decidendi of the decision can be put as follows: limiting the freedom of communication and expression by suspending access to the internet is a disproportionate form of punishment.

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*'Article 11 of the Declaration of the Rights of Man and the Citizen of 1789 proclaims: "The free communication of ideas and opinions is one of the most precious rights of man. Every citizen may thus speak, write and publish freely, except when such freedom is misused in cases determined by Law". In the current state of the means of communication and given the generalized development of public online communication services and the importance of the latter for the participation in democracy and the expression of ideas and opinions, this right implies freedom to access such services.'*

*- Constitutional Council of France (2009)*

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According to scholarly opinion, this judgment means that free speech currently implied access to the internet, not that internet was an autonomous right.<sup>97</sup> However, others have read the judgment as the Court referring to internet access in terms of a fundamental/constitutional right.<sup>98</sup> Other scholars have focused more on the consequences of the judgment, rather than the substance or implications of the judgment itself. They have highlighted that the importance of this judgment is the adoption of a law as a consequence which transferred the sanctioning power from the administrative authority to the judiciary by introducing a system of "three-strikes law".<sup>99</sup> This system consists of two stages of warning to users suspected of downloading copyright-protected content, non-compliance with both eventually leading to an appearance before a judge empowered to issue a sanction on the delinquent individual, which may range from partial/complete suspension of internet access and/or prohibitions against contracting with other internet service providers for the time period of the suspension. Therefore, the apex court of France read in a right to internet access as part and parcel of the existing constitutional right to free speech but did not declare internet access to be an independent, autonomous right.

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<sup>97</sup> Ivar A. Hartmann (n 61) 307.

<sup>98</sup> Tommaso Edoardo Frosini, 'Access to Internet as a Fundamental Right' (2013) 5 Italian Journal of Public Law 226, 232; Editorial, 'Internet Piracy and the European Political and Legal Orders' 5 European Constitutional Law Review 169, 172.

<sup>99</sup> Qerim Qerimi (n 30) 15.

### 3.3.2. Costa Rica

The Supreme Court of Costa Rica [pronounced](#) on a right to internet access in 2010. The relevant extracts of the judgment, as translated, put forward two important points. Firstly, the Court recognised that access to information communication technologies served as a basic instrument which facilitated the exercise of several fundamental rights. The Court elaborated on an illustrative list of such rights, including education, freedom of expression and thought, access to information within its purview, amongst others. This explicit recognition of internet access as a facilitator of the fundamental right to education is important and differentiates this judicial recognition from the others examined in this section. Secondly, the Court here opined that the exercise and enjoyment of several fundamental rights were specifically affected because of the delay in opening the telecommunications market. These rights included the freedom of choice for consumers, the right of access to new information technologies, right to equality, eradication of the digital divide and free enterprise and trade. Therefore, the context of this ruling was specific to telecommunications law. However, the recognition of internet access as a right which facilitates a bundle of other, constitutionally recognised rights is vital and clear from the judgment.

### 3.3.3. India

In early 2020, the Supreme Court of India pronounced on the legality of internet shutdowns in Jammu and Kashmir.<sup>100</sup> With regards to internet access, the following questions presented before the Court are of relevance to this report:

1. Whether the freedom of speech and expression and the freedom to practice any profession, or to carry on any occupation, trade or business over the internet is a part of the constitutional fundamental rights.<sup>101</sup>
2. Whether the curtailment of the internet was in nexus with principle of proportionality.<sup>102</sup>

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<sup>100</sup> Anuradha Bhasin vs. UOI (2019 SCC Online SC 1725) Supreme Court of India

<sup>101</sup> *ibid* para 10(II).

<sup>102</sup> *ibid* para 47.

On these questions, the Court held that while the Government could suspend the Internet<sup>103</sup>, it had to prove necessity<sup>104</sup> for such suspension and impose a temporal limit<sup>105</sup> so as to make such actions proportionate<sup>106</sup> to the stated aims. The Court surmised that the government failed to fulfil the test of proportionality in the suspension of the Internet. It was held that an indefinite suspension of internet services would be illegal under the law of India because it imposed a disproportionate restriction on the constitutional right of freedom of expression.

