

Mandate of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression

REFERENCE: OL
PAK 8/2016:

8 July 2016

Excellency,

I have the honour to address you in my capacity as Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, pursuant to Human Rights Council resolution 25/2.

In this connection, I would like to bring to the attention of your Excellency's Government information I have received concerning the **draft legislation "Prevention of Electronic Crimes Act", pending before the Senate of Pakistan.**

According to the information received:

On 14 December 2015, I wrote to Your Excellency's Government expressing concern that a number of provisions in the draft "Prevention of Electronic Crimes Act" (hereinafter "the Bill") pending before the Senate of Pakistan would unduly restrict the right to freedom of opinion and expression in Pakistan. I am grateful for Your Excellency's reply on 15 January 2016, and hope that we may continue our dialogue with respect to the Bill. In particular, as the Bill remains under legislative consideration, I remain concerned that many of the Bill's provisions - including several added or amended in April 2016 - may unnecessarily and disproportionately restrict the right to freedom of opinion and expression.

While I will address substantive aspects of the legislation below, I remain concerned about the public's ability to participate in the consideration of the Bill. For example, even though the National Assembly's Standing Committee on Information, Technology and Telecommunication (the "NA Standing Committee") approved the Bill on 13 April 2016, the bill was not publicly available until 7 May. I have also received reports that the legislative process has not adequately taken into account the views of civil society, the private sector and other relevant stakeholders. In particular, we have received reports that the NA Standing Committee, which plays a vital role in the passage of the Bill, has sought to prevent its own members from examining and voting on drafts of the Bill, and permitted limited consultations with civil society.

The following provisions of the Bill continue to raise concerns with respect to the freedom of opinion and expression:

• **Sections 3 to 7**, which criminalize the unauthorized access, copying and transmission of data with "dishonest intention," raise issues of media freedom. In the absence of further clarification, it is unclear whether the

requirement of “dishonest intention” would encompass the activities of journalists and whistleblowers, who reveal information of public interest that they may not be authorized to access, copy or transmit. It is also unclear from the text of Sections 4 and 7 whether the mere transmission of information or data that has been obtained without authorization - for example, a journalist who merely publishes information that her source accessed without authorization - would be subject to criminal sanction. This lack of clarity may provide excessive discretion in law enforcement authorities to restrict the flow of information, thus raising concerns under Article 19(3) of the ICCPR, which requires that restrictions on freedom of expression must be prescribed by law and be necessary and proportionate to protect legitimate interests such as national security and public order.

- **Section 9**, which criminalizes the “glorification of an offense and hate speech,” would appear likely to restrict expression that does not constitute incitement to violence, hatred or discrimination under Article 20 and that would be protected under Article 19 of the ICCPR. While I acknowledge the latest draft Bill attempts to specify the types of offenses and activities that may not be “glorified,” the term “glorification” remains overly broad and could have a chilling effect on public discourse concerning national security and terrorism-related issues, including the work of journalists in the field, and the expression of political, religious and other expression. As my predecessor concluded in a 2008 Joint Declaration joined by other international experts on freedom of expression, the mere “glorification” of terrorism does not by itself constitute incitement prohibited under Article 20 of the ICCPR, and should not be criminalized.

- The definition of “cyber-terrorism” under **Section 10**, which is largely unchanged from previous versions, remains excessively broad, for the reasons that I identified in my previous communication. While there is a legitimate need to protect against the hacking of critical information systems, the current definition would treat a far broader range of activities as “cyber-terrorism.” For example, a blog that satirizes, parodies or otherwise criticizes the government’s efforts to combat terrorism may not only be deemed to be speech that “glorifies” terrorism under Section 9, but also an act of “cyber-terrorism” if it is deemed to “create a sense of ... insecurity in the Government” under Section 10.

- The creation of offenses against a person’s dignity under **Section 18** may increase self-censorship in Pakistan. I am pleased that the drafting has lately attempted to narrow the scope of the provision, including the inclusion of the knowledge requirement with regards to the transmission of false information, and the requirement that the information must cause harm or intimidation (as opposed to merely creating the likelihood of harm or intimidation). Nonetheless, even though the protection of reputation or privacy may

constitute a legitimate aim under Article 19(3)(a), the criminalization of defamation is a disproportionate means of achieving that aim.

•**Section 22** on spamming and **Section 23** on spoofing prohibit a wider range of online expression than is necessary or proportionate as required under article 19(3) of the ICCPR. The latest version of Section 22 omits the explanatory proviso clarifying that the offense of spamming does not cover unsolicited marketing authorized under the law or the transmission of unsolicited information which has not been specifically unsubscribed by the recipient. This proviso was cited in Your Excellency's response to our concern that the offense of spamming is overly broad and might criminalize the transmission of any information without the recipient's prior consent. Section 22 should clarify the limits on the transmission of unsolicited information, and ensure that such limits are consistent with Article 19(3) of the ICCPR. With respect to Section 23, satire and other forms of artistic or humorous expression remain vulnerable to sanction under the provision. I acknowledge Your Excellency's assurance that "[any] definition of satire lacks all [the ingredients of the offense of spoofing] and does not fall within the purview of this provision." However, for the avoidance of doubt and to limit the potential for abuse, it would be my hope that this position be made explicit and clear in the text of the Bill.

•**Section 29's** requirement that service providers retain traffic data for a period of one year or for an indefinite period at the Pakistan Telecommunication Authority's (PTA) notification facilitates State surveillance that potentially undermines the exercise of the right to freedom of opinion and expression. While mandatory third party data retention laws may be necessary to protect legitimate aims like national security and public safety, mass retention orders raise serious proportionality concerns. In the alternative, targeted data retention orders that request preservation of communications data of specific individuals based on an investigation or proceeding may fulfill the proportionality requirement.

•The PTA's power to order the removal or blocking of online content under Section 34 potentially triggers unnecessary and disproportionate restrictions on the right to seek, receive and impart information. The grounds for such removal or blocking, such as the protection of "the interest of the glory of Islam" and "decency," are prone to extremely broad interpretation and conducive to excessive censorship. This vagueness is exacerbated by the lack of judicial or other independent external oversight. While your Excellency mentions in her 15 January 2016 response that the PTA "performs its functions under strict judicial scrutiny," Section 34 does not establish a process for prior judicial approval of a content removal or blocking order.

Given these continuing concerns, I urge Your Excellency's Government to undertake a rigorous and thorough reassessment of the Bill to ensure its compliance with

international human rights laws and standards, and keep the public informed of how any future amendments ensures such compliance. I also welcome any additional information on or responses to my observations and concerns above.

This communication will be available to the public and posted on the website page of the mandate :

(<http://www.ohchr.org/EN/Issues/FreedomOpinion/Pages/OpinionIndex.aspx>)

Your Excellency's Government's response will also be made available in the same website and in a report to be presented to the Human Rights Council for its consideration.

Please accept, Excellency, the assurances of my highest consideration.

David Kaye
Special Rapporteur on the promotion and protection of the right to freedom of opinion
and expression