

# Comparative Analysis

Digital Media Regulatory Landscape In Pakistan





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# Introduction

Every year the global Press Freedom Index paints a gloomy picture of Pakistan as being one of the lowest performing countries in the world.<sup>1</sup> This has much to do with Pakistan's legal landscape which gives ample room for the state to muzzle the media in the name of regulation.<sup>2</sup> The primary victims of state regulatory frameworks have been electronic and digital media.

Pakistan's media is regulated through the Pakistan Electronic Media Regulatory Authority (PEMRA) under the PEMRA Ordinance 2002.<sup>3</sup> PEMRA was established with an underlying aim to “Improve the standards of information, education and entertainment” and “ensure accountability, transparency, and good governance by optimising the free flow of information.”<sup>4</sup> PEMRA, therefore, is the primary entity tasked with regulating the media industry in Pakistan through the ordinance of its promulgation and other subsidiary laws and rules notified by the state.

The last two decades have seen digital and electronic media expanding in scope and outreach in Pakistan and across the globe. This is complemented by the upsurge in the embracement of digital media usage and its gradual transition into a combined platform for social networking, information, and media.<sup>5</sup> Digital media, therefore, has largely occupied the principal seat of the media industry given its added advantage of accessibility and swiftness while at the same time its ability to serve as a platform for electronic media broadcast. While the hybrid of electronic and digital media has made access to information easy, it has made states restless.<sup>6</sup> This has given birth to problematic and reactionary legal approaches towards regulation of which Pakistan has had a fair share. A comparative analysis of such regulations vis-à-vis global best practices will be the major thrust of this study.

The purpose of this comparative study is to also identify similar patterns of regulations in countries with similar outlook and control tendency, e.g., Bangladesh and India. This is to narrow down on the state's penchant towards curbing electronic and digital access in the name of national security such as Prevention of Electronic Crimes Act, 2016 (PECA)<sup>7</sup> and the rules associated with it in Pakistan, Digital Security Act 2018 (DSA) in Bangladesh,<sup>8</sup> and Information Technology (Intermediary Guidelines and Digital Media Ethics Code), Rules, 2021 in India.<sup>9</sup> The study will also entail a comparative analysis of Pakistan's regulatory landscape of media in comparison with EU Human Rights Guidelines on Freedom of Expression Online and Offline which can be regarded as having a progressive legal policy regime to govern both online and offline media.<sup>10</sup>

The study will critically examine the existing regulatory frameworks in Pakistan and will suggest a way forward encompassing a set of regulations which do not infringe on the fundamental rights of citizens.

01. 'Pakistan | RSF' <<https://rsf.org/en/country/pakistan>> accessed 9 May 2022.

02. 'Pakistan's New Media Laws and Crackdown Threaten Press Freedom' <<https://foreignpolicy.com/2022/02/28/pakistan-media-laws-crackdown-press-freedom/>> accessed 22 May 2022.

03. 'A Short Guide to the PEMRA Ordinance – Josh and Mak International' <<https://joshandmakinternational.com/a-short-guide-to-the-pemra-ordinance/>> accessed 9 May 2022.

04. 'Ministry of Information and Broadcasting' <<http://www.moib.gov.pk/Pages/15/Media-laws>> accessed 9 May 2022.

05. 'How Pakistani Journalists Can Ready Themselves for a Shift to Digital' (Reuters Institute for the Study of Journalism) <<https://reutersinstitute.politics.ox.ac.uk/how-pakistani-journalists-can-ready-themselves-shift-digital>> accessed 22 May 2022.

06. Ibid.

07. Prevention of Electronic Crimes Act, 2016 (PECA).

08. 'Digital Security Act 2018 (DSA)' <<https://www.cirt.gov.bd/wp-content/uploads/2020/02/Digital-Security-Act-2020.pdf>> accessed 22 May 2022.

09. 'The Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021 | Ministry of Electronics and Information Technology, Government of India' <<https://www.meit.gov.in/content/notification-dated-25th-february-2021-gsr-139e-information-technology-intermediary>> accessed 22 May 2022.

10. 'EU Human Rights Guidelines on Freedom of Expression Online and Offline'.

# Background

Media is the backbone of a society and over the period of a few decades, it has taken centre stage in dictating and propagating a narrative. Media and democracy are rightly referred to as a couple walking hand in hand.<sup>11</sup> From the printing press to the digital era, media has undergone a significant transformation. With time it has evolved in terms of scope, impact, and accessibility. The evolution of media has played a vital role in the democratic diffusion in the last couple of decades. With its gradual integration in the state as one of the pillars, the media has been key in defining the direction of a state and holding it accountable in the process.

While such evolution of media has been welcomed across democratic societies, it has made many states restless. Such states then resort to ways to curb freedom of expression on rationales which are *ultra vires* to international benchmarks on freedom of expression.

The expansion of media has made states imbue draconian tendencies to regulate it.<sup>12</sup> This trend is evident in countries with weak democratic credentials and authoritarian traits.<sup>13</sup> To curb dissent, such states resort to mechanisms which are alien to global standards on freedom of expression.

Media in Pakistan has gone through a transition in the last few decades. It has transformed into a robust entity entailing print, electronic and digital media. The political and intellectual fabric of Pakistan has transformed with the advent of media with a plethora of electronic media options stimulating discussions in Pakistan.

However, successive reports indicate censorship, patronage, and suppression.<sup>14</sup> An analysis of regulations and policies responsible for the digital and electronic media decadence is the primary scope of this paper.

11. Josef Trappel and Hannu Nieminen, 'Chapter 10 Media and Democracy: A Couple Walking Hand in Hand?': Media and Democracy: A Couple Walking Hand in Hand? [2018] Comparative Media Policy, Regulation and Governance in Europe <<https://directory.doabooks.org/handle/20.500.12854/27362>> accessed 11 May 2022.

12. Ikram Junaidi, 'Digital Media Freedom in Pakistan Remains Weak: Report' (DAWN.COM, 29 October 2021) <<https://www.dawn.com/news/1654587>> accessed 9 May 2022.

