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E-Safety Bill, 2023

Another draconian law of censorship and threat to citizens privacy

Submission to The Ministry of Information Technology and Telecommunication (MoIT&T)

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The E-Safety Bill 2023 (the “Bill”) is a hugely problematic piece of legislation, which will stifle freedom of expression and speech in Pakistan if passed in its current form. It will also cripple Pakistan’s nascent digital economy. From its preamble, the Bill claims to protect the fundamental rights of users of Social Network Platforms, foster competition, increase private investment, and safeguard the interests of users concerning e-commerce services and related matters. However, from the detailed examination it is evident that the actual purpose of the Bill differs from its stated objectives.

Rather than solely protecting the fundamental rights and interests of users, the Bill empowers the State to gain control over the social media networks and exercise rigorous regulation. The purported protection of fundamental rights is a mere facade, serving as a pretext for the State to control social media platforms.

One of the concerning aspects is **Section 2(c)** of the Bill, which defines "Aspersion”. The definition is vague and includes terms such as "harmful information" and "harmful allegations", granting broad powers to the Authority to interpret and classify any statement or information as harmful. Moreover, the Bill fails to define these ambiguous terms, leaving ample room for potential misuse by the Authority.

Similarly, **Section 2(v)** defines "incitement" in a vague manner, providing the Authority with the discretion to potentially misuse it against anyone they wish. The lack of a clear definition enables the Authority to decide whether an act of any person amounts to incitement or not.

Section 2(aa) introduces the term "online safety", but the words "in a safe manner" remain undefined. This ambiguity grants unbridled power to the Authority to determine whether a social media platform was used safely or not.

The definition of "propaganda" in **Section 2(ee)** appears to be a deliberate attempt to curtail freedom of expression and information enshrined in the Constitution. The inclusion of the word "controversial" leaves the interpretation and decision solely to the Authority. Propaganda cannot be defined in such a slack manner as it expresses the State’s intention to respond to misinformation, disinformation or influenced operations through this opaque language without differentiating between these without defining their intricacies.

Section 2(gg) defines "publisher of news and current affairs content" hastily, excluding newspapers and replica e-papers, but failing to clarify whether mainstream TV channels and their social media accounts will fall under this definition. A clear definition of digital media must be taken into consideration.

Section 2(oo) - “Social Network Platform” means...” is the most problematic section as it is an attempt to regulate all different nature online service providers under the garb of social networking platforms, whereas the roles and functions of OTT platforms, cloud-based socializing websites and advertisers or e-commerce service providers are totally different.

Section 2(u) - “illegal operation” means the operation of the Social Network Platform without having a valid registration from the Authority is also discussible.

Section 4 – outlines the Powers and functions of the Authority, including the regulation of advertisers. However, the Bill lacks a mechanism to effectively regulate advertisers, leaving the Authority with significant discretionary power. This level of vagueness and lack of definition contradicts Bill’s stated purpose of fostering competition and increasing private investment.

Furthermore, the Authority has been granted extensive powers to protect users from "online harm," regulate content on Social Media Platforms, and enforce their registrations. These broad powers could lead to various forms of misuse. The lack of clear definitions and scope within the Bill is concerning.

The composition of the Authority and criteria for the appointment of Chairperson suggest that it may become a bureaucratic body lacking the necessary expertise to effectively exercise its functions and powers as enunciated in the Bill. This issue also extends to the Executive Director General and Secretary of the Authority.

Furthermore, the Authority has been granted extensive powers to protect users from "online harm," regulate content on Social Media Platforms, and enforce their registrations. These broad powers could lead to various forms of misuse, such as targeting of political activists, journalists, human rights defenders, etc. The lack of clear definitions and scope within the Bill is concerning.

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S**ection 15** – provides the Authority with access to databases on reasonable cause or suspicion, which appears to infringe upon citizens' fundamental right to privacy and is highly inconsistent with the Article 14 of the constitution. Additionally, the Bill remains silent on how the data will be protected if obtained and whether there will be consequences for breaches or leaks of personal data on the data controller and processors including those run and managed by the state such as NADRA and the corporates and/or third parties.

Sections 26 and 27 – require all social media networks to register with the Authority, potentially negatively impacting citizens, as companies failing to register will not be allowed to operate their platforms in Pakistan, affecting those who rely on these platforms for income.