Relevant to the purpose of this report is the Supreme Court's examination of the nature of the right to freedom of expression in relation to the internet. The Court said that the constitutional right of freedom of expression extends to the internet, recognizing that online expression has become one of the major means of information diffusion and so was integral to the enjoyment of this constitutional right.<sup>107</sup> The Court also extended the protection of the constitutional right of freedom of trade and commerce to the internet.<sup>108</sup> Even though the Court extended existing constitutional rights to the internet, it did not declare the right to internet access independently as a fundamental, freestanding right. This could perhaps be because none of the parties to the case raised or rebutted that proposition<sup>109</sup>, or it could even be because the Court did not want to create a new constitutional right through its pronouncement in this case.

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*“Law and technology seldom mix like oil and water. There is a consistent criticism that the development of technology is not met by equivalent movement in the law. In this context, we need to note that the law should imbibe the technological development and accordingly mould its rules so as to cater to the needs of society. Non recognition of technology within the sphere of law is only a disservice to the inevitable. In this light, the importance of internet cannot be underestimated, as from morning to night we are encapsulated within the cyberspace and our most basic activities are enabled by the use of internet.”*

*- Supreme Court of India (2020)*

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<sup>103</sup> ibid para 83.

<sup>104</sup> ibid para 99.

<sup>105</sup> ibid para 100.

<sup>106</sup> ibid para 28.

<sup>107</sup> ibid para 26.

<sup>108</sup> ibid para 27.

<sup>109</sup> ibid para 28.

Therefore, the Indian Supreme Court recognised an implied right to internet access as part and parcel of the existing constitutional rights to freedom of expression and freedom of trade and commerce. This interpretation in line with the existing context of recognition of internet access on the international human rights plane as discussed in Part I of this report.

### *3.3.4: Judicial Protection in Pakistan*

This section will map out the landscape of judicial protection in Pakistan of the right to education explicitly, internet access implicitly and other positive constitutional rights more generally.

In *Shehla Zia v WAPDA*<sup>110</sup>, one of the legal questions posed to the Supreme Court of Pakistan through a public interest litigation was whether the right to life and liberty encapsulated in Article 9 of the Constitution of Pakistan<sup>111</sup> extended to protection from a threat to healthy life caused by the construction of a nearby electricity grid station.<sup>112</sup> In a landmark judgment, the Supreme Court interpreted Article 9 extensively to include a right to a healthy environment within its ambit. Interpreting Article 9 and Article 14 (inviolability of dignity of man<sup>113</sup>) conjunctively, the Court concluded that the right to dignity of individuals is also violated if a person is deprived of their right to life, clothing, food, and a healthy environment. What is imperative in the Supreme Court's jurisprudence in this case is the expanse and depth of its interpretation of the right to life.

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*“The word life is very significant as it covers all facts of human existence. The word life has not been defined in the Constitution but it does not mean nor can it be restricted only to the vegetative or animal life or mere existence from conception to death. Life includes all such amenities and facilities which a person born in a free country is entitled to enjoy with dignity, legally and constitutionally.”*

*- Supreme Court of Pakistan (1994)*

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<sup>110</sup> Ms. Shehla Zia v. WAPDA, PLD 1994 SC 693

<sup>111</sup> Article 9 reads as: “Security of person. No person shall be deprived of life or liberty save in accordance with law.”

<sup>112</sup> Ms. Shehla Zia (n 163) para 12.

<sup>113</sup> Article 14 reads as: “Inviolability of dignity of man, etc.— (1) The dignity of man and, subject to law, the privacy of home, shall be inviolable.

(2) No person shall be subjected to torture for the purpose of extracting evidence.”

Therefore, the Court concluded that the harmful electromagnetic radiations from the grid station can pose danger to the life of individuals and so, the station must be constructed only after obtaining the consent of parties and preparing a detailed report to enable complete protection to individuals and ensure they are able to live a healthy life with dignity.<sup>114</sup> In another case, the Supreme Court interpreted the right to life to encapsulate a right to clean water as well.<sup>115</sup> The right to life has been held to encompass the right to a healthy environment by the Lahore High Court.<sup>116</sup>

In a judgment by the Sindh High Court, the constitutionally protected rights to life and dignity were interpreted to encompass a right to health as well.<sup>117</sup> The Court recognised that the right to health was not explicitly enshrined in the constitution but because of its importance to citizens' lives and well-being, it was imperative that the Court read in a right to health while interpreting existing constitutional rights.

