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CONTENT REGULATION AND HUMAN RIGHTS IN THE DIGITAL AGE

Multistakeholder Roundtable on Content Regulation in Pakistan

16 July 2020 – 4:00pm PKT / 1:00pm CEST / 7:00am EDT

Roundtable Report

On 16 July 2020, the Global Network Initiative (GNI) hosted a multistakeholder roundtable discussion to examine key provisions of digital content regulation in Pakistan through the lens of international human rights law and principles.

GNI presented its forthcoming policy brief, “Content Regulation and Human Rights in the Digital Age,” which provides a framework for considering good policy practice. Though many human rights are impacted by content regulation, controls on communication most directly impact fundamental rights to freedom of expression and privacy. The policy brief and our discussion thus focused on these two rights.

Facebook then presented on the global landscape of digital content regulation, outlining the unique and dynamic challenges of regulating digital content. Bolo Bhi followed with a presentation on its policy brief on Pakistan’s Online Censorship Regime, covering the Pakistani government’s Citizens Protection (Against Online Harm) Rules 2020 (“Citizen Protection Rules”) and Section 37 of the Prevention of Electronic Crimes Act (PECA) 2016. After these presentations, participants engaged in an open discussion about digital content regulation in Pakistan.

As content regulation initiatives continue to be introduced and implemented around the world, GNI believes proactive and honest multistakeholder conversations on this topic are key to ensuring that responses to digital harms are legal, proportionate, and fit-for-purpose. GNI looks forward to further consultations on the Citizens Protection Rules and other content regulation efforts.

The conversation was held under the Chatham House Rule. Nothing in this report is attributed to any individual, institution, or affiliation, nor does it necessarily reflect GNI’s position.

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A Human Rights-Based Approach to Content Regulation

The roundtable began with an overview of the analytical framework used in GNI's forthcoming policy brief, "Content Regulation and Human Rights in the Digital Age."

The brief was developed in response to an increase in governmental efforts around the world that claim to address various forms of harm related to user-generated online content, which we refer to as "content regulation." It uses a human-rights based approach to analyze content regulation measures from a dozen countries around the world.

International human rights law reminds us to put individual rights at the center of efforts to improve our shared digital spaces. This is critical because these spaces and services remain primarily devoted to acts of communication. History has repeatedly shown the perils of efforts to govern communication that put majoritarian interests above the rights of individuals, journalists, critics, and dissidents.

The brief demonstrates that the norms and principles articulated in international human rights law provide a universal, time-tested, and robust framework that can help lawmakers find creative and appropriate ways to engage stakeholders, reconcile different interests, and mitigate unintended consequences of content regulation.

The brief examines content regulation efforts for their compatibility with three key principles of international human rights law: legality, legitimacy, and necessity. It also considers proportionality as a component of necessity and extends this analysis to privacy.

Legality

The principle of legality establishes that restrictions on freedom of expression must clearly define that which is prohibited and that which is allowed, "to enable an individual to regulate his or her conduct accordingly."¹ Such laws must also enable those responsible for their execution to ascertain expression that is allowed and that which is not, which contributes to predictable, consistent, and non-discriminatory enforcement. This is particularly important when laws rely on private bodies, rather than democratically-accountable regulators or independent judiciaries, to adjudicate and enforce such restrictions.

¹ UN Human Rights Committee, General Comment No. 34: Article 19 (Freedom of opinion and expression), 102nd Sess, adopted 12 September 2011, UN Doc CCPR/C/GC/34, online: < <https://undocs.org/CCPR/C/GC/34>>.

Ambiguous content regulations can have a “chilling effect” on legitimate speech. In practice, chilling effects unfold in two ways. First, individuals who fear violating the law may shape their communications to avoid any potential implication, sometimes choosing not to speak at all. Second, intermediaries held liable for user-generated content may be overly broad in their enforcement of the law to prevent any possible infringement.

Legitimacy

The principle of legitimacy holds that laws restricting expression can only be justified to achieve specific, enumerated purposes. These may include respect for the rights or reputations of others or the protection of national security, public order, public health or morals. While international law gives states significant latitude to determine the activities that justify restrictions, that discretion is not unlimited. International courts and authorities have made clear that the right to freedom of expression is broad and encompasses “even expression that may be regarded as deeply offensive.”

In addition, numerous consensus United Nations resolutions establish that offline rights must also be protected online. Inconsistencies in the treatment of online and offline speech may be exploited by regimes and actors who do not respect democratic norms. Therefore, it is critical to protect speech equally and consistently, and to resist differentiating approaches to expression across offline and online mediums.