13. Akhilesh Pillalamarri and Cody Stanley, 'Online Content Regulation: An International Comparison' (International Law and Policy Brief) <<https://studentbriefs.law.gwu.edu/ilpb/2021/12/08/online-content-regulation-an-international-comparison/>> accessed 16 May 2022.

14. O'Donnell, L. (2022, February 28). Pakistan's New Media Laws and Crackdown Threaten Press Freedom. Foreign Policy. <https://foreignpolicy.com/2022/02/28/pakistan-media-laws-crackdown-press-freedom/>

# Legal landscape of Media in Pakistan

With the evolution of media, the legal landscape regulating it in Pakistan has also taken a shift. Pakistan Electronic Media Regulatory Ordinance 2002 is one of the primary entities which regulates the electronic media industry in Pakistan. There are seven laws which regulate other media entities in the country.

Electronic Media Laws	Digital Media Laws	Print Media Laws	Laws Containing Provisions Related to Media
Pakistan Electronic Media Regulatory Authority (PEMRA) Ordinance 2002	Prevention of Electronic Crimes Act, 2016 (PECA)	1) The Press Council Ordinance, 2002  2) The Defamation Ordinance 2002  3) The Newspaper Employees (Condition of Service) Act, 1973  4) The Press, Newspaper, News Agencies and Books Registration Ordinance 2002	1) The PTA (Re-organization) Act, 1996  2) The Pakistan Penal Code, 1860 (PPC)  3) The Telegraph Act, 1885.  4) The Post Office Act, 1898.  5) The Contempt of Court Act, 1973.

*Table A. Media Laws in Pakistan*

The state has formulated several subsidiary laws and policies to regulate and control the media. The renewed focus is on limiting electronic and digital media freedom in the country. Analysis of the laws governing the digital and electronic media sphere is vital to understanding the media landscape in Pakistan. Therefore, PEMRA and PECA will be discussed in detail.

## - Pakistan Electronic Media Regulatory Authority (PEMRA)

Pakistan stands out as the first country in the South Asian region which has introduced a regulatory framework for electronic media. The Pakistan Electronic Media Regulatory Authority (PEMRA) was established through an ordinance in the year 2002 (Section 4, PEMRA Ordinance) to regulate electronic media in the country.

15. 'Ministry of Information and Broadcasting' (n 4).

16. Ibid.

17. Azmat Rasul and Stephen D McDowell, 'Regulation and Media Monopoly: A Case Study of Broadcast Regulation in Pakistan' (Calgary: International Telecommunications Society (ITS) 2011) <<https://www.econstor.eu/handle/10419/52339>> accessed 19 May 2022.

18. 'Ministry of Information and Broadcasting' (n 4).

The promulgation ushered a wave of media liberalisation allowing private televisions networks, radio channels and cable operators to operate in Pakistan. Previously only state-owned media entities had the sole broadcasting rights. The ordinance was enacted to improve the quality of information, access and to optimise the free flow of objective news.<sup>19</sup> A 13-member body under PEMRA Ordinance has been governing and managing the development of electronic media in Pakistan ever since. This entails issuing licences for the establishment of channels and broadcast, distribution of broadcasting rights, etc. The promulgation of PEMRA paved the way for private TV and FM radio, ushering a new wave of media development in Pakistan. Several dozen private TV channels were registered and several entities from print media launched their TV channels to supplement their foothold in the landscape.

PEMRA is vested with executive, legislative, and judicial powers.<sup>20</sup> It makes rules for the private broadcast entities and regulates their conduct for any breach. It has the power to penalise entities if any breach is established. The regulation mechanism of PEMRA has a three-tier process which involves issuance of licence, conditions and restrictions and the enforcement of the prescribed rule and regulations.<sup>21</sup>

However, PEMRA as a regulatory body is not autonomous as noted by the Supreme Court of Pakistan in numerous judgements.<sup>22</sup> As the PEMRA Ordinance 2002 authorises the government to issue directives from time to time, the Ministry of Information and Broadcasting (MoIB) has been using such leverage to intervene in the administrative and policy matters of the authority. Moreover, through the PEMRA Amendment Act 2018, the federal government has given itself a dominant role in defining the working mechanism of PEMRA. The amendment also grants the federal government an upper hand in matters which involve policy ambiguities.<sup>23</sup> Furthermore, the composition of members of PEMRA is determined by the federal government. However, people with well-established political loyalties are considered for top slots in PEMRA.<sup>24</sup> Therefore, PEMRA has failed to evolve as a modern regulatory body of media in the country, and is largely seen as a tool to stifle press freedoms due to its many arbitrary censorship orders and fines on electronic media houses. With regards to media monopoly, it has failed to prevent multi-ownership of media houses.<sup>25</sup>

In a nutshell, the scope of PEMRA as a regulatory body has been reduced to being a censor board of the state often engaged to suppress critical debates.<sup>26</sup> This is evident by PEMRA's all-out efforts to limit and halt the coverage of opposition leaders, their rallies, and interviews in the primetime shows.<sup>27</sup>

## - Subsidiary guidelines governing digital and electronic media

PEMRA Ordinance was the first legislative attempt to bring the electronic media under a legal ambit. With the evolution in the media industry and its subsequent impact on politics, the fundamental approach towards media, especially digital media, has changed. There has been a perception drift regarding the right to freedom of expression in the government as noted by global human rights bodies.<sup>28</sup> In the name of national interest and security, the state of Pakistan has introduced several laws and guidelines penalising all forms of derogation.

19. Ibid.

20. 'Pakistan Electronic Media Regulatory Authority Ordinance, 2002' <[https://pemra.gov.pk/uploads/legal/Ordinance\\_2002.pdf](https://pemra.gov.pk/uploads/legal/Ordinance_2002.pdf)> accessed 22 May 2022.

21. Ibid.

22. Raza, A. & another v Federation of Pakistan and another. (Supreme Court 2017). PLD Islamabad 64.

23. 'Pakistan Electronic Media Regulatory Authority Ordinance, 2002' (n 20).

24. 'Pemra Head Appointment: Reply Sought from Centre, Info Ministry - Pakistan - DAWN.COM' <<https://www.dawn.com/news/1595941>> accessed 25 May 2022.

