

Major Contentions: PECA

Curbs on Speech, Expression and Access to Information

20: Offences Against Dignity of a Natural Person – criminalizes the act of exhibiting, displaying or transmitting “information he knows to be false and intimidates or harms the reputation or privacy of a natural person.” While this doesn’t apply to anything aired on television, it applies to everything uploaded and shared online. Political expression and satire are not exempted. Some examples of how this can be misapplied are as follows:

The person who uploaded Rehman Malik’s video of boarding a flight late would be jailed for it. In fact he did lose his job and was charged under the Maintenance of Public Order. PTI activist Qazi Jalal was charged under Section 36 & 37 of the ETO for a tweet in which he alleged a judge’s son-in-law was deriving benefits due to his in-laws’ position. He included a wedding card in his tweet to corroborate the person in question was actually the son-in-law. In Turkey, a man is facing a two-year jail term for sharing a meme comparing Erdogan and Gollum – character from the Lord Of The Rings Trilogy. Would the same happen to person who created/shared the Nawaz Sharif & Shrek meme? And any other form of political expression, satire or citizen journalism will be construed as harm to reputation. Either people will start to self-censor – as is now rampant on channels and do a great degree in print – or people will be facing jail terms.

Defamation is already covered under the Defamation Ordinance 2002, and Sections 499, 500, 501 and 502 of PPC. Not only does this Section 20 duplicate what already exists but also does not outline clear procedures and exceptions, the way they exist in the other laws.

Section 20 carries a three-year jail term and while this is a non-cognizable offence, however, under subsection (2), any “aggrieved person...may apply to the Authority,” i.e. PTA and the Authority will determine what the appropriate remedy should be vis a vis the content in question, instead of the court making that decision after deciding the merit of the case.

This subsection also features in **Sections, 20, 21, 22 and 24**, which not only awards discretionary powers to the PTA, empowering it to make content decisions, but it is also ill-conceived because PTA will not be able to provide any relief to aggrieved parties due to the lack of jurisdiction over platforms and the technical inability to effectively deal with the content in question.

- As far as large social media companies are concerned, US law applies to them
- Then come their own terms of service and guidelines
- In countries they have a physical and legal presence – and in Pakistan they do not – they are not obligated to adhere to local law
- Even in jurisdictions they are legally present, companies have gone to court to challenge government directives if they happen to disagree with them

- There is no evidence of any company establishing a presence in Pakistan or agreeing to comply with the contents of this bill if enacted – statements by the government count for naught; at the very least these claims should be verified

A look at YouTube, Facebook and Twitter's community standards and rules – platforms which are most in use and where the bulk of the problems arise – reveal a lot of content categories are already covered and there exist mechanisms to deal with issues, report such accounts and pages, and take action.

Given that the above remedies already exist, and oftentimes PTA and FIA have to go through the same procedures when approached by complainants, the more sensible approach instead of empowering the government, PTA or anyone to do what they should not and cannot, is to raise awareness and facilitate citizens in seeking redress of grievances. A facilitation service/centre provided by these authorities is a better option. The role the government and authorities (FIA/PTA) should play is in helping citizens seek redress of grievances through available mechanisms instead of taking it upon themselves and going about all of this in an arbitrary manner. This of course should be subjected to a clear process.

Section 37: Unlawful online content

This section gives the government/PTA unfettered powers to block access or remove speech not only on the Internet but transmitted through any device. It is a copy-paste of Article 19, allowing the PTA to interpret how the exclusions are to be applied.

In the past, Beyghairat Bridage's video critical of the army was blocked. Shia killings, a website that documents sectarian killings, stands blocked. IMDB, a movie database was blocked because there was a review and link to a documentary on Balochistan on it. Instagram was blocked on the pretext of there being pornographic material available on it. All the alternate views found on the Mina tragedy that emerged on social media would most likely now stand blocked. No dissenting view would be available on Balochistan. As it is, several sites stand blocked on the pretext of them being 'anti-state.' Any commentary on religion or a view other one particular sect's interpretation could be blocked in the name of protecting 'the glory of Islam.' The Internet in Pakistan will become an extended version of PTV: all dissenting views would be controlled and only the state version.

For fundamental rights to be curtailed, the restriction has to be reasonable and imposed through law. While the language of Section 37 has been copied directly from Article 19 of the Constitution, this section allows PTA – an executive authority - to determine, interpret and apply the restrictions listed. There exists legislation on Article 19A that lists out exclusions and has a procedure for when and on what grounds information may not be provided (as vague as those are), However Article 19 has not been legislated upon. Determining what those restrictions mean and how they are to be applied is the parliament's function, and should have to come through a separate law (like the FOI/RTI laws), instead of being left to the discretion of the executive. Therefore, the restrictions vis a vis Article 19 are not being imposed 'through law.'

