

Form No: HCJD/C-121

ORDER SHEET

IN THE ISLAMABAD HIGH COURT, ISLAMABAD
(JUDICIAL DEPARTMENT)

W.P. No.3028/2020

Muhammad Ashfaq Jutt
Versus
Federation of Pakistan, etc.

S. No. of order/proceedings	Date of order/proceedings	Order with signature of Judge and that of parties or counsel where necessary.
	11-05-2022	Mr Usama Khawar, Mr Majid Rashid Khan, Mr Husnain Ibrahim Kazmi, Mr Shah Khawar, Mr Sikandar Naeem Qazi, Advocates for petitioner. Syed Safeer Hussain Shah, Barrister Iqbal Khan Nasir, Ms Naila Naureen, Ms Laraib Kanwal, Mr Faisal Iqbal Khan, Ms Maheen Zeeshan, Ms Shafaq Abid, Advocates for respondents. Mr Naeem Ashraf, Director (Lit), Mr Adil Javed, Asstt. Director (Law), Mr Farhan Babar, MTO (Law), Mr Shahmeer Shahid, MTO (Law) for PTA.

Athar Minallah, C.J.- The questions raised through the petitions, submitted on behalf of the learned counsels, are as follows.-

"Review of Prevention of Electronic Crimes Act, 2016:

1. Section 37: Review very Broad Scope of Section 37 of PECA:

- i. Unlawful online content as defined in Section 37 is merely a reproduction of Article 19 of the Constitution. The language of the Constitution is meant to be a statement of **broad principles** that governs legitimate curtailment of Freedom of Expression through reasonable restrictions by law. Section 37 needs to be more precise, with more narrow definitions; e.g., highly vague language concerning morality and national security needs to be replaced with precise terms.
- ii. Scope of the *sub judice* rule should also be defined by the Parliament: Concerning sub-judice rule what should be its parameters [see W.P. No. 2865/2017, Majid Rashid Khan Vs. Fop And Others].
- iii. The powers given to the PTA, a non-judicial body, to interpret section 37, and by extension Article 19, violates the separation of powers and gives undue powers making determinations regarding

permissible online speech to an administrative body.

- iv. Consider insertion of a new section for the 'formation of an oversight committee' in Chapter III. The multi-stakeholder committee will review the content takedown decisions of the authority. This committee should consist of representatives from the regulating body, representative of legal fraternity as well as representatives of civil society, industry, lawyers, and media." Additional sections. may be added to spell out the formation, composition, and responsibilities of the committee.
- v. Alternatively, repeal Section 37 altogether in line with the recommendation of the Amicus Frieha Aziz in Writ Petition titled ***Muhammad Ashfaq Jutt Vs FOP, etc (WP 3028/2020)***.

2. Section 53: Report to the Parliament: Provide Penal Consequences for the Failure to Present Reports:

Under S. 53, FIA is required to submit bi-annual reports to the Parliament, but FIA since 2016 has submitted 4 reports that too with much reluctance. Chairman Senate has given a Ruling directing the FIA to submit a report but FIA has shown disregard for the Parliament needs to make this a mandatory requirement and provide penal consequences for non-submission of the Reports to the Parliament.

3. Section 20 (Criminal Defamation): Revisit Criminal Defamation

- i. Parliament should reconsider Section 20 of PECA in the light of the order dated 08-04-2022 delivered by the Islamabad High Court in W.P. No.666/2022 titled *Pakistan Federal Union of Journalists through its Secretary General Versus The President of Pakistan through the Secretary & 4 others*.
- ii. Criminalization of defamation should be subject to parliamentary review, particularly in light of the fact that alternate remedies for defamation exist under civil laws.

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

Parliament is suggested to consider the following problematic aspects of the Rules:

1. PRIMA FACIE THE RULES EXCEED THE MANDATE OF THE PARENT ACT

Limited Scope of Rule Making Powers Under Section 37 of PECA 2016” The Rules have been framed under S. 37 read with S. 51 of PECA. These are two different types of Rule making powers. S. 37 is a specific and narrow type of Rule making provision and in its presence reliance can't be placed on S. 51, which is more administrative in nature. Section 51 deals with appointments and powers of FIA, not the PTA.