On the constitutional right to education, the Supreme Court has promulgated an expansive interpretation.<sup>118</sup> The Court emphasised on the state's positive obligation to provide access to education, which is a necessity of life.<sup>119</sup>

A judgment of the Islamabad High Court is important on the matter of internet access.<sup>120</sup> On the facts, in 2018, internet access was blocked in three districts of Balochistan due to security concerns for about one and a half year. The Court ruled that mobile network shutdowns, including mobile based internet suspension are illegal.

In addition, albeit in the specific context of rights for persons with disabilities (PWDs), the courts of law in Pakistan have protected the rights of PWDs through purposively interpreting the "triangular construct of the right to life, dignity and equality under the Constitution".<sup>121</sup> Even

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<sup>114</sup> Ms. Shehla Zia (n 163) para 16.

<sup>115</sup> Barrister Zafarullah Khan v Federation of Pakistan, 2018 SCMR 2001.

<sup>116</sup> Ms Imrana Tiwana v Province of Punjab, CLD 2015 Lahore High Court 983.

<sup>117</sup> Messrs Getz Pharma (Pvt) Ltd. through Authorised Person v Federation of Pakistan, through Secretary, Ministry of National Regulation and Services and another, PLD 2017 Sindh 157.

<sup>118</sup> Fiaqat Hussain v Federation of Pakistan through Secretary Planning and Development Division Islamabad, PLD 2012 Supreme Court 224.

<sup>119</sup> *ibid* para 23.

<sup>120</sup> CM Pak Limited v Pakistan Telecommunication Authority, PLD 2018 Islamabad 243.

<sup>121</sup> Hafiz Junaid Mahmood v Government of Punjab, PLD 2017 Lahore 1 para 17; Muhammad Yousaf v Chairman FPSC, PLD 2017 Lahore 406 paras 24, 25, 30, 31; Malik Ubaidullah v Government of Punjab, PLD 2020 SC 599 para 13.

though “accessibility” itself is not a fundamental right enshrined in the Constitution of Pakistan, the jurisprudence of the courts has purposively interpreted other inter-dependent and interconnected fundamental rights to mainstream the rights of persons with disability.

A review of the above cases highlights the non-existence of an explicit judicial recognition of a right to internet access in Pakistan. However, the case law examined above does highlight a judicial tendency to broadly construe the right to life, specifically, to encapsulate and protect other emerging rights not formally protected through the constitution. Therefore, there exists scope for such an interpretation of the right to life and/or the right to education to be extended to a right to internet access were a suitable case to come before the judiciary.

The Supreme Court of Pakistan has interpreted the judicial duty to interpret fundamental constitutional rights in a broad manner, and in cognizance of changing times and corresponding needs:<sup>122</sup>

Constitutional Interpretation should not just be ceremonious observance of rules and usages of interpretation but instead inspired by, inter alia, fundamental rights, in order to achieve the goals of democracy, tolerance, equality and social justice. The prescribed approach while interpreting fundamental rights is one that is dynamic, progressive and liberal, keeping in view the ideals of the people, and socio economic and political cultural values, so as to extend the benefit of the same to the maximum possible”. The Constitution is a living organism and has to be interpreted to keep alive the traditions of the past blended in the happening of the present and keeping an eye on the future.

In a similar vein, in another case the Supreme Court further reiterated the significance of enabling constitutional interpretation in a manner that is flexible and receptive<sup>123</sup>:

Pakistan has a written Constitution, which is an organic document designed and intended to cater to the need for all times to come. It is like a living tree; it grows and blossoms with the passage of time in order to keep pace with the growth of the country and its people. Thus, the approach while interpreting a Constitutional provision should be dynamic, progressive and oriented with the desire to meet the situation which has arisen, effectively.

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<sup>122</sup> Benazir Bhutto v Federation of Pakistan, PLD 1998 SC 388.

<sup>123</sup> Sayed Masroor Ahsan v Aedeshir Cow Asjee, PLD 1998 SC 823.