Secondly, interpretation of the law is a judicial function. Essentially, the powers that

have been given to the PTA to curtail a fundamental right, are a combination of the functions the parliament and judiciary should actually be exercising. Moreover, even without the framing of rules or procedures, PTA has been empowered to exercise these powers. That too, an Authority, which is not independent of the government: Section 8 of the PTA Act enables the federal government to issue policy directives to it (through the Ministry of IT).

Not only does this section award excessive and discretionary powers but its implementation will also place unreasonable restrictions, given the nature of the Internet.

In giving power under Section 37 to PTA – whereas in other jurisdictions courts decide the matter of content takedowns - the right balance will not be struck and more curbs will be placed on protected speech in trying to ineffectively deal with some unprotected speech. In trying to ineffectively block one piece of content, whole websites have been shut down in the past - case in point the YouTube ban – and this is most likely the regime that will continue given the inability to effectively deal with content on other platforms. And if not that, then invasive methods and softwares will be sought that will breach privacy and pry through secure protocols in order to achieve this.

Given that the internet is a voluntary medium and one rarely stumbles upon content without making a determined effort to get to it, it makes more sense to educate users on how to exercise caution instead, and come to terms with how internet technology functions. Moreover, as far as availability of undesirable content is concerned or child safety online, there is a way of enabling users both through awareness raising of existing self-help tools and through the provision of self-help tools that allow less tech-savvy people to opt for solutions to manage what enters their homes without infringing or deciding for others (See Annex A).

Privacy

31. Expedited preservation and acquisition of data – An ‘authorized officer’ may write to a person in control of an information system and require him/her to provide data or order that specified data be preserved up to 90 days. It is after this is done that the authorized officer must bring this to the court’s attention within 24 hours. 24 hours is long enough a period to misuse the powers given. While Section 41 has been added in the final version of the law, which penalizes any service provider or authorized officer for breach of confidentiality of information, however, if misused, the damage will already be done and there is very little in terms of success rates, in bringing cases against executive abuse, especially for the average person who has scant resources and little clout.

32: Retention of traffic data – a service provider (i.e. ISP) is required to retain data (of its customers) up to a year and provide it to the investigation agency or authorized officer as and when notified by the Authority to do so – now subject to a warrant. While a warrant is now necessary to acquire the data, retention itself is problematic. As per previous practice, data was being retained for a period of 90 days. Not only is retaining data up to a year costly – a burden that will most likely fall on Internet users through a spike in bills – but in the absence of data protection and privacy legislation,

and clear guidelines on how the security and integrity of this data will be maintained, it could very well fall into the wrong hands through breaches. In Philippines, the data retention requirement in their cybercrime law was struck down by the Supreme Court because it was held that it infringed upon the privacy of users. Not only does it provide the location of a user, but the data can also be used to decipher the contents of communication. Our entire digital footprint – what we accessed, who we communicated with and the specific contents – can be retrieved through traffic data, as it is identifiable data.

39. Real-time collection and recording of information –For a period of seven days, real-time activity will be recorded as sanctioned by court. There is no mention of the capability and methods that will be used to do this – how invasive they would be. The same instruments used to record for seven days can (and most likely will) be used for continued and selective and/or broad-based surveillance – not only those who are under investigation but also by default those who may be conversing with the person in question.

Section 48: Prevention of electronic crimes – This section empowers the federal government and the Authority i.e. PTA to issue directives from time to time and makes it an offence if they are not complied with. These directives could very well place an unrealistic burden on service providers or owners of information systems, which may not be practically implementable or possible to do.

Guidelines to the extent that they break down laws for the benefit of citizens and businesses are another matter. Around the world, governments play a pro-active role through public messaging to inform citizens about crimes, laws and how they apply, and what they can do. For example, Canada has an extensive anti-spam website which breaks down the law and rules. Similarly in the United States, the Federal Trade Commission issued a Compliance Guide for their Spam Act. The Khyber-Pakhtunkhwa government has done the same with its web portal for the Right to Information Ordinance 2013. These are advisories or easy to understand manuals at best, and that is all the government’s guidelines should attempt to do, instead of amassing powers to unilaterally issue directives and penalize people for it.

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Concluding Note:

It is unfortunate, that in the drafting of this law and the rush to pass it, the authors, instead of drawing from world best practices have instead relied on worst practices across various jurisdictions, including our own. This becomes particularly problematic in the absence of protective legislation that recognizes and upholds citizens' fundamental rights. It is the duty of the state to ensure rights given to citizens under the Constitution of Pakistan are upheld and not treated as state property or a privilege doled out at the state's discretion.

Recommendations:

It is requested that

- the Senate Human Rights Committee oversee the implementation of the law, and that there be strict monitoring through provincial human rights commissions of cases lodged under this Act
- there be review of rules framed under this Act before they are issued and that public input is solicited
- efforts be made to review sections of the law that violate fundamental rights; amendments to remove/revise sections be made; and affirmative legislation that protects speech, privacy and data be introduced