2. LIMITED SCOPE OF THE POWERS OF THE AUTHORITY UNDER SECTION 37 OF THE PECA 2016:

PECA is a criminal statute, not a regulatory authority statute like PTR Act 1996. PECA 2016 does not relate to regulation, registration, or functioning of social media companies. Therefore, social media cannot be regulated through the Impugned Rules under PECA 2016. Social Media Companies may be regulated through another Act of Parliament or through amendments.

3. BLOCKING OF THE ENTIRE ONLINE INFORMATION SYSTEM:

Rule 5(7)(ii)(b) is ultra vires of PECA for it grants the Authority the power to issue directions for **blocking of the entire Online Information System.**

- a. Section 37(1) confers limited powers to the PTA to remove or block, or issue directions to remove or **block access to information** through any information system.
- b. Blocking **of the entire Online Information System** fails to meet the **critereon of proportionality.**

4. SUO MOTU powers of PTA: Rule 4(6) is prima facie ultra vires PECA 2016 because it gives PTA unregulated, broad, suo motu powers “on its own motion to take cognizance of any unlawful Online Content”. A holistic reading of PECA 2016 - especially, **section 16(2), section 20(2), section 21(3), section 22(2) and section 24(3)** - reveals that PTA can only exercise its power to remove or block online content upon **two conditions: namely, (i) on receipt of an application/complaint (ii) from an aggrieved person.**

5. MAXIMUM PENALTY PROVIDED UNDER THE IMPUGNED RULES IS MORE THAN THE MAXIMUM PENALTY PROVIDED IN THE PARENT ACTS.

Rule 5(7)(ii)(c) is *ultra vires* of the Parent Acts for:

- (i) prescribing a penalty and

(ii) the penalty being more than the maximum penalties or fines allowed under the Parent Acts.

Section 37, under which the Rules are framed does not confer upon PTA the power of imposition of financial penalty. Maximum fine provided in the Parent Acts (**350 million**, Section 23(3)(c)(i) of PT Act 1996) is less than the penalty prescribed by Rule 5(7)(ii)(c). Similarly, the maximum fine in PECA 2016 does not exceed the value of **fifty million rupees [S. 10(c) [Cyber terrorism]**].

6. Rule 5(4) Illegally Imposes Obligation Upon the User for Data Retention:

Rule 5(4) extends the obligation to retain specific information, including traffic data, to the “users”, which is *ultra vires* Section 32 read with Section 2(xxviii) of PECA. Section 32 authorizes the PTA to require a “service provider” to retain “specified traffic data”. The definition of service provider (Section 2(xxviii) of PECA) does not include a “user”. However, Rule 5(4) extends the obligation to retain “specified traffic data” to the users as well.

This provision also exceeds the scope of Section 37 as it only pertains to “removal or blocking,” not retention of data.

7. Data Localization is Ultra Vires of PECA 2016:

Rule 7(6) is essentially a data localization provision that exceeds the authorization under Section 37 and Section 51 of PECA. There are **only two provisions in PECA, Section 31 (Expedited preservation and acquisition of data) and Section 32 (Retention of traffic data)**, that concern data retention. At best, these provisions allow the PTA to direct the service provider to retain specific data “subject to production of a warrant issued by the Court, provide that data to the investigative agency or the authorized officer whenever so required.”

8. UNCONSTITUTIONAL PRIOR RESTRAINT: RULE 7(5) IS ULTRA VIRES SECTION 38(5) OF PECA 2016

Rule 7(6)(f) is *ultra vires* Section 38(5) of PECA 2016 to the extent it obligates a social media company to deploy proactive mechanisms to monitor content. Imposes an obligation upon a Significant Social Media Company to “deploy suitable content moderation methods including Artificial Intelligence (AI) based content moderation system(s) and

content moderators well versed with the local laws.” This amounts to **Prior Restraint of Freedom of Press and Speech**. **Prior Restraint** is government action that prohibits speech or other expression before the speech happens.

Section 38(5) of PECA explicitly incorporates the constitutional protection of prior restraint:

"No service provider shall be under any obligation to proactively monitor, make inquiries about material or content hosted, cached, routed, relayed, conduit, transmitted or made available by such intermediary or service provider."