Necessity and Proportionality

The principle of necessity requires states seeking to restrict expression to articulate the threat imposed by a specific type or piece of speech as well as the “direct and immediate” connection between the expression and the threat.

The related principle of proportionality requires that any restrictive law, as well as the actions of administrative and judicial authorities in their application of that law, must be: (i) proportionate to the interest being protected; (ii) appropriate to achieve that protective function; and (iii) the least intrusive instrument among those which might achieve that protective function.

In the content regulation context, the principles of necessity and proportionality should guide lawmakers to think carefully about which types of services are most appropriately positioned to address specific concerns. Shifting liability for illegal content from creators to intermediaries rarely if ever fits this description. Similarly, punitive sanctions, rigid timelines for content adjudication, and pre-emptive filtering requirements are also likely to run afoul of the necessity and proportionality principles, and as such are likely to prove ineffective or counterproductive.

To ensure content regulation efforts are appropriately and narrowly tailored and to guard against unintended consequences, lawmakers should look to proven approaches based on concepts like transparency, due process, and remedy. They should also consider the perspectives of and, where appropriate, provide explicit protections for specific actors such as journalists and vulnerable groups.

Privacy

Many content regulation efforts lack protections for the fundamental right to privacy at best and, at worst, actively undermine individual privacy. Requirements to proactively monitor, track, or trace content often lack consideration of associated privacy risks. In addition, compelling content hosts to proactively report user-generated content and associated data to law enforcement agencies further undermines this right. Moreover, the explicit prohibition or implicit limitation of the use of anonymity and encryption tools signals a disregard for the importance of privacy and the rights it enables.

Global Landscape of Content Regulation

A presentation by Facebook

Facebook's presentation provided background into the global context of content regulation discussions, and outlined the company's approach to content moderation and regulation issues. The presentation included three components: 1. An overview of how companies approach content enforcement, 2. A review of global models emerging for content regulation, and 3. A proposed approach to content moderation and regulation issues.

How Companies Approach Content Enforcement

Both governments and social media companies have strong and legitimate interests in preventing the proliferation of many types of harmful content, such as adult nudity and sexual activity, violence and graphic content, hate speech, terrorism, fake accounts, bullying, child nudity and exploitation, regulated goods like drugs and firearms, suicide and self injury, and spam. Many company "community standards" therefore prohibit this type of content from being shared, and companies invest significantly in proactively enforcing these policies.

Emerging Global Models of Content Regulation

The Internet has become increasingly central to public discourse. As technology evolves, the way that bad actors use technology changes as well. Enforcement mechanisms must therefore also adapt, and this is why constant dialogue and consultation between companies, civil society, and

governments are so important. Platforms like Facebook and its peers are intermediaries, not speakers or content creators, which comes with responsibility, including the need to take steps to address harmful content created by others and being shared through their platforms.

Some content regulation efforts have demonstrated the consequences of imposing strict demands on company moderation efforts. For example, France's Avia's Bill included a provision that would have required social media intermediaries to remove content within 24 hours after receiving an administrative order from police. The country's Constitutional Council recently issued a decision finding that many parts of the bill were unconstitutional. In particular, it found the administrative procedures lacked sufficient safeguards, and the overall timeline and process would infringe on freedom of expression rights. Implementation of components of Germany's NetzDG law has also been fraught. For example, the law has inadvertently given more voice to a number of far-right hate organizations, rather than meeting its goal of addressing hate.

In parallel, content regulation efforts in the United Kingdom and Ireland have pursued inclusive consultative approaches to policy-making, which have produced outputs that, while not perfect, have gained widespread support among industry and civil society. The UK's Online Harms White Paper has, through an extensive multistakeholder consultation process, focused on systems, instead of prescribing takedown times or specific methods of content moderation. Ireland's Online Harms and Safety Bill also primarily focuses on systems, and includes an opportunity for regulated entities to redress potential noncompliance and discuss with regulators before punitive sanctions are applied.

A Proposed Approach to Content Moderation and Regulation Issues

Facebook identified three key themes that drive their approach to content moderation and regulation issues: consultation, transparency, and oversight. It also discussed a [content regulation white paper](#) published by the company in February 2020, which outlines five principles for regulators to take as they seek to develop content regulation:

1. **Incentives:** Facilitate accountability in company content moderation and procedures by nudging companies to responsibly balance values like safety, privacy, and freedom of expression.
2. **The Global Nature of the Internet:** Efforts to address locally illegal content need to recognize the potential global implications, as well as differing norms across jurisdictions. Regulators should collaborate to maintain interoperability across different jurisdictions.