25. 'The Electronic Media Economy in Pakistan: Issues and Challenges' (PIDE) <<https://pide.org.pk/research/the-electronic-media-economy-in-pakistan-issues-and-challenges/>> accessed 9 May 2022.

26. Ibid.

27. 'TV News Channels Blocked in Pakistan after Airing Opposition Speeches' (Committee to Protect Journalists, 9 July 2019) <<https://cpj.org/2019/07/tv-news-channels-blocked-in-pakistan-after-airing/>> accessed 11 May 2022.

28. 'Proposed Pakistan Law Seeks Greater Control of Media' (Human Rights Watch, 28 January 2021) <<https://www.hrw.org/news/2021/01/28/proposed-pakistan-law-seeks-greater-control-media>> accessed 11 May 2022.



## a) Prevention of Electronic Crimes Act, 2016 (PECA)

PECA traces its origin to the contours of National Action Plan (NAP) which was outlined after the gruesome attack on the Army Public School in Peshawar in the year 2014.<sup>29</sup>

The underlying theme behind the promulgation of PECA law was to keep a check on digital harassment, curb hate speech and control the proliferation of extremist content on electronic and digital platforms.<sup>30</sup> However, with time the real intent behind the promulgation of PECA became evident as detentions of journalists, anti-terrorism charges on rights activists became a norm under this law.<sup>31</sup>

Content regulation has been centralised through Section 37 of the Act. Section 37 gives vast powers to the PTA to censor, block and restrict any content that it deems against the spirit of Islam, contempt of court, and to be promoting indecency and immorality. The wording of the section is exactly the same as Article 19 of the Constitution that gives freedom of expression the status of a fundamental right, and also lists seven exceptions when the right ceases to exist. Section 37(Unlawful Online Content) of PECA adopts these restrictions verbatim from Article 19 and fails to specifically describe the scope of the restrictions listed in the Constitution, as required of the law. As a result, the section gives Pakistan Telecommunication Authority (PTA), the designated implementation authority under Section 37, the powers to determine the limitations and restrictions.<sup>32</sup> The PTA has exercised these powers arbitrarily and without transparency, which has led to blanket censorship of online content in the country. Vague terms like “immorality”, “indecency” and “obscenity” are used to take down or block online content, leading to a direct impact on people’s businesses, livelihoods, communication, entertainment and access to information,<sup>33</sup> such as in the case of the TikTok ban that has been imposed four times in the country.<sup>34</sup> The section also does not offer any accountability mechanism to challenge or appeal against the decision of the PTA. As a result, the PTA has been questioned multiple times by the Islamabad High Court (IHC) for its exercise of powers beyond the scope of the section under the Act that impacts citizens’ right to freedom of speech in the country.<sup>35</sup>

In May 2022, the Islamabad High Court directed the parliament to review Section 37 in response to a petition challenging the Removal and Blocking of Unlawful Online Content Rules 2021 that were drafted and notified under the said section.<sup>36</sup>

A comparative legal analysis of the certain provisions of PECA with other regional laws will be carried out to make sense of the regional legal landscapes governing electronic and digital media.

## b) Removal and Blocking of Unlawful Online Content (Procedure, Oversight and Safeguards) Rules, 2021

The Removal and Blocking of Unlawful Online Content (Procedure, Oversight and Safeguards) Rules, 2021 were notified in October 2021 to bring the conduct of social media companies under a domestic legal ambit.<sup>37</sup> The rules, commonly known as the Social Media Rules, are drafted under Section 37 of PECA that gives PTA the power to regulate the internet, and have outlined procedures for social media companies to

29. ‘National Action Plan, 2014 – NACTA – National Counter Terrorism Authority NACTA Pakistan’ <<https://nacta.gov.pk/nap-2014/>> accessed 22 May 2022.

30. ‘The Prevention of Electronic Crimes Act 2016: An Analysis’ (Shaikh Ahmad Hassan School of Law, 20 February 2019) <<https://sahsol.hums.edu.pk/law-journal/prevention-electronic-crimes-act-2016-analysis>> accessed 21 May 2022.

31. Ibid.

32. Usama Khilji, ‘Some Relief’ (DAWN.COM, 10 April 2022) <<https://www.dawn.com/news/1684304>> accessed 27 May 2022.

33. Kamran, H. (2021, September 13). The TikTok Curse: The Constant Struggle to Create. Digital Rights Monitor. <https://digitalrightsmonitor.pk/7357-2/>

34. Nadeem, R. (2021, July 22). TikTok Banned for the Fourth Time by PTA. Digital Rights Monitor. <https://digitalrightsmonitor.pk/tiktok-banned-for-the-fourth-time-by-pta/>

35. Ghani, A. (2020, November 2). DRM Exclusive: PTA asked to present published Rules under S.37 to Court, under a TikTok Ban petition. Digital Rights Monitor. <https://digitalrightsmonitor.pk/drm-exclusive-pta-asked-to-present-published-rules-under-s-37-to-court-under-a-tiktok-ban-petition/>

36. DRM. (2022, May 11). IHC Sends Social Media Rules, PECA’s Section 37 To Parliament For Review. Digital Rights Monitor. <https://digitalrightsmonitor.pk/ihc-sends-social-media-rules-pecas-section-37-to-parliament-for-review/>

37. ‘Govt Issues Rules for Removal, Blocking of Unlawful Online Content’ <<https://www.thenews.com.pk/print/900332-govt-issues-rules-for-removal-blocking-of-unlawful-online-content>> accessed 22 May 2022.

be regulated by the authorities in Pakistan and outlined a punishment mechanism for violations and non-compliance. The rules come under fire for its obvious impact on freedom of expression through digital platforms and privacy.<sup>38</sup>

The rules have highlighted a very narrow interpretation of freedom of expression imposing problematic limitations in express violation to Article 19 of the constitution of Pakistan.<sup>39</sup> Under rule 4, “integrity, security, and defence of Pakistan,” the authorities have been given powers for a broader application given the ambiguity of the section. The reputation of the federal and provincial government is deemed as vital as the integrity, security, and defence of Pakistan. Such interpretation is beyond the scope of PECA which is the parent act.<sup>40</sup>

Rule 5 has outlined a mechanism for complaint. As per this rule, a complaint can be filed by a person or designated guardian, ministry, division, attached department, subordinate office, provincial or local department or office, law enforcement agency or intelligence agency, or a company owned by the government.

