

# FREEDOM OF EXPRESSION IN DISSEMINATION OF MOBILE 2.0 CONTENT: PAKISTAN

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## TABLE OF CONTENTS

<b>1. INTRODUCTION.....</b>	<b>1</b>
<b>2. THE DEVELOPMENT OF MOBILE PHONE IN PAKISTAN .....</b>	<b>2</b>
<b>3. REGULATORY AUTHORITIES.....</b>	<b>3</b>
<b>4. PAKISTAN’S POLITICAL-LEGAL LANDSCAPE AND EMERGENCE OF MOBILE 2.0 .....</b>	<b>4</b>
4.1. Freedom of Expression as a Legal Right .....	5
4.1.1. Mobile 2.0: Content and the Law in Pakistan.....	6
4.2. Exceptions to Freedom of Expression.....	6
<b>5. MOBILE NETWORKS, CONTENT REGULATION AND FREEDOM OF EXPRESSION IN PAKISTAN.....</b>	<b>8</b>
5.1. Content – 2.0 - Context .....	9
5.2. Blogger on Mobile 2.0 - Micro-blogging.....	10
<b>6. PRIVACY AND FREEDOM OF EXPRESSION.....</b>	<b>11</b>
6.1 Mobile Consumer Rights .....	12
<b>7. RECOMMENDATIONS FOR AN INTERGRATED POLICY .....</b>	<b>14</b>
<b>8. CONCLUSION .....</b>	<b>15</b>
<b>ANNEXURE.....</b>	<b>16</b>
<b>NOTES AND REFERENCES .....</b>	<b>20</b>



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## 1. INTRODUCTION

Mobile 2.0 is a new phenomenon that allows mobiles to browse through the latest innovative mobile accessible web 2.0 services. But its growth is exceptional, especially in developed economies. It is estimated that during next few years it will become the dominant access method in many countries of the world particularly through use of latest handsets as mobile companies form strategic partnerships to augment the use of Mobile 2.0 content services.

Pakistan is already feeling the pangs of this evolution at a revolutionary pace. The number of its mobile subscribers is more than 93 million in Pakistan and it stands fifth position for number of mobile users in Asia.<sup>1</sup> Moreover it is among the five countries of Asia in terms of increased penetration of mobile phones, internet and broadband, according to the Information Economy Report 2009, published by the United Nations Conference on Trade and Development.<sup>2</sup>

Thus, with the abundant availability of basic tools necessary for mobile 2.0, Pakistan has to gear itself to face the deluge that is fast inundating the world. It ought to be ready to open it self to stomach this phenomenon and at the same time it must have proper regulation to ensure its healthy use. According to BuzzCity report, youth and children form the bottom of the pyramid (BOP) in the use of Mobile 2.0 services in Pakistan and emerging Asian countries.

Pakistan has a chequered political and constitutional history repeatedly marred by military rules. Democratic orders have been intermittent and short-lived. Therefore, freedoms of expression and civil liberties have been casualties of this uneven system. Since February 2008, after the ouster of the military dictator, democratic order is once again trying to take hold and supremacy of constitution is gradually being licked back into shape. With this the sanctity of freedom of expression and civil liberties is gaining strength. For many years the regulations and regulatory authorities were established and used with a despotic mind set. For example in 2007 the two most popular media news channels of Pakistan, operating from Dubai, were closed down by the authorities, at the behest of the then ruler, General (Retd.) Pervez Musharraf. This operation was done over and above and in violation of Pakistan Electronic and Media Regulatory Ordinance 2002.

The closure of these channels gave birth to the rise of alternative media in form of SMS, internet and mobile 2.0. That phenomenon has continued even post Musharraf regime. Nevertheless the democratic government is trying to regulate media and ICT within the parameters of the constitution of Pakistan – however, she has to go a long way to accomplish the target. However, blanket bans have not been able to prevent the flow of information and gave rise to popularity to alternative media in the form of SMS, internet and Mobile 2.0.