Therefore, a right to access the internet in the context of education can be protected through a judicial pronouncement which focuses on the inextricable connection between the state's obligation to provide free and compulsory education and the necessity of internet access for the same during Covid-19 lockdowns, such that the guarantee of access to internet is necessary for the fulfillment of Article 25A. Apart from the constitutional right to education, a judicial decision could also potentially read in a right to internet access as part of the right to life (Article 9, Constitution of Pakistan) because the pandemic has shown that the right to life now ought also to cover the essential amenity and facility of internet access for students during a pandemic, which has mandated continued physical closures of education institutions. Access to the internet is a significant fact of the human existence of students during this pandemic. In addition, a right to internet access for learners can also be judicially protected through Article 25 of the Constitution of Pakistan which protects the right to equality of all citizens of the country. The digital divide in Pakistan creates an unequal distribution of telecommunication and broadband services, and has also led to a digital divide between students from low-income backgrounds and high-income backgrounds and constitutes a grievous violation of the right to equality of all citizens protected in Article 25 of the Constitution of Pakistan. In addition, purposively interpreted, Article 3 of the Constitution of Pakistan which imposes an obligation on the state to prohibit all forms of exploitation and fulfil the principle "from each according to his ability to each according to his work", can be read to enshrine equality of internet access as well.

#### **3.4. Incorporation into Public Policy Frameworks**

The preceding sections have engaged in a comparative analysis of means of formal, legal entrenchment of a right to internet access through the constitution, legislative enactment and/or judicial pronouncement. In this section, the focus will be on informal means of protection of such a right by incorporation into public policy frameworks or agendas of various governmental ministries. Unlike the preceding sections, the list of public policy frameworks examinable in a comparative perspective are innumerable and beyond the scope of this report. Therefore, this report will focus on only one policy framework from a comparative angle: Kerala (India). This is chosen because it is a state within a South-Asian country with significant social and cultural similarities to Pakistan and because it explicitly couched a right to internet access in human rights terms.

#### *4.4.1: Kerala (India)*

In 2015, Kerala became the first (and only, to date) Indian state to [declare](#) internet as a basic human right. The main objective of this declaration was to provide affordable broadband connectivity of 2 Mbps and to establish a “mobile governance” scheme to shift government paperwork to the digital realm. Through this policy pronouncement, the government of Kerala aimed to bridge the digital divide by making digital infrastructure accessible to all strata of society, at affordable costs. Another explicit aim of this policy was to reduce discrimination and marginalization of the disadvantaged groups of society and ensure through internet access a high quality of life for all. To implement this declaration the government of Kerala introduced a system called “Kerala Fiber Optic Network” (K-FON) whereby internet access would infrastructurally be provided to all households in the state, with free internet facility to 20 million poor families in the state in addition to established wi-fi transmission centers at government offices, libraries, and public places. The budget for this system was approved in November 2019.

In a 2019 judgment, the Kerala High Court reaffirmed the status of internet access as a fundamental right.<sup>124</sup> On the facts of this case, in a female hostel in Kerala, students were prohibited from using mobile phones for certain hours of the day.<sup>125</sup> According to the petitioner, this restriction infringed on a number of rights of female hostel inmates including gender discrimination (the restriction only extended to the girls’ hostel).<sup>126</sup> Relevant to this report are the claims made regarding the violation of the petitioners’ right to acquire knowledge through the internet<sup>127</sup>, to exercise her constitutionally protected right of freedom of speech and expression<sup>128</sup> and privacy<sup>129</sup> and that the restriction impaired the quality of access to education for female students<sup>130</sup>. The Court, after considering arguments of both sides as well as the content of the UN Frank La Rue report discussed in the previous part of this report, concluded that the right to internet access is part of the

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<sup>124</sup> Faheema Shirin R.K vs State of Kerala and others, Kerala High Court (2019), WP(C)No.19716.

<sup>125</sup> *ibid*, para 1.

<sup>126</sup> *ibid*, para 2.

<sup>127</sup> *ibid*.

<sup>128</sup> *ibid*.

<sup>129</sup> *ibid*, para 4.

<sup>130</sup> *ibid*, para 2.

constitutionally protected rights to education and privacy in India and therefore, had to be protected.<sup>131</sup>

### *3.4.2. Policy-level Protection in Pakistan*

To date, Pakistan has not declared internet access as a human right, neither generally nor in the specific context of the right to education, either before or during the Covid-19 pandemic. However, there are indications in Pakistan's current and future federal policy frameworks which prioritise internet access, generally and in the context of education. These policy frameworks will be examined in this subsection, and their scope and sufficiency will be analysed.