Section 28, concerning prohibited content, raises concerns as it may conflict with Article 19 and 19A of the Constitution, which already provides reasonable restrictions on freedom of speech and expression. The proposed section needs revision considering the fundamental rights enshrined in the Constitution.

Section 30 – imposes restrictions on news and current affairs programs, potentially infringing on the right to freedom of speech and information. It appears to coincide with the PEMRA Ordinance, but the Bill's detailed guidelines appear to conflict with existing regulations. The Bill, particularly Sections 31, 32, and 33, also appears to curtail the right to freedom of information and speech.

Section 37 – seeks to regulate talk shows in a restrictive manner, limiting individuals' ability to express their opinions.

The proposed E-Safety Complaints Commission under Section 42 will be regulated by the Authority, which raises questions on its independence and duplication of functions. This Commission should be constituted as an independent body administratively and financially as enshrined in the Paris Principles for the reason that it will be deciding complaints related to freedom of expression, right to information and privacy. Moreover, it should also act as an oversight body. The power granted under Section 4(i) should be removed. The E-Safety Commission shall have the sole authority to receive, inquire, investigate, and adjudicate the complaints without any external influence.

Sections 47 & 48 – regarding non-cognizable and non-compoundable offenses appear to be inaccurately drafted, as they refer to Section 45(1) and (2) which pertain to Appeals against the decisions of the Tribunal, not offenses and penalties.

Section 49 – dealing with the cognizable offences, requires clarification to avoid redundancy in the presence of the Commission, Tribunal, and the Authority. If the Magistrate is to ultimately try offenses, there may be little need for the Commission or Tribunal.

Section 26 & 27 – The Bill aims to regulate and control Social Network Platforms, which includes platforms like YouTube channels, Vlogs, social networking sites, Over the Top (OTT) platforms, and various other online content distribution services. The law suggests that any person or entity operating or planning to operate a Social Network Platform needs to obtain registration from the Authority. Failure to do so may result in legal consequences. Additionally, the Authority has the power to prescribe terms and conditions, including fees, for obtaining and maintaining such registration. Furthermore, the Authority is empowered to create a Code of Conduct for the operation of Social Network Platforms, specifying rules and guidelines for the content accessible to users based in Pakistan.

This is a form of prior restraint, which means the government is exerting control over the content even before it is published or made available to the public. Prior restraint infringes upon the principles of freedom of expression and freedom of the press, which are fundamental rights under Article 19 of the Constitution of the Islamic Republic of Pakistan. It puts the responsibility on platform holders to ensure the content complies with the guidelines set by the Authority, potentially leading to self-censorship to avoid any issues with the authorities.

Section 28(1) – The use of terms like "Islamic values and ideology of Pakistan" can be subjective and open to various interpretations, which may result in different understandings and applications by different stakeholders. Who is going to decide what is against Islamic values and what is against the ideology of Pakistan? These are academic questions at best and the E-safety Authority or other bodies envisaged under the law cannot sit in judgment on the issue. Almost all the subsections (b) through (o) may also be misinterpreted and applied in a manner that would curtail freedom of expression and speech and religious freedoms.

This lack of a clear and universally accepted definition of what the ideology of Pakistan could potentially lead to censorship concerns, freedom of expression issues, and questions about what content should be restricted or allowed.

Section 52 – “Jurisdiction of courts barred-. No court, authority or forum other than those conferred jurisdiction under this Act shall have jurisdiction to question legality of anything done or any action taken under the Act.”

Due process and fair trial are fundamental principles of justice enshrined in Pakistan's constitution. These principles ensure that individuals have the right to a fair and impartial hearing before an independent and competent tribunal. They also provide the right to challenge actions taken against them and seek redress in a court of law.

When a law explicitly bars the jurisdiction of other courts or authorities to question the legality of actions taken under that law, it restricts the ability of individuals to seek judicial review and access justice. Such a provision may be seen as undermining the checks and balances on government actions and potentially violating the right to due process. In a democratic society, the judiciary plays a vital role in upholding the rule of law and protecting the rights of citizens. Judicial review is an essential mechanism for ensuring that laws and actions by the government comply with constitutional principles and do not infringe upon individual rights.

By limiting judicial review only to specific courts or authorities designated by the Act, there is a risk of concentrating power and potentially curtailing the ability to challenge potential abuses of power. Any restrictions on judicial review should be carefully considered and subject to scrutiny to ensure they are consistent with the principles of constitutional governance and the rule of law.

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