This paper presents an interdisciplinary approach in an attempt to bring about a holistic approach to communications, civil liberties, political democracy and Information Communication Technology (ICT) laws in Pakistan. There are no case law precedents in Pakistan pertaining to ICT law and this paper attempts to reason analogous arguments in a legal context to developing issues in the political and social arena; that may have an effect on freedom of expression with a particular focus on Mobile 2.0: content services, in Pakistan and relevant Asia Pacific jurisdictions. The premise of arguments stem from mobile companies unilaterally denying “content services” to customers under reasonable terms of service. Who regulates content, mobile companies, regulators or government? Are privacy policies, customer friendly and encourage network neutrality and plurality? Moreover, it endeavors to ferret out the forces and environment that regulate the regulators and the policies in this regard. It will scrutinize the existing state of affairs of freedom of expression and civil liberties vis-à-vis Mobile 2.0. The aim is to come up with plausible suggestions for formulation of policies to regulate new electronic commercial services, media technologies and the telecom sectors suitable to operate in a democratic environment.

## 2. THE DEVELOPMENT OF MOBILE PHONE IN PAKISTAN

Pakistan's mobile market has matured into a successful "Telecom Industry" since the launch of its first mobile<sup>3</sup> and paging services in 1994. Acsys Limited (US based) received an approval in 1996 to lay out rural network and provide state of the art data communications and value added services. This was a result of government's initiative to privatize a highly nationalized telecom infrastructure in 1991, which paved way for deregulation of state incumbent monopoly the Pakistan Telecommunications Corporation Limited (PTCL). Pakistan Telecommunication (Re-organization) Ordinance 1996 was promulgated to bring the socio-economic benefits of communication systems to the nation by attracting investment and harnessing competition, thus protecting consumer interests. These objectives were expected to be attained by making a congenial regulatory framework to attract investors in telecommunications. This led to sector based policy framework recognition by the government, since it sensed the evolutionary prospects of communications as an integral resource to the economy of the country.

The restricted market with only two GSM mobile operators namely, Mobilink and Ufone<sup>4</sup>; was liberalized under the first mobile phone policy introduced in 2004 and paved way for the licensing of new mobile phone operators through competitive auction bidding. Licenses<sup>5</sup> were issued in to Waridtel and Telenor. Zong; a subsidiary of China Mobile Pakistan; acquired its license from Millicom in 2008. From 2004-2009, Pakistan's mobile market has grown phenomenally, according to the Budd Report 2005, historic progress was seen in Pakistan's Communications Technology deregulated competitive structure. Mobile consumer base in 2005 was estimated at 6.2 million while in 2009, Pakistan flaunts 93.7 million subscribers. Market penetration was at 7 % which currently is estimated at 58%. Mobile phone companies have invested heavily in form of Foreign Direct Investment (FDI) in the Pakistani market despite, geo-political<sup>6</sup> and legal constraints.

Developing countries such as Pakistan which have demonstrated a high level of mobile phone penetration (59% in 2009) over the years has seen a gradual rise in the use of this service. However, due to high rates of illiteracy<sup>7</sup> the use of this service has not been phenomenal. Moreover, there is a dearth of customer friendly services that would encourage the population at the bottom of the pyramid to use this service proficiently to their use.

However, recent attempts by the mobile companies by improving their business models to assimilate new pricing strategies has paid off and the use of SMS has spiked phenomenally within an year signifying shift in trends of cell phone usage.<sup>8</sup> Recent boom in new media technologies has integrated the use of SMS in a dynamic and interactive platform.

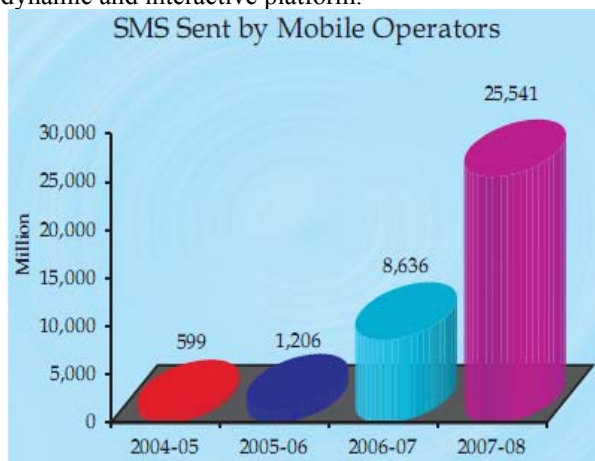


Figure 1 - Source: Pakistan Telecommunications Authority

All incoming content is free while the average cost of sending a local SMS is \$0.012 while an international SMS is \$ 0.072 and of VMS (Voice Message Service) is \$ 0.036. The average cost of sending a local MMS is \$ 0.072 whereas an international MMS is \$ 0.18. The above figure depicts the voluminous growth in SMS traffic over a span of five years.