Rule 5(a) requires the social media companies with more than five million users to register with PTA within nine months after the promulgation of these Rules. It also requires the companies to establish a physical office in Islamabad and appoint an authorised compliance and grievance officer based in Pakistan who will address complaints directed at them within seven working days.<sup>42</sup>

The rules grant suo moto powers to PTA to regulate online content and social media companies that control this content. Under rule 5(6), PTA can take cognisance of any online content and direct to cease and block streaming content relating to pornography and/or anti-national security. Under rule 6(6), PTA has the power to bind the social and digital media entities to store information of the user, content, traffic data for a period as deemed appropriate by the telecommunication authority.

Rule 7 requires such entities to comply with the directives of PTA within 24 hours and within six hours in cases of emergencies, after receiving directives. Thus, the rule grants PTA an unbridled power to regulate the conduct of social media and censor it as per the whims of the government.

This set of rules challenges the freedom of expression on digital and social platforms promoting the culture of self-censorship and arbitrary actions by states through the Pakistan Telecommunication Authority (PTA).

38. Salwa Rana, 'Social Media Rules Prima Facie, in Violation of Article 19 & 19 A: Islamabad High Court' (Digital Rights Monitor, 4 December 2020)

<<https://digitalrightsmonitor.pk/social-media-rules-prima-facie-in-violation-of-article-19-19-a-islamabad-high-court/>> accessed 21 May 2022.

39. DRM, 'The Removal and Blocking of Unlawful Online Content Rules 2020 - Legal Analysis' (Digital Rights Monitor, 22 January 2021)

<<https://digitalrightsmonitor.pk/the-removal-and-blocking-of-unlawful-online-content-rules-2020-legal-analysis/>> accessed 22 May 2022.

40. Ibid.

41. Ibid.

42. Ibid.

# A Comparative Regional Analysis of the Media Landscape: A Case of Pakistan, India, and Bangladesh.

The desire to control the media is an intrinsic character of authoritarian regimes. However, currently states even with democratic credentials and party to international human rights obligations are resorting to legal mechanisms to undermine the access to and rights on and of digital and electronic media. For the sake of comparison, Pakistan's digital and electronic laws will be analysed in the light of other relevant laws in countries such as Bangladesh and India.

Although there are several laws which govern the mainstream media in Pakistan, we will focus on PECA given its direct implications on digital and electronic media in the country.<sup>43</sup>

The rationale for such comparison is to analyse the laws and regulations which are governing the digital and electronic media spaces in the region, and discuss the collective focus of governments to legally control media and assess their status with regards to the right to freedom of expression.

## - The Digital Security Act, 2018 (Bangladesh)

The Digital Security Act, 2018 was passed by the Parliament of Bangladesh. The act is considered draconian in its scope and application.<sup>44</sup> Almost 20 sections of the Act deal with punitive measures and offences out of which 14 are non-bailable with punishment ranging from one to seven years.<sup>45</sup>

Under Section 4 of the Act, the DSA has extraterritorial applications. The section broadens the scope of the law to criminalise actions committed outside of the country, and gives them the same penal effect as they would have inside Bangladesh.<sup>46</sup> This has effectively targeted dissident voices not residing in the country engaged in genuine activism as under this section their actions will be considered to have occurred in Bangladesh.<sup>47</sup> Such a wider scope of the Act has threatened all citizens of Bangladesh, both based in the country and abroad, rendering all their criticism of the state's policies vulnerable to incrimination under the Act.<sup>48</sup>

ARTICLE 19, an international organisation working to defend freedom of expression, states, "Section 4 is overbroad since it would lead to the extraterritorial application of provisions, which are in breach of international human rights law."<sup>49</sup>

Under Section 8(1), the Act has given a broad interpretation of "threat" to digital security. As per the section, a mere perception of threat will be sufficient to make the Bangladesh Telecommunication And Regulatory Commission to block the flow of information under the garb of digital security, which according to ARTICLE 19, "is not understood in the sense of information security but rather more broadly in the

43. 'Analysis: Pakistani Government's New Online Censorship Strategy | RSF' <<https://rsf.org/en/analysis-pakistani-governments-new-online-censorship-strategy>> accessed 11 May 2022.

44. 'Bangladesh: Analysis of the Digital Security Act' (ARTICLE 19) <<https://www.article19.org/resources/bangladesh-analysis-of-the-digital-security-act/>> accessed 22 May 2022.

45. 'Three Years of Digital Security Act 2018 (DSA): Observations and Summary Findings | CGS'

<<https://cgs-bd.com/article/4671/Three-Years-of-Digital-Security-Act-2018--DSA--Observations-and-Summary-Findings>> accessed 22 May 2022.

46. 'Law Review; Digital Security Act 2018 and Questions of Citizens' Basic Human Rights' (শুদ্ধধার, 2 June 2021)

<<https://shuddhashar.com/law-review-digital-security-act-2018-and-questions-of-citizens-basic-human-rights/>> accessed 27 May 2022.

47. 'Digital Security Act 2018 (DSA)' s 4 <<https://www.cirt.gov.bd/wp-content/uploads/2020/02/Digital-Security-Act-2020.pdf>> accessed 22 May 2022.

48. Ali Riaz, 'How Bangladesh's Digital Security Act Is Creating a Culture of Fear' (Carnegie Endowment for International Peace)

<<https://carnegieendowment.org/2021/12/09/how-bangladesh-s-digital-security-act-is-creating-culture-of-fear-pub-85951>> accessed 15 May 2022.

49. Bangladesh: analysis of the Digital Security Act. (2020, January 20). ARTICLE 19. <https://www.article19.org/resources/bangladesh-analysis-of-the-digital-security-act/>

sense of national security.”<sup>50</sup> The Act, therefore, grants sweeping blocking powers to government entities to block information as they deem fit.<sup>51</sup>

Furthermore, Section 8(2) is very narrow in defining “solidarity”, “financial activities, security”, “defence”, “religious values”, or “public discipline”. The section requires that any information which causes such action should be immediately removed from digital platforms. This has effectively silenced activists and dissidents’ voices on issues relating to the conduct and policies of the government.