3. **Freedom of Expression:** Freedom of expression needs to be respected and affirmatively enshrined in regulations, including through procedural safeguards.
4. **Technology:** The use of technology as a content moderation tool comes with significant limitations. Moreover, a tool used today may become ineffective as technology evolves. Regulators should avoid prescribing the use of tools that may hamper results and undermine the desired goal.
5. **Proportionality and Necessity:** The approach to regulation should mirror the tangible risk of harm; the severity and prevalence of content should be considered.

In conclusion, Facebook noted Pakistan's opportunity to distinguish itself as a global leader on content regulation that is both effective and consistent with human rights norms.

Content Regulation in Pakistan

A presentation by Bolo Bhi

Bolo Bhi opened its presentation with a discussion of historical efforts in Pakistan to restrict access to online content hosted by international intermediaries. The Inter-Ministerial Committee for Evaluation of Websites (IMCEW) was established in 2006 through an executive order with a mandate to regulate access to blasphemous and pornographic content. By order of this committee, implemented through the Pakistan Telecommunications Authority (PTA), the infamous YouTube ban took effect in September 2012. After challenges to the legality of this blocking regime in court, the government introduced and ultimately passed the Prevention of Electronic Crimes Act, 2016 (PECA).

Section 37 of PECA gives discretionary powers to the PTA to remove or block, or issue directions to remove or block, access to online content "if it considers it necessary" for certain purposes drawn from Article 19 of the Constitution. It also includes a provision calling on the PTA to develop rules, with the approval of the Federal Government, that provide for safeguards, transparency, and oversight of its implementation of these powers. This sub-section gave rise to the Citizens Protection (Against Online Harm) Rules, 2020.

The Citizens Protection Rules were issued in a surprise announcement in February 2020. The rules create an office of a "National Coordinator" with power to compel companies to block content at its will and fine those which do not comply. In addition, the rules empower the Federal Investigation Agency to seek from social media companies information, data, content or

sub-content of its users after receiving a warrant, expanding the scope of the authority to create rules provided by Section 37 of PECA.

After much local and international concern, the Prime Minister “suspended” the rules, rendering the status of the rules unclear.² PTA announced its pursuit of stakeholder consultations shortly after. Civil society has largely rejected both the process by which the rules were issued and the content of the rules and has refused to participate in the PTA’s *ex post facto* consultations. Several petitions challenging the rules have been put forward to high courts, with results still pending. Bolo Bhi has been advocating for an amendment to PECA that gets rid of Section 37 which means the Rules also go, citing existing mechanisms such as community standards of platforms, other clauses of PECA, etc. as sufficient to protect citizens if implemented effectively.

The problematic origins of the Citizens Protection Rules paired with the government’s historical efforts to assume and execute broad powers to mandate content removal paints a troubling picture for the future of content regulation in Pakistan. A review of the stated aims of content regulation efforts against how such powers have been exercised is needed. New efforts should be founded on protections and safeguards for citizens provided through the Constitution of Pakistan and international best practices, with accountability and remedy mechanisms available when these are violated.

Discussion

The Unique Context of Pakistan

Participants noted features of the Pakistan political system that make it unique amid the global content regulation landscape. Policy making is influenced by religious beliefs, and religious arguments have been successfully used in court cases. In addition, international human rights law may not always apply in Pakistan courts, because international human rights law must be enshrined in national legislation for it to be applicable. This has impacted the results of some cases related to freedom of expression.

Concerns with Content Regulation Efforts in Pakistan

Participants expressed that current efforts to regulate digital content must begin with a review, if not a complete withdrawal, of Section 37. Section 37 affords the government powers to remove content with few, if any, checks on or balances of that power. Vague terminology is used

² The office of the Prime Minister cannot legally undo the Cabinet’s approval of the rules. Therefore, the legal status of the rules is not clear at the time of this report.

to describe which types of content can be blocked and under which conditions this power can be exercised, rendering interpretation challenging and therefore giving broad discretion to the government. Section 37 also fails to consider protections for rights enshrined in Articles 10a, 14, and 19 of the Constitution of Pakistan.