### 3. REGULATORY AUTHORITIES

In wake of new media technologies such as mobile 2.0, electronic media and telecommunication services are converging at a rapid pace. Pakistan has two separate regulatory bodies, PEMRA and PTA, which oversee the traditional broadcast medium: television and radio, and, the telecommunication services, respectively.

Pakistan Telecommunication Authority (PTA) is the sole regulator of telecommunication (voice and data) services in Pakistan under the Ministry of Information Technology, Pakistan. It was formed in 1997, under the Pakistan Telecommunication (Re-Organization) Act no XVII 1996. Since its inception PTA has been responsible to oversee the deregulation and liberalization of telecom sector of Pakistan and has had a commendable lineage of ensuring free competition and in enforcement of legislation and regulatory orders. Only a decade after its inception Pakistan won the Government Leadership Award-2006 and Global Regulatory Exchange Award by the GSM Association (GSMA) along with many accolades for its transparent policies and effective regulatory framework in proliferation of mobile technology in Pakistan. However, only after one year, its transparency and powers came into question, after PTA had decreed Internet Service Providers<sup>9</sup> to block several websites which had “objectionable” content and requiring mobile companies to monitor unwarranted communications.<sup>10</sup> The performance regulator is shown in the trend depicted in the figure below:

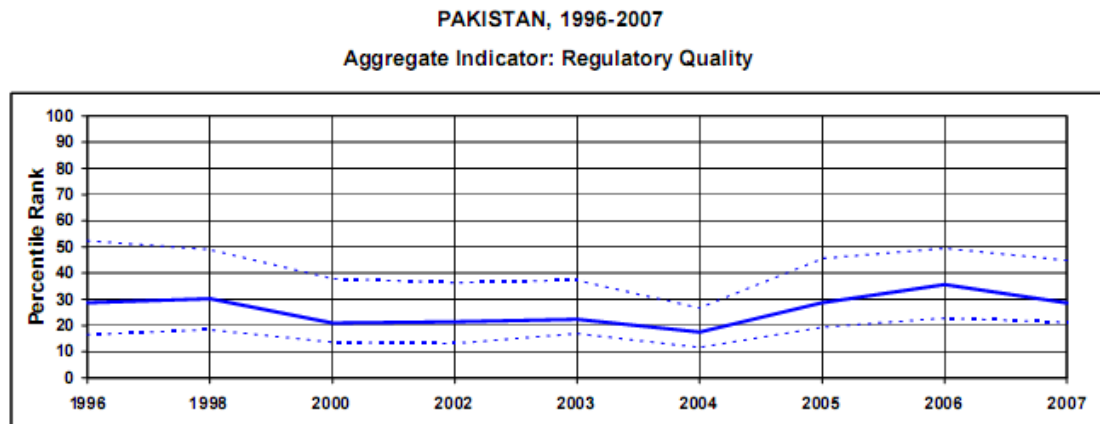


Figure 2 - Source: World Governance Indicators 2008

Pakistan Electronic Media Regulatory Authority (PEMRA) was formed under the Pakistan Electronic Media Regulatory Ordinance 2002 under the Ministry of information, Pakistan, during the tenure of an authoritarian regime with minimal stakeholder participation. It is mandated to issue new licenses to broadcasting companies and to ensure free flow of information. However, since then it has been injudiciously manipulated to further Government’s control over media and to mandate censorship at will. PEMRA is considered to be an instrument to curb civil rights and to restrain freedom of expression in Pakistan.<sup>11</sup>

PTA and PEMRA have conflict of interest over several new media technologies<sup>12</sup> being offered by mobile companies, which often results in confusion among mobile companies, as to who is the responsible authority for obtaining permissions and protocols. Clear delineation of functions and powers along with liaisons of functions and powers needs to be developed between PEMRA and PTA, harmonising Telecommunications Act and PEMRA ordinance<sup>13</sup> as in Taiwan, India and Philippines, which have one regulatory authority for both broadcast and telecommunications often known as “Communications and Media Authority”. To meet future challenges of new media technologies, Pakistan regulatory authorities should contemplate on a unified regulatory authority for both media and telecommunication services.