Through Section 9(1) of the Act, state has promulgated an Emergency Response Team which will be composed of digital security experts and law enforcement agencies. The team is vested with the authority to detain without warrant merely based on suspicion as determined by the concerned law enforcement officer.

Section 15 vests the government with an authority to declare an entity critical information infrastructure. This gives the Director-General of the Digital Security Agency (DSA) the authority to take a suo moto and inquire into the matter. The digital security agency formed through the DSA will have the permission to access the system without any prior permission.

The punishment mechanism is draconian in its scope as under Section 17(2)(a) and (b) for the so-called illegal access to information, the punishment ranges from one year to seven years. Section 20(1) even penalises source modification, criminalising the use of VPNs which are now widely used across the world for anonymity and safe web browsing. The Act has also criminalised all forms of critical debates on the founder of the nation and the liberation efforts in Bangladesh.

The law has placed a time limit on trial, fast tracking convictions, thus leaving a room for abuse of power and miscarriage of justice. Section 40 of the Act sets a time frame of hardly 60 days for the investigation and judicial conclusion.

Under this Act, latest figures suggest that almost 200 journalists alone have been charged between January 2020 and February 2022.<sup>52</sup>

Saad Hammadi, the South Asia Campaigner at Amnesty International, writes, “the DSA has been weaponised to cruelly target dissenting voices.”<sup>53</sup> He further adds, “Under the pretext of combating disinformation, defamation and the ‘deterioration of law and order,’ the authorities have used the DSA to incarcerate journalists and cartoonists for months, many of whom are held without trial. Even children have been targeted.”

## **- Prevention of Electronic Crimes Act (PECA) 2016 (Pakistan)**

PECA is Pakistan’s primary tool to control digital and electronic media in the country. The ordinance has been one of Pakistan’s most draconian laws used to govern the media landscape in the country. In February 2022, the former government, under then-Prime Minister Imran Khan, attempted to amend Article 20 of the Prevention of Electronic Crimes Act 2016 (PECA) that criminalises online defamation, by proposing stringent punishments through an ordinance. The Act also sought to reduce the timeframe for trials involving online defamation targeting state institutions and officials.<sup>54</sup> However, the proposed amendment was struck down by the Islamabad High Court (IHC) on account of it being unconstitutional.<sup>55</sup> Despite the

50. Ibid.

51. Ibid.

52. Saad Hammadi, ‘World Press Freedom Day: Speak Now or Forever Hold Your Tongue’ (The Daily Star, 3 May 2022) <<https://www.thedailystar.net/views/opinion/news/press-freedom-day-speak-now-or-forever-hold-your-tongue-3016671>> accessed 23 May 2022.

53. Ibid.

54. ‘Online Defamation in Pakistan Now Punishable by Five Years in Prison | RSF’ <<https://rsf.org/en/online-defamation-pakistan-now-punishable-five-years-prison>> accessed 11 May 2022.

55. ‘Pakistan: PECA Ordinance Overruled by Islamabad High Court | IFJ’

<<https://www.ifj.org/media-centre/news/detail/category/press-releases/article/pakistan-peca-ordinance-overruled-by-islamabad-high-court.html>> accessed 23 May 2022.



amendment being struck down, Section 20 in its original state continues to be a threat to freedom of expression and press freedom in the country given its repeated use against journalists, activists and critics of state policies.

Like DSA of Bangladesh, through Section 29 of PECA, the government has sought to establish an investigation agency under the existing Federal Investigation Agency (FIA). The resultant National Response Centre on Cyber Crimes (NR3C) has been given vast powers to implement the law, including receiving complaints, initiating investigations, and conducting arrests in matters pertaining to cybercrimes as defined under the Act. Given the blanket powers to FIA, many media professionals have found themselves being the target of arbitrary notices issued to them.<sup>56</sup> The Islamabad High Court has termed this issuance of notices an abuse of power in multiple hearings of applications filed by affected journalists.<sup>57</sup>

Similar to Section 44 of DSA, PECA, under Section 31, requires the person in question to give data without any court warrant in the name of “expedited preservation and acquisition of data”. The section impacts the right to due process and privacy of an individual.

Section 37 of PECA is one that has impacted the digital media landscape the most in the country. By giving arbitrary powers to the Pakistan Telecommunication Authority (PTA), the Act enables censorship and control of dissent in the name of vague terms like national security and morality. The section makes it PTA’s prerogative to define what constitutes unlawful online content. The section has also given vast powers to the authority to ban content and platforms on the pretext of immorality, obscenity and threat to national security. One example of this power at play is the ban on the video-sharing application TikTok that was blocked in the country four times in the span of less than a year on account of hosting immoral and obscene content.<sup>58</sup>

Moreover, like DSA, Section 32 of PECA requires the Internet Service Providers (ISPs) to store data for one year, making it mandatory for the ISPs to share the data with the law enforcement agencies as and when required. Section 32 is against the minimum global standards of privacy protection, especially as it fails to outline data protection protocol of this large amount of data. In addition, this data becomes a risk of being targeted with breaches as the country does not have a concrete data protection legislation, at the time of writing this report.

## **- Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021 (India)**

The Indian guidelines on IT have introduced several restrictive mechanisms which undermine digital and electronic freedoms. The nomenclature suggests a focus on online intermediaries; however, the guidelines are directly extended to digital news, publishers, and streaming websites despite not having any clear mandate.<sup>59</sup> The guidelines have been referred to as a document that will “force tech companies and news outlets to comply with government surveillance and censorship demands.”<sup>60</sup>

These guidelines are rooted in Section 79 of the Information Technology Act (ITA) of India. The Rules have three parts: Part I deals with definitions; Part II deals with compliance; and Part III of the Rules deals with regulations of digital media.<sup>61</sup> These guidelines are more of an attempt to seek a bargain between the

56. DRM. (2022, May 23). Cases Registered Against Senior Journalists For ‘Criticising’ State Institutions. Digital Rights Monitor.