While education is a provincial subject post the 18<sup>th</sup> amendment to the Constitution of Pakistan, an analysis of national-level education policies is imperative in this context because during this pandemic, the federal response to school closures has, for the large part, been determinative of provincial responses.

1. In May 2020, the Federal Ministry of Education released a report highlighting key long-term goals to build resilience in the education sector of Pakistan.<sup>132</sup> It noted the need to increase internet coverage, requiring public-private partnerships to that end.<sup>133</sup> Apart from that, it noted measures which should be taken in ensuring safe schools once the lockdowns were lifted, training for teachers to transition to online learning and coordination between the provinces and the federal government.<sup>134</sup> The report's aims and objectives fall short of addressing the impacts of lack of internet access for most students in the country. The report does inculcate the need to train teachers in online learning and it also includes an objective of partnering with private organisations to create affordable digital content. However, most of these aims are premised on the flawed assumption that the digital divide is either non-existent or insignificant. After all, teachers can only be given internet literacy if they have access to the internet in the first place. Creating affordable digital content only tends to solve a small portion of a bigger problem because this content will exist in a

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<sup>131</sup> *ibid*, para 13.

<sup>132</sup> Ministry of Federal Education and Professional, Training, and Government of Pakistan, 'Proposed Stakeholder Engagement Plan: COVID 19 Response, Recovery and Resilience in Education Project' (May 2020).

<sup>133</sup> *ibid* 8.

<sup>134</sup> *ibid*.

vacuum unless its subjects i.e., students, are able to access it seamlessly. The report does not present any concrete mechanisms or proposals for increasing internet access for students. The need to do so is highlighted but that need is now an established fact, the necessity having been laid bare through Covid-19. Ideally, this report should have gone further and incorporated, at the bare minimum, a policy commitment to ensure internet access for students, teachers, and institutes across Pakistan and across the various socio-economic strata. A concrete policy commitment could have steered tangible implementation measures towards a long term, sustainable, inclusive, and non-discriminatory goal – access to the internet for all learners.

2. The [Digital Pakistan Policy](#) authored by the Ministry of Information Technology and Telecommunications. The broader vision for this policy is: *“To become a strategic enabler for an accelerated digitization eco system to expand the knowledge-based economy and spur socio economic growth.”* More specifically, the primary aim of this policy is to ensure the availability of accessible, affordable, reliable, universal, and high-quality ICT services in Pakistan. Therefore, the goal of access to the internet which is inclusive and affordable pre-exists. The policy commitment is clear and strong. However, the translation of that commitment into the recovery of the education sector from the Covid-19 pandemic is debatable. In the context of Covid-19 and its adverse impacts on education, it is imperative to begin with a strong, focused policy commitment which not only recognises the problem that lack of internet access posed to the education system during lockdowns but finds effective long-term solutions to deal with that problem, commits to specific resource allocations for the task and delegates its implementation to relevant executive institutions. The Digital Policy commendably encapsulates digital inclusion via bridging the digital divide for the marginalized segments of the population based on locality, gender, socio-economic area and disability amongst others. In the context of education, affordability and infrastructural constraints are paramount in ensuring that learners are not deprived of their fundamental right to education where social distancing during a pandemic mandates closures of buildings and institutions. A key component of the Digital Policy is to promulgate new legislation and policies to *“enable the creation of a sustainable IT environment”* including enactment of data protection laws. To some extent, this component has been achieved with the pending Data Protection Bill. However, new legislation which

mandates internet access for learners, students and teachers should also form part of a sustainable IT environment, especially in the wake of Covid-19. On the link between internet and education, the Digital Policy enumerates goals to facilitate the Federal Ministry of Education. These include, *inter alia*, creating opportunities to ensure inclusive and equitable quality ICT education, initiating projects to provide network accessibility at educational institutions and encouraging the development of e-portals for educational purposes. Here specifically, a focused policy commitment is needed which makes the mandatory link between education and internet access, not solely relegating internet access to the realm of enhancing the **quality** of education but recognizing that internet access is fundamental to the foundational **existence** of education in the first place.