#### 4. PAKISTAN'S POLITICAL-LEGAL LANDSCAPE AND EMERGENCE OF MOBILE 2.0

Pakistan has restarted treading on the democratic path after eight years (1999-2008) of military rule by an autocrat; General (Retd.) Pervez Musharraf. However the civil liberty and political democracy will take time to mature and consolidate its foothold in Pakistan.<sup>14</sup>

Albeit Gen. (Retd.) Pervez Musharraf, introduced a policy which resulted in mushroom growth of television channels and cable networks in 2002, he clamped on his 'glasnost' in November 2007 when he declared a "state of emergency", suspended the constitution including basic civil rights such as freedom of speech and freedom of assembly and dismissed the Supreme and Provincial High Courts. He dismissed the Chief Justice of the Supreme Court of Pakistan with 59 superior courts' judges by taking extra-constitutional measures. Ex-post, the legal fraternity along with civil and political leaders and masses took to the streets, seeking restoration of the deposed judiciary and restoration of fundamental civil rights in the form of the "lawyer's movement".

Since, fundamental freedoms were held in abeyance, civil society activists employed "alternative methods" such as mobile activism, to protest against Government's authoritarian conduct.

Use of Mobile 2.0 services grew phenomenally in 2007, by way of mobile activism<sup>15</sup>, since the mobile networks were not barred by the Government from sending out messages curtailing freedom of expression under the legal exceptions. Mobile networks acted as neutral conduits for free flow of information and did not impose voluntary restrictions on freedom of expression, although, a few news media channels were banned<sup>16</sup> across Pakistan. Mobile companies reported the highest volume of SMS being sent out; an average of approximately 10 messages per phone and according to conservative estimate 500 million text messages per day<sup>17</sup>.

Non-Governmental Organizations (NGOs) such as<sup>18</sup>; a women right's organization in Islamabad: "Aurat Foundation", subscribed to SMS center to inform its members about protests and bring about awareness for social change particularly, rule of law, freedom of media and human rights. Political parties such as Pakistan Tehreek-e-Insaf (PTI) established an SMS center for similar purposes as did civil society groups, particularly student's organizations across Pakistan.

Fundamental freedoms were restored in December 2009 and nouveau judiciary was introduced under Provisional Constitutional Order (PCO), which remains a highly contested decision till date; and fresh elections were called in January 2009. However, prior to elections a prominent political figure Ms. Benazir Bhutto was assassinated followed by a horrendous suicide attack claiming many innocent lives. MMS messages<sup>19</sup> depicting her assassination; were recorded through a cell phone camera that had been virally sent out to various media channels<sup>20</sup>, helped identify the assassin, although investigations are still underway. It is believed that the person who recorded the images was held up for interrogation by secret services and his phone was confiscated.

Elections were rescheduled in February 2009 and democracy was restored in Pakistan, albeit, under looming controversies of rigging of the electoral process, paving way for "illiberal democracy."<sup>21</sup> Pakistan history is punctuated by recurring long military rule with shorter democratic periods that destroyed or enfeeble the state institutions... 32 years of Pakistan's 62 years history witnessed destructively long dictatorial regimes and the incumbent system is an "Illiberal democracy" as it inherited a relatively freer judiciary that is still in its infancy.

Blatant transgressions against constitutional freedoms have been common phenomena of third world countries. Especially in the context of political activism in Iran through the use of microblogging service "twitter", termed as the "twitter revolution"<sup>22</sup> resulting in a transitory restriction of Mobile 2.0 services.

"From Peru to the Palestinian Authority, from Sierra Leone to Slovakia, from Pakistan to the Philippines, we see the rise of a disturbing phenomenon in international life -- illiberal democracy" – Fareed Zakaria

#### 4.1. Freedom of Expression as a Legal Right

Freedom of expression is the **fundamental civil right** for every citizen in an independent state. The architects of Constitution of Pakistan expressly protected this fundamental right of Pakistani citizen, however, decades of military and quasi-military rule held this basic right in perpetual abeyance.