<https://digitalrightsmonitor.pk/cases-registered-against-senior-journalists-for-criticising-state-institutions/>

57. DRM. (2022, May 23). IHC Suggests Imposing ‘Exemplary’ Fine On FIA Over Power Abuse. Digital Rights Monitor.

<https://digitalrightsmonitor.pk/ihc-suggests-imposing-exemplary-fine-on-fia-over-power-abuse/>

58. Nadeem, R. (2021, July 22). TikTok Banned for the Fourth Time by PTA. Digital Rights Monitor. <https://digitalrightsmonitor.pk/tiktok-banned-for-the-fourth-time-by-pta/>

59. ‘How (Not) to Regulate the Internet: Lessons From the Indian Subcontinent’ (Lawfare, 23 September 2021) <<https://www.lawfareblog.com/how-not-regulate-internet-lessons-indian-subcontinent>> accessed 16 May 2022.

60. ‘What India’s Sweeping New Internet Rules Mean’ (Time) <<https://time.com/5946092/india-internet-rules-impact/>> accessed 16 May 2022.

61. ‘Analysis of the Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021’ (SFLC.in)

<<https://sflc.in/analysis-information-technology-intermediary-guidelines-and-digital-media-ethics-code-rules-2021>> accessed 23 May 2022.

state of India and intermediaries linking their presence and business in India with certain legal obligations.

The set of Rules obligates companies to monitor user generated content. These guidelines are aimed to regulate digital media including but not limited to publishers and streaming websites.<sup>62</sup> These guidelines were met with several legal challenges from individuals, rights groups, and digital entities.<sup>63</sup>

Through rules 2(w) and 2(v), there has been an attempt to classify intermediaries as “social media intermediary” and “significant social media intermediary”. A cap of five million users is being placed as a threshold number to categorise an intermediary as a significant social media intermediary, similar to Pakistan’s Social Media Rules. However, rule 6 of the guidelines makes it the prerogative of the government to categorise any intermediary as a significant social media intermediary. The discretionary mandate gives the states an opportunity to issue compliance orders, wherever, it deems appropriate.

The Section (3)(1)(d) of the Internet Rules also makes it mandatory for the intermediaries to comply with the takedown requests where the authorities feel that such content undermines India. The rules require the companies to remove all such content within three days which the state of India deems unlawful or against Indian laws. The rationale for such an obligation is the desire to protect the public order, decency, and morality. The rules also direct such companies to handover user information if desired by the law enforcement agents. Rule 3(1)[h] mandates data retention of the users for up to 180 days for the purpose of investigation and law enforcement.

An open letter by 10 international NGOs expressing concern over the Rules, stated that they “are part of a wider push toward ‘digital authoritarianism’, including Internet shutdowns and arrests of journalists.”<sup>64</sup>

Similar to Pakistan’s Social Media Rules, the Indian Internet Rules also require the companies to appoint a chief compliance officer who will ensure the compliance of information and news sharing with the regulations set by the government of India.

The guidelines target social media companies, streaming platforms, and online news platforms. Under these Rules, social media platforms are required to take down the content within 36 hours. Failure to do so will result in criminal proceedings against the entity under Information Technology Act and criminal laws of India resulting in punishment with possible jail term of up to seven years.<sup>65</sup>

The provision of traceability is another thorny aspect of the guidelines. Under rule 4(2), the law enforcement agent can demand the identification of the first originator of the media, thus undermining the security and trust of any user using the applications. The guidelines require the entities to monitor speech on their platform, ensure a compliance mechanism within India, and be able to trace and provide details of the first originator of any message or post.<sup>66</sup>

The IT Rules have outlined a regulatory mechanism underscoring the requirement to appoint a grievance officer who will be linked with the Ministry of Information and Broadcasting.

The grievances mechanism under rule 3(2)(a) has resulted in a series of litigations involving harassment of journalists and the public for exercising their right to free speech on the internet. The same has been used against platforms such as Netflix and Amazon Prime for broadcasting shows in the name of hurting

62. ‘How (Not) to Regulate the Internet: Lessons From the Indian Subcontinent’ (n 46).

63. ‘Table Summarising Challenges to IT Rules, 2021’ (Google Docs) <[https://docs.google.com/document/d/1kmq-AIRO1XpPiThvesl5xQq2nVkJz6UdmaKFAJ8AMTk/edit?usp=embed\\_facebook](https://docs.google.com/document/d/1kmq-AIRO1XpPiThvesl5xQq2nVkJz6UdmaKFAJ8AMTk/edit?usp=embed_facebook)> accessed 19 May 2022.

64. Perrigo, B. (2021, March 12). India’s New Internet Rules are a Step Toward “Digital Authoritarianism,” Activists Say. Here’s What They Will Mean. Time. <https://time.com/5946092/india-internet-rules-impact/>

65. Kanitza Rodriguez Schmon Sasha Mathew, and Christoph, ‘India’s Strict Rules For Online Intermediaries Undermine Freedom of Expression’ (Electronic Frontier Foundation, 7 April 2021) <<https://www.eff.org/deeplinks/2021/04/indias-strict-rules-online-intermediaries-undermine-freedom-expression>> accessed 18 May 2022.

66. Ibid.

religious sentiments.<sup>67</sup>

Experts argue that the Rules are a way of “manipulation and censorship of online spaces stemming from short-sighted regulation aimed at tech giants. Users will pay for this misguided approach, stripped of their basic human rights. What we need is full transparency and accountability built into platforms’ decision-making processes, not changes to the liability regime.”<sup>68</sup>

67. 'Netflix, Amazon Prime Sued for Obscene Content in India | The News Minute' <<https://www.thenewsminute.com/article/netflix-amazon-prime-sued-obscene-content-india-91579>> accessed 23 May 2022.  
68. Brody, J. (2021, March 11). Indian government must correct moves toward digital authoritarianism, allow tech platforms to uphold rights. Access Now. <https://www.accessnow.org/farmer-protests-india-censorship/>

# International Human Rights Standards

The laws reflect a collective trend of authoritative regression and suppression of freedom of expression which seems to be an ambition of the governments in the region.<sup>69</sup>

Freedom of expression is one of most widely recognised rights in international human rights laws. In the 21st century the most potent tool for such expression is media, namely the print, electronic and digital media. In the last two decades digital media has taken centre stage as one prominent platform for expression of such rights.