9. IMPRECISE/VAGUE DEFINITIONS: MERE REPRODUCTION OF THE WORDS OF THE CONSTITUTION:

The basis upon which the Authority removes and blocks online content under Rule 3 is vaguely defined and severely restricts the rights guaranteed by the Constitution. For example, second proviso of sub-Rule (1) defines:

*(ii) **"security of Pakistan"** which shall bear the same meaning as given under Article 260 of the Constitution of Islamic Republic of Pakistan 1973.*

Article 260 of the Constitution in turn provides: ***"security of Pakistan"** includes the safety, welfare, stability and integrity of Pakistan and of each part of Pakistan, but shall not include public safety as such.* Neither the Act nor Rules precisely define or provide any **"objective" standards** to measure what constitutes "safety", "welfare", "stability" or "integrity" of Pakistan.

Legitimate criticism of the **political government** or its elected officials can be censored if the PTA, in its subjective opinion, determines that the speech is against a **vague concept of welfare of Pakistan**..... creation of a totalitarian and paternalistic state- **George Orwell** in his ominous novel, **1984**. This is entirely possible considering the **PTA is bound by the directions of the Federal Government under S. 8(2)(c): Fed Govt. can issue directives on the requirements of "national security"**.

10. VIOLATION OF ARTICLE 19A: Expansive Definition of Complainant

The power conferred upon PTA to keep identity of the complainant confidential - as stipulated in Rule **4(5)** read with the definition of Complainant, provided in Rule **2(1)(iii)** - is against the **Right to Information** (RTI), as enshrined in Article 19A o and the **Right of Access to Information Act 2017**. Public institutions fall under the definition of "complainants", hence the imposition of restrictions on disclosure of identity of complainants if there is danger of "harming, harassing or defaming the Complainant, or invasive of the Complainant's privacy" is against the **principle of democracy, accountability, transparency, and due process**. Citizens have the right to know the kinds of complaints that the public institutions are filing, what they are concerned with, and what are the priorities of the public institutions.

The Parliament in its wisdom may even consider striking down PECA and replacing it with a new legislation in consultation with all stakeholders.

Review of Pakistan Telecommunication (Re-organization) Act, 1996 ("PTR Act 1996")

Review the Qualifications of the Appointment of the Members and Chairman PTA:

Section 3(3) PTR Act 1996 concerns the qualifications of members of PTA. The qualifications are bare minimum: out of three members, one of them shall be a professional telecommunication engineer and other shall be a financial expert. Considering the nature of the powers conferred upon the Authority by PECA, the professional telecommunication engineer and financial experts are not equipped to adjudicate upon the complex issues involving criminal law, content moderation, permissible speech and fundamental rights. PTA was originally created to regulate handle telecommunications infrastructure and systems, promote telecommunications, grant licenses, receive and expeditiously dispose of applications for the use of radio-frequency spectrum; promote the availability of a wide range of high quality, efficient, cost effective and competitive telecommunication services throughout Pakistan; promote rapid modernization of telecommunication systems and telecommunication services, etc. Therefore the qualifications of the members of PTA in Section 3 are very relevant; with the advent of PECA and the powers granted to PTA by PECA, the qualifications need to be revised and independent experts in social media, representatives of civil society and journalist bodies also should be included in PTA.

2. The Court has been informed that the office of the learned Attorney General is vacant, therefore, arguments may be adjourned. The learned Attorney General is expected to assist the Court regarding the above questions on the date fixed.

3. Mr Farhat Ullah Babr, one of the petitioners, has suggested that in the meanwhile the matter may be referred to the Federal Government for review of the impugned rules so that they may be brought in conformity with the fundamental rights set out in Articles 19 and 19A of the Constitution of the Islamic Republic of Pakistan, 1973. He has also suggested that the matter be referred to the Majlis-e-Shoora (Parliament) for consideration. The suggestions are reasonable but referring the matter to the Majlis-e-Shoora (Parliament) by this Court may not be appropriate on the touchstone of the principle of trichotomy of powers and parliamentary supremacy. However, the political parties having representation in the Majlis-e-Shoora (Parliament) can obviously initiate the process for review of the provisions of the Prevention of Electronic Crimes Act, 2016 and the impugned rules.

4. The petitions are directed to be fixed for arguments of the learned Attorney General on 17-06-2022. In the meanwhile, the Federal Government is expected to review the provisions of the rules so as to bring them in conformity with the rights guaranteed under the Constitution.

5. Relist on 17-06-2022.

(CHIEF JUSTICE)