The Constitution of Pakistan, Article 19 states...:

*“Every citizen shall have the right to freedom of speech and expression, and there shall be freedom of the press, **subject to any reasonable restrictions imposed by law** in the interest of the glory of Islam or the integrity, security or defense of Pakistan or any part thereof, friendly relations with foreign states, public order, decency or morality, or in relation to contempt of court, commission or incitement to an offence”*.....

as does the UN’s universal declaration of Human Rights promulgated in 1945, includes the right to seek, receive and communicate information and ideas. Universal Declaration of Human Rights (1948), Article 19 defines it as:

*“Everyone has the right to freedom of opinion and expression: this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers”*.

It is stipulated in the International Covenant on Civil and Political Rights (‘ICCPR’), Article 19(2):

*Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.*

Pakistan is a signatory to ICCPR but has not ratified the convention, under which Pakistan would be obligated to transpose the aforementioned rights into relevant legislative framework.

Freedom of expression is not an absolute or sacrosanct but comes with responsibility.<sup>23</sup> In a case<sup>24</sup>, Supreme Court of Pakistan held that reasonable restrictions could be imposed on freedom of expression based on reasonable grounds. It is subject to norms and values of the society. Freedom of expression entails the risk of disseminating information, which might “*annoy, disturb, terrorize or disgust, or, would engage, educate, inform and uplift*”. This fundamental right invokes both civil and criminal liabilities on parties. Governments seek to identify certain exceptions to freedom of expression and freedom of access<sup>25</sup> largely to protect privacy of citizens, maintain social order and to ensure national security.

Certain exceptions to freedom of expression are as follows; the list is not exhaustive or conclusive and may vary across Asia Pacific States<sup>26</sup>:

- Establishment of Religion
- Defamation
- Incitement to Crime
- Sedition
- Obscenity
- Public Order
- National Security

These exceptions have so far not been challenged in any court of law against any mobile company in the particular context of Mobile 2.0: content services, however, there have been incidents where these exceptions have been sought unilaterally by law enforcement agencies. At this point, it is imperative to discuss the existing definitions and legislation of “Mobile Content” pertaining to ICT Laws in Pakistan before presenting an analogous account of the aforementioned exceptions.

#### 4.1.1. Mobile 2.0: Content and the Law in Pakistan

There is no precise definition of “Content” or “Mobile Content” in any of the main legislative instruments pertaining to ICT Laws in Pakistan. However, the Broadband Policy 2004, uses the term extensively, and defines it as:

“Information in an electronic format for example, websites, TV channels, data, voice etc”<sup>27</sup>.

Under the proposed Prevention of Electronic Crimes Ordinance (PECO) 2009, content is classified under “data”; defined as:

“representations of information or of concepts that are being prepared or have been prepared in a form suitable for use in an electronic system including but not limited to computer program, text, images, sound, video and information within a database or electronic system”.

It is simplified as non-voice based data-services, classified as “**value-added services (vas)**”. In this paper, VAS includes, SMS and (MMS) and Mircoblogging.<sup>28</sup>

“Electronic Data” or “Data”, “Information” and “Intelligence” are synonymous terms used instead of content. Legal definition and thus the legal interpretation of content, is therefore encapsulated in the following terms:

“intelligence”: “.... any speech, sound, data, signal, writing, image or video”.<sup>29</sup>

“information” includes: text, message, data, voice, sound, database, video, signals, software, computer programs, codes including object code and source code”.<sup>30</sup>

#### 4.2. Exceptions to Freedom of Expression

Freedom of Expression in Mobile 2.0 has challenged the legal fraternity to draft laws that are technically apt and applicable across converging technologies. As case law develops in Pakistan these standard exceptions to Freedom of Expression in Mobile 2.0 technologies shall apply uniformly.

➤ **Blasphemy:** Establishment of religion is protected under Article 20 and is further strengthened under Article 233 of the Constitution of Pakistan<sup>31</sup>, which cannot be suspended even in case of national emergency. Blasphemy or defamation of religion is a clear exception to freedom of expression. Any offence against the establishment of religion and religious figures is an offense under the Blasphemy Act 1679. In particular context of new media technologies including mobile 2.0, the Pakistan Telecommunications Authority (PTA) has imposed bans on several websites and blogs, especially “Blogspot”, “Wikipedia” and “YouTube” that had published the caricatures of Prophet Muhammad (PBUH) based on an Order decreed by the Supreme Court of Pakistan.<sup>32</sup> The order stated:

*“We will not accept any excuse or technical objection on this issue because it relates to the sentiments of the entire Muslim world. All authorities concerned will have to appear in the Court on the next hearing with reports of concrete measures taken to implement our order”*<sup>33</sup>.