3. The Ministry of Information Technology and Communication released the draft [National Broadband Policy 2021](#). This policy is still under consultation but its key pillars are worthy of examination in this subsection. The four pillars of this policy are inclusivity and accessibility, usability and market enablement, digital trust and, transformation and evolution. Of relevance to the present report is the first pillar of inclusivity and accessibility of broadband. This pillar recognises the digital divide in Pakistan and focuses on ways to bridge it by improvement on the infrastructure. The targets of this pillar include ensuring that 100% of the population living in tier 2/3 cities (as identified in the policy) should have access to high-speed internet by 2025 and every internet user should have ownership of at least one smartphone and/or device. This broadband policy is ambitious in its scope and has a clearly delineated goal of bridging Pakistan's digital divide based on universal service. On the question of implementation, only time will tell the extent to which the objectives laid down in this policy have been met by the target dates. It should be noted that this policy-level protection of internet access and the recognition of its importance is not done in a human rights context, therefore the extent to which policymakers can be held accountable in their failure to implement this policy is questionable. As far as the education sector specifically is concerned, this broadband policy needs to be adapted further in the wake of Covid-19 to fast-track its resource allocation scheme for provision of broadband infrastructure to the disadvantaged faction of the digital divide in Pakistan.

4. The [Covid-19 Responsive Annual Plan 2020-21](#) prepared by the Ministry of Planning, Development and Special Initiatives. This is important as it lays the policy-level contours for recovery from the impacts of Covid-19 with regards to specific sectors, including education. On basic and college education, this plan focuses on improvement in access to education and the introduction of a uniform education system in Pakistan. Specifically with regards to the impact of Covid-19, the plan outlined the following important interventions at the federal level with regards to education:
  - Development of remote/ distance learning, e-learning, and online technical courses.
  - Development of alternative learning models and programs to serve hard-to-reach areas.
  - Distribution of learning material to go along with distance learning TV and radio platforms.
  - Existing widespread access to television and smartphones may be capitalized for remote learning.

While all these interventions are suitable considering the resort to virtual learning during Covid-19 lockdowns in Pakistan, each of these interventions is premised on the assumption that internet access is available for learners and teachers everywhere in the country. Even if the best of remote learning courses and materials are developed, they are futile where there is no access to the internet. Therefore, this Plan needs to cater specifically to solving the problem of lack of internet access as without that foundational issue resolved, the outlined interventions, even if implemented optimally, will continue to exist in a vacuum and will not be able to benefit those who have suffered most.

5. The final policy commitment of relevance here is the Ministry of Human Rights' report on Covid-19 and human rights in Pakistan.<sup>135</sup> This report rightly highlights the inequalities that have been exacerbated in the education sector because of Covid-19 lockdowns owing to the different platforms used to deliver education during this time.<sup>136</sup> The Ministry of Human Rights made the following recommendations for the education sector in response to disasters in general and Covid-19 in particular:

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<sup>135</sup> Ministry of Human Rights, Government of Pakistan 'Covid-19 and Disaster Vulnerability in Pakistan: A Human Rights-Based Analysis' (November 2020).

<sup>136</sup> *ibid* 28.

- Develop indicators for tracking the progress of remote learning modules Pakistan’s commitment to the Sustainable Development Goals.
- Conduct teacher trainings to fully utilise hybrid education models.
- Provide special support to poor households, especially girls to allow disadvantaged learners to continue remote learning.
- Develop educational resources for disabled learners.
- Explore the potential of public-private partnerships to bridge the digital gap.
- Ensure that all schools are equipped with the necessary hygiene and sanitation facilities.
- Continue distant learning programmes with major focus on reaching out-of-school children.<sup>137</sup>

These recommendations are a step in the right direction, especially the fifth recommendation which reflects the necessity of bridging the digital divide specifically in education and focusing on overcoming infrastructural hurdles towards the realization of equality of education. However, all the other recommendations are wholly contingent on the extent to which the fifth recommendation is realised. Assessing the quality of remote learning, for example, is a moot question where there is no remote learning option in the first place due to lack of internet access. Therefore, it is important to underscore the necessity of provision of internet access to learners and teachers in the first place, so that these recommendations can be implemented. Furthermore, since this policy document had a clearly designated human rights focus, perhaps the link between internet access and education should have been made in human rights terms here, thereby accentuating the significance between the two for a sustainable recovery from the Covid-19 pandemic.