Universal Declaration of Human Rights (UDHR) and core human rights conventions such as the International Covenant on Civil and Political Rights (ICCPR),<sup>70</sup> UN General comment No. 34,<sup>71</sup> all advocate for the right to freedom of expression. Article 19 of the ICCPR advocates limited restriction that too should be provided by law, for the purpose of safeguarding one of the legitimate interests listed in article 19(3).<sup>72</sup>

Given its vitality for the society, it is essential that the freedom of expression in the electronic and digital platforms is allowed without any interruption. In this regard, the EU Human Rights Guidelines on Freedom of Expression Online and Offline offers a way forward towards an inclusive right to freedom of expression in both online and offline platforms. These guidelines offer South Asian countries, particularly Pakistan, a legal policy direction towards legislations entailing the right to freedom of expression. The guidelines offer a road map towards legislating rights-sensitive laws on the fundamental right to freedom of expression which is also protected under the country's Constitution.

A cursory study of these guidelines will be instrumental in understanding the scope of freedom of expression in both online and offline spaces.

## 5.1. EU Human Rights Guidelines on Freedom of Expression Online and Offline.

As opposed to legal mechanisms discussed above which are restrictive in scope, the Human Rights Guidelines on Freedom of Expression Online and Offline are progressive and futuristic in scope.<sup>73</sup> These guidelines were adopted by the European Union (EU) in the Foreign Affairs council meeting held in Brussels, May 12, 2014.<sup>74</sup> Ever since, these guidelines have been serving as a benchmark to gauge the level of freedom of expression in the EU and beyond.<sup>75</sup>

The EU has drafted guidelines for its member states to adopt through their local laws. While these guidelines are binding for the EU member states to reflect in their laws, this approach reflects an open approach to implementing guidelines based on the needs in the country to protect freedom of expression. These guidelines are not perfect, however, they offer human rights sensitive benchmarks for both online and offline media. Therefore, the adaptation of such guidelines will pave the way for free and impartial media both in online and offline platforms.

69. 'How (Not) to Regulate the Internet: Lessons From the Indian Subcontinent' (n 46).

70. 'International Covenant on Civil and Political Rights' (OHCHR) <<https://www.ohchr.org/en/instruments-mechanisms/instruments/international-covenant-civil-and-political-rights>> accessed 23 May 2022.

71. United Nations High Commissioner for Refugees, 'Refworld | General Comment No. 34, Article 19, Freedoms of Opinion and Expression' (Refworld) <<https://www.refworld.org/docid/4ed34b562.html>> accessed 23 May 2022.

72. 'International Covenant on Civil and Political Rights' (n 55).

73. 'EU Human Rights Guidelines on Freedom of Expression Online and Offline' (n 10).

74. 'EC Adopts Guidelines on Freedom of Expression Online and Offline' (European Digital Rights (EDRI)) <<https://edri.org/our-work/ec-adopts-guidelines-on-freedom-of-expression-online-and-offline/>> accessed 23 May 2022.

75. Ibid.



The Human Rights Guidelines authoritatively accept the freedom of expression as one of fundamental human rights in the 21st century. They stress the need for freedom of expression to be protected without limitations and attach other rights with the actualisation of this right in a society. The guidelines stress the need for a free and independent media and its vitality in facilitation of free flow of information and ideas central to the masses in democracies.

The EU guidelines recognise technology as a tool vital for protection, promotion and exercise of the right to freedom of expression. Para 6 expressly considers technology as a new and unique opportunity for the individuals to share and disseminate information to a wider audience. This, as per the guidelines, gives an opportunity for all to have a say in the decision-making process. It further emphasises the need to protect both offline and online rights with a strong emphasis on privacy and protection of personal data.

Para 14 of the guidelines stresses on the need for access to information. Unlike the South Asian laws which criminalise the access to information by giving blanket powers through arbitrary language to authorities, the EU Human Rights Guidelines on Freedom of Expression Online and Offline underscore the importance of access to information and its importance associated with promotion of justice and reparations. Para 14 also notes that both the public and individuals have the right to access information relating to the conduct of the government.

Para 15 of the guidelines gives an individual right to control their data. This means the individual can access their data, ascertain its requirement and purpose of storage. It suggests that the individual shall have a right to erase their data or rectify if wrong data with detrimental consequences is stored.

Para 16 recognises digital technologies as a vital addition of media. A strong emphasis is being placed on any attempt to regulate it beyond the permissible limitations outlined in the international human rights law.

Para 17 grants the most liberal interpretation of freedom of expression. It entails all forms of ideas and its transmission to them through the media, even those ideas which might “shock, offend or disturb” anyone. These include discussions on “human rights, journalism, scientific research, linguistic and religious identity and teaching.” Such expressions, as per para 18, can be spoken, written and through sign language.<sup>76</sup>

Right to freedom of expression is not an absolute right, rather it comes with conditions laid out by countries depending on their local needs and context. The Pakistani Constitution lists seven restrictions where the right to freedom of expression ceases to exist. Similarly, the EU Human Rights Guidelines on Freedom of Expression Online and Offline also recognise this right as a conditional right.