It is noteworthy that this legal exception is practiced as Internet Censorship in other Asia Pacific regimes such as China, Malaysia, India and Thailand.<sup>34</sup>

➤ **Defamation:** Defamation is a public statement whose object and effect is to harm an individual. The three prong test includes: false statement based on fact and not on mere opinion, unprivileged publication to a third party and in case of defaming a public official, need to prove causal effect.<sup>35</sup> Mobile 2.0 services in Pakistan are being intensely regulated to include defamation of Government officials as a punishable offence.<sup>36</sup> For instance, jokes were sent out by individuals through SMS and blogs defaming<sup>37</sup> President Asif Ali Zardari under Section 8 of Defamation Ordinance 2002, the cyber crime wing of the Federal Investigation Agency (FIA)<sup>38</sup> which has countervailing powers under the Pakistan Electronic Crimes Ordinance (PECO) 2009, confiscated electronic equipment of the person alleged to have been identified as the originator of such messages without warrant.<sup>39</sup>

- **Incitement to Crime:** Where individuals seek to bring about harm through offensive messages leading to criminal effect such as speech that may incite terrorism. Section 15 on Cyber terrorism under PECO 2009 implicates anyone aiding or abetting towards violence against the State. Mobile 2.0 services like any other content services cannot guarantee freedom of expression under this exception, in Pakistan and other jurisdictions in Asia Pacific. Mobile networks, have to be cautious that their conduits are used for legal purposes and their services are not subjected to incite criminal activities. Terrorists have been using mobiles to coordinate their activities and to detonate bombs.
- **Sedition:** Sedition<sup>40</sup> is an unlawful conduct against the Government or violent acts of transgression to overthrow the Government. Sedition is an exception that many advocates of democracy and free speech view as pernicious to the cause of freedom of expression.<sup>41</sup> Mobile 2.0 services recently came under threat as seditious with regards to the lawyers' movement in 2007 coupled with blanket bans on internet service. . TeethMaestro: SMS to blog service; helped student activism in 2007 by providing real-time updates and podcasts, when Government had threatened students to imprisonment under Section 124 of Pakistan Penal Code, if they resorted to political activism. Moreover, Hizb-u-Tahrir<sup>42</sup>; a banned militant organization, has been using Mobile 2.0 services to incite religious sentiments and insinuate its subscriber's base towards sedition.<sup>43</sup> Sedition as an exception is also practiced in Malaysia under Sedition Act 1948.
- **Obscenity:** Lascivious, vulgar, indecent and obscene acts are exceptions to freedom of expression. Such acts cause moral harm to subjects. In Mobile 2.0 services, such content can be incriminated under section 17 of the PECO 2009. PTA monitors several websites, interestingly, publicly, religiously and culturally amoral: pornographic websites or "objectionable"<sup>44</sup>: lascivious content has not been blocked or filtered as required under the constitution.<sup>45</sup>
- **Public Order:** The preamble of the Constitution brings in the exception of Public Order to maintain public safety. This exception <sup>46</sup>was sought under the Maintenance of Public Order Ordinance, 1960, when mass-scale protests against the Government were launched in 2007. Faculty members of Lahore Management Sciences (LUMS)<sup>47</sup> had been arrested for arranging protests and rallies however, these arrests were not made under any electronic crimes legislation but for unlawful assembly inciting violence and disrupting public order under Section 144 Pakistan Penal Code and Section 16 of the Maintenance of Public Order; law of public safety.<sup>48</sup> It is unclear whether such an exception would be sought in particular context of Mobile 2.0 services, where mailing lists and subscription services are suspended to maintain public safety?
- **National Security:** Ever since the United States invasion on Afghanistan, Pakistan is facing acute terrorist onslaught mainly due to its active role in 'War on terror'. It is in grip of insurgency in its tribal areas and suicide attacks in urban centres. Terrorists have carried out horrendous suicide attacks on army officers, police and intelligence offices and personnel and indiscriminate attacks on general public in main cities of Pakistan. They have their cells and sympathisers across Pakistan with whom they stay in touch through cell phones and internet. The security agencies have managed to apprehend a number of such terrorists and their supporters through monitoring of call record of their cell phones and internet communication.

The Government is trying to ensure bonafide subscribers of mobile phones and particularly to prevent the unauthorised use of mobile phones .The Special Investigation Group (SIG) of Federal Investigation Agency (FIA) deals with the misuse of mobile and internet for terrorist purposes. Inter services Intelligence (ISI) and Intelligence Bureau (IB) maintain close liaison with the mobile phone companies to ensure religious implementation of rules formulated to check and control the mobile phone communication by terrorists and extremists. Mobile 2.0 services such as Micro-blogging and networking through Twitter and Facebook are another source of communication used by the terrorists which is a challenge for the counter terrorism agencies.<sup>49</sup> In Pakistan, Government had shut down SMS centers and jammed cell towers of mobile companies in wake of public protests on grounds of national security. None of the mobile companies have contested Government orders. Government of Pakistan reserves the right to suspend the service or revoke the license of a cellular service under Section 54 of Pakistan Telecommunication (Re-organization) Act, 1996 and Mobile Cellular Policy 2004.<sup>50</sup> A review of Mobile Cellular Policy is pending this year. Short Message Peer-to-Peer (SMPP) along with SIM based SMS service is considered by activists during "state

emergency” who are concerned that the intelligence services, if not the cell phone operators can lawfully intercept their communication and a directive could be issued to shut down SMS service of such nature or track down the activists.<sup>51</sup> Similar exception is practiced in Iran, India, Malaysia and Singapore.<sup>52</sup>

## 5. MOBILE NETWORKS, CONTENT REGULATION AND FREEDOM OF EXPRESSION IN PAKISTAN

Mobile networks in a highly networked ecosystem are embracing new business models to become smart pipes and tap into new technologies. Consumers are becoming empowered as a result of the progression in technology. Mobile networks are becoming more of a smart pipe: network with intelligence instead of a dumb pipe: pure access provider. Intelligence in commercial terms would mean information about the network, consumer and transactions that have commercial value for parties.<sup>53</sup>

Mobile networks are not mere access providers or common carriers rather information networks. Growth in content industry is primarily based on decentralized intelligence where third party content providers integrate horizontally with network providers to reach out to a select subscriber base. Prior to 2001, laws were formulated in a manner that they basically separated telephone networks and content providers. Telephone networks were considered more to be common carriers of traffic data that could be used for surveillance and was subject to juridical consent. Content industry was primarily a premise of internet service providers and hence was regulated separated with minimal surveillance.

Mobile 2.0 brings the challenge of meshed networks where there is no single “intermediary” or “third” party and transactions occur between individual users which may not transact or communicate under the usual terms of service of the network service provider, the originator and addressee in real time - may share common ownership to information sent and/or received especially in the use of microblogging and social networking such as Facebook and Twitter?<sup>54</sup> There would then be a need to assign short-term property rights to transactions of such nature thereby allowing sharing and collaboration of networks through a service provider freely adhering to privacy of parties to the transaction. A scenario where an applet created by a community for real time discussion on gay rights organizes protests across country using a service center of a mobile network, who is responsible - in a real time session, if such an assembly is considered to be detrimental to public order or establishment of religion; the originator or the addressee or the common carrier?

In developed countries such as United States<sup>55</sup> and the United Kingdom, case law has traditionally separated internet traffic and telephone traffic. Internet was considered a broadcast medium for content services, where content on it was considered published and the Internet Service Provider (ISP) was the publisher. While telephone traffic was plainly construed under telecommunication and wireless laws and telephone operators were considered common carriers of voice and data services. Internet and telephone traffic are no more distinct as the telecommunication carriers become content carriers and publishers. Mobile carriers offer bundled and unbundled services with voice and data and are becoming the next generation ISPs.<sup>56</sup> With the convergence of technology legal definitions need constantly be updated. Pakistan’s ETO 2002 deals extensively with electronic transactions however, not with the pressing challenges of Law 2.0 especially with regards to converging technologies.

For instance, United States Patriot Act 2001 considers Internet as broadcast medium where minimal restraint is required and a telecommunications infrastructure when it serves political interests that leaves an individual with minimal legal recourse to their communications being intercepted or blocked.<sup>57</sup>

The mobile operators are increasingly relying on transactional data retained indefinitely to make informed market strategies, also used based on subscriber consent to