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<sup>137</sup> *ibid* 29.

# **CONCLUSION AND RECOMMENDATIONS**

## Part IV: Conclusion and Recommendations

To sum up, this research report proposes a bipartite legal framework to protect a right to internet access specifically for education in light of the Covid-19 pandemic and ensuing school closures. The digital divide in education is a well-documented problem in Pakistan, and this pandemic has made it worse by exacerbating inequalities in access to education. In light of this problem, this report has recommended that a right to internet access should be at the heart of the legal framework to address and mitigate the challenges of the digital divide in education. This proposed legal framework is a combination of a top-down and bottom-up approach. The former encapsulates a normative argument for internationally recognizing a right to internet access in education in IHRL, while the latter recommends combining this top-down international recognition with domestic entrenchment and enforcement of the same right. The bottom-up domestic enforcement is proposed to be carried out in one or more of the following four methods: constitutionalisation, legislative protection, judicial protection and incorporation into public policy frameworks.

To foreground the proposal for international recognition of a right to internet access, this research report has conclusively recommended the following:

1. A right to internet access should be read in as an auxiliary right of the existing right to education enshrined in the ICESCR and/or the CRC.
2. The substantive contours of this right should, at a minimum, include the following commitments for states:
  - a) An affirmative positive duty on states to take steps towards the progressive realisation of this right, in addition to the negative duty not to interfere in individuals' exercise of this right.
  - b) A resource commitment to ensure access to the internet through all of its enabling mediums like infrastructure, broadband cables, appropriate internet-enabled devices, etc.
  - c) An obligation of non-discrimination on states with regards to the protection of this right, so that special targeted measures are proactively taken to ensure the provision of internet access to the most disadvantaged learners, such as learners with disabilities or those belonging to the lower socio-economic strata of society.

- d) Provision of internet literacy and training programmes for learners and teachers alike, so as to concretise and make the right to internet access in education meaningful and subject to optimal positive utilization.

3. The foreseeable roadblocks to implementation are identified with preliminary proposals made for mitigation of these problems. The identified problems include, but are not limited, to the following:

- a) The adaptation of social norms to dispel a traditional cultural mistrust of the internet.
- b) The prospects of abuse and misuse of the internet, including issues of cybersecurity and cyberbullying.
- c) The balancing of internet access rights with competing rights and interests.
- d) Costs of ensuring access to the internet, especially for developing countries.

Combining this international recognition with domestic entrenchment of the same right is capable of producing holistic obligations on states for the protection and promotion of the right to internet access in education. Therefore, drawing from the cross-country analysis in Part III, the author recommends the following legal interventions for optimum domestic protection in Pakistan.

| <b>Temporality of Legal Intervention</b> | <b>Constitutional Protection</b>  | <b>Legislative Protection</b>  | <b>Judicial Protection</b>   | <b>Incorporation into Public Policy Frameworks</b>  |
|--|---|--|--|---|
| <b>Short-term</b>                        | A right to internet access in education can be read into Article 37(c). | Implementation of PTA’s existing statutory function to ensure equal accessibility to the internet for all. | A right to internet access for education should be read into the existing rights to life, dignity, education, equality and protection from exploitation. | Current policy frameworks should be implemented in a manner so as to put accessibility of the internet for learners at the heart of all measures taken to build resilience in the education sector. |

|                  |  |  |  |   |
|------------------|--|--|--|---|
| <b>Long-term</b> | The right to internet access in education should be constitutionally enshrined in the chapter on Fundamental Rights, as a proviso specifically of the existing right to education. | Introduction of special legislation on the subject of internet access rights in education. |  | Enshrine clear, concrete and holistic policy commitments on relevant responsible departments on federal and provincial levels to delineate sustainable plans for the provision of internet access to all learners and teachers. |
|------------------|--|--|--|---|

Table 1: Domestic Entrenchment in Pakistan

The long-term legal interventions recommended in Table 1 should form the subject of multistakeholder consultations involving a range of diverse stakeholders, including relevant government departments, private ed tech companies, learners, teachers, educational institutions and technology experts. Moreover, it is recommended that the perceptions, needs and views of learners and teachers be kept at heart of these long-term proposals to ensure access to the internet in education.