Para 20 of the guidelines outline the potential restrictions on the freedom of expression through a three-part cumulative text. This includes;

1. They must be provided for by law, which is clear and accessible to everyone (principle of legal certainty, predictability and transparency)
2. They must pursue one of the purposes set out in article 19.3 ICCPR, i.e. to protect the rights or reputations of others; to protect national security, public order or public health or morals (principle of legitimacy)
3. They must be proven necessary and as the least restrictive means required and commensurate with the purported aim (principles of necessity and proportionality).<sup>77</sup>

76. EU Human Rights Guidelines on Freedom of Expression Online and Offline. (2014, May 12). Council of the European Union. [https://www.eeas.europa.eu/sites/default/files/eu\\_human\\_rights\\_guidelines\\_on\\_freedom\\_of\\_expression\\_online\\_and\\_offline\\_en.pdf](https://www.eeas.europa.eu/sites/default/files/eu_human_rights_guidelines_on_freedom_of_expression_online_and_offline_en.pdf)

77. Ibid.

Para 24 entrusts the states to protect the right to freedom of expression in both online and offline platforms through local relevant laws. The member states are required to formulate legal mechanisms which protect the right to freedom of expression.<sup>78</sup>

Para 27 outlines priority action areas that the EU will have to pay special attention to while regulating freedom of expression in the region. These include the protection of journalists from all sorts of intimidation, harassment, persecution owing to their exercise of right to freedom of expression. The scope of the priority areas is applicable beyond the EU region as it emphasises the need for holding states accountable with obligations of protecting freedom of expression.<sup>79</sup>

Para 30 of the guidelines discourages violence aimed at journalists, media actors and individuals exercising freedom of expression. It specifically underlines the need to discourage efforts to create a legal environment which will promote censorship, self-censorship, criminal actions, and administrative actions for expressing freedom of expression. The EU, through these guidelines, has taken upon itself to work to end the persecution of journalists and excessive limitations imposed on them to hamper their journalistic work. This also includes advocating and lobbying to limit restrictive legislations when it is about media and press freedom in the EU and beyond.

Para 38 of the guidelines are international in their scope. The guidelines mandate the EU to engage partner states to promote freedom of expression both with regards to online and offline press freedom. It also underscores the need for encouraging other countries to ratify key global obligations with regards to freedom of expression in the world.

Para 48 of the guidelines requires member states to uphold the policy of "No Disconnect Strategy" with regards to uninterrupted access to internet and other mediums of communications, and to ensure that social expressions are intact without any hurdles.

Para 52 of the guidelines commits to ensure that freedom of expression remains the cornerstone of the UN agenda and all other relevant international forums. This includes supporting the Office of the UN Special Rapporteur and other responsible entities tasked with ensuring protection of the right to freedom of expression both in online and offline platforms.

78. 'EU Human Rights Guidelines on Freedom of Expression Online and Offline' (n 10).

79. Ibid.

# Conclusion

An analysis of these laws, regulations and guidelines reveals a varied legal approach to freedom of expression. Laws formulated in the South Asian region have an obvious catastrophic impact on online and offline freedoms.<sup>80</sup> As evident by the trends, there is a desire to limit freedom of expression rooted in an authoritarian governance model rather than a democratic one.

The successive promulgations of laws reveal a security obsessed mindset that is afraid of the digital revolution. The South Asian approach, as evidenced by media legislation in Pakistan, India and Bangladesh, is undoubtedly state centric and regressive towards digital and electronic media freedom, and depicts the intentions of the legislations being centred in control of the rights rather than protection of these rights. They curtail the access to information and add the element of national security in ordinary debates thus throttling the length and breadth of freedom of expression in the region. The laws also reflect a poor judgement on what constitutes destabilising and anti-state ideas. The legislation's apparent aim seems to be not rooted in regulation of the media or to facilitate the masses with uninterrupted access to information, rather, the focus is on filtering out the content which can challenge the status quo and its beneficiaries.

On the other hand, trends in the EU, and those based on the international standards, indicate a progressive outlook where the regulations and guidelines are centred around protecting the rights of individuals to freely express themselves. The regulations are intended to cement the idea that freedom of expression both in online and offline spaces continue to remain as the cornerstone of a society and vital for the democratic progression. This is evident by the focus of each regulation that we discussed in comparison with guidelines promulgated in the European Union.

80. How (Not) to Regulate the Internet: Lessons From the Indian. (2021, September 29). Lawfare. <https://www.lawfareblog.com/how-not-regulate-internet-lessons-indian-subcontinent>

# Recommendations

1. There is a dire need to reconcile all existing laws with Pakistan's domestic and international obligations with regards to freedom of expression. Going contrary to the local and international benchmarks on human rights contributes negatively to the democratic values of Pakistan, and so its standing on international forums.
2. The state should proactively seek to include civil society and key stakeholders on legislative matters, especially the ones dictating the right to freedom of expression on electronic and digital media platforms. The lack of a multistakeholder consultative mechanism and unilateral promulgation of laws by the state creates a needle wedge between the state and its subjects.
3. No authority should be given unbridled power to make rules on its own. Rather policy formulation and legislative exercise should include people from the media industry, rights activists, and civil society. In the context of Pakistan, the powers vested to PTA through PECA have negative consequences on freedom of speech and access to information.
4. The laws which are being promulgated should not be vague and overly broad as it enables the arbitrary implementation of laws that gives rise to misuse and abuse of powers granted to implementing authorities.
5. PEMRA should be given the autonomy that was promised at the time of its conception. The regulatory authority should operate as per the Constitution and Pakistan's international obligations with regards to the right to freedom of expression. Moreover, the government's control in matters concerning PEMRA should be addressed.
6. Legislations and subsequent creation of authorities should not be immune from judicial and parliamentary oversight. The lack of oversight and accountability practically converts such authorities to exercise powers of an investigator, judge and jury because of which the misuse of law becomes rampant.
7. Government should refrain from reactionary takedowns of content and censorship. This harms the right to freedom of expression, and at the same time, promotes self-censorship with serious implications on media freedoms in the country.
8. It is vital that digital media and social media remains free from the needless clutches of the state. This discourages companies from doing business in the country and in the process impedes the growth of the digital economy.





## About MMfD

Media Matters for Democracy (MMfD) works to defend the freedom of expression, media, Internet, and communications in Pakistan. The main premise of our work is to push for a truly independent and inclusive media and cyberspace where citizens in general, and journalists in specific, can exercise their fundamental rights and professional duties safely and without the fear of persecution or physical harm.

We undertake various initiatives, including but not limited to training, policy research, movement building and strategic litigation to further our organisational goals. We also work on acceptance and integration of digital media and journalism technologies, and towards creating sustainable 'media-tech' initiatives in the country.

MMfD recognises diversity and inclusion as a core value of democracy and thus all our programs have a strong focus on fostering values and skills that enable and empower women, minority communities, and other marginalised groups.