Courts have weighed in on interpretation of Section 37, but the government has not fully implemented adjustments based on these rulings. Some legislators in Pakistan's Senate are seeking to bolster Section 37, rather than reevaluate it. Policy makers sympathetic to civil society have had some success countering such efforts, but it is likely that problematic content regulation efforts will continue to be pushed and passed.

The Citizens Protection Rules were issued under Section 37 to give greater shape to the authorities of the government to order content removal. However, the legality of the rules are currently being challenged in court for failing to meet their mandate and for exceeding the boundaries of permissible restrictions under Article 19 of Pakistan's Constitution. In one example, though Section 37 includes a right to review decisions to restrict content, the text of the Citizens Protection Rules do not include a review obligation. In other cases, the text of the rules goes beyond the described scope of Section 37 by creating new obligations and liability for companies and delegating powers to other parties, among others.

The new requirements placed on companies as a result of the Citizens Protection Rules create a risk of excessive censorship, including a clear risk of selective enforcement in which a leader can target political opponents or others of interest. The rules will impact not just the privacy and free expression of Pakistan's citizens, but also Pakistan's digital economy. The rules reflect unrealistic expectations of companies and place unnecessary burdens on small and medium enterprises, deterring innovation. Citizens who conduct or build their businesses through social media services may also experience consequences of broad and ambiguous content regulation. In addition, an unpredictable legal environment may discourage foreign investment in Pakistan's information and communication technology sector. This is one reason why clarity on the status of the Citizens Protection Rules is needed; it is unclear if they have been withdrawn or de-notified.

A Path Forward for Content Regulation in Pakistan

Principles for Policy Makers

Content regulation efforts in Pakistan should ensure that due process is guaranteed and freedom of speech is not arbitrarily curtailed. Definitions should be precise and the criteria used for blocking content should be clear. Parties affected by potential content restriction decisions should have the opportunity to respond, only after which a decision on the content is rendered, and that decision and reasoning should be public. Affected parties should also have the

opportunity for a review of the decision. Potential misuses of regulations should be considered in advance by policy makers, and if a misuse of power does occur, the government should establish a process for departmental proceedings against the person involved.

Policy makers should strive to approach online content differently from offline media. Online, citizens have more control over the content they encounter when compared to television or print media. Efforts to reduce online harm should be fit-for-purpose to avoid having a blunt impact on online conversation and communication and to ensure effectiveness. Blocks on online content can easily be circumvented, and removed content can reappear easily if shared by another user. Additionally, experience shows that content can receive more attention once blocked or banned than it would have otherwise.

The Role of Companies

Some participants argued that social media companies should refuse to implement the Citizens Protection Rules by not incorporating offices in Pakistan and refusing to censor content under the framework of the rules. Participants suggested that companies should be more transparent about their content moderation policies and process.

Incentives

Participants discussed the role of incentives in content regulations and suggested that these should be carefully considered by policy makers. Incentives, positive or negative, impact the way that companies moderate content. Incentives can skew approaches to content moderation, drawing resources toward a goal that meets a government requirement and away from other efforts, including those to counter harmful content that may not be in the remit of government regulation.

Participants mentioned two examples of incentives in action. Germany's NetzDG sought to incentivize companies to remove hate speech content within a certain time window by threatening a fine for non-compliance. A company shifted resources to focus on meeting this target; however, this hampered the company's efforts to seek or respond to harmful content not reported by police, resulting in prominent hate speech on the platform. In contrast, incentives within the inter-governmental Christchurch Call have been perceived as positive to protecting rights and achieving desired goals because they facilitate more transparency and oversight, as well as user-friendly processes. Regulators should seek to understand the diversity of approaches to content moderation and the consequences of prescribing specific goalposts.

Related Resources

[Pakistan's Online Censorship Regime](#) (July 2020, Bolo Bhi)

[AIC Submits Comments on Pakistan Citizens Protection \(Against Online Harm\) Rules 2020](#) (June 2020, Asia Internet Coalition)

[AIC Submits Response to Pakistan's Citizens Protection Rules \(Against Online Harm\)](#) (February 2020, Asia Internet Coalition)

[Charting a Way Forward on Online Content Regulation](#) (February 2020, Facebook)

[AIC Media Statement - Pakistan's Citizens Protection \(Rules Against Online Harm\) 2020](#) (February 2020, Asia Internet Coalition)

[GNI Expresses Serious Concern Regarding Pakistan's Rules Against Online Harm](#) (February 2020, Global Network Initiative)

[Pakistan Civil Society Statement](#) on rules against online harm (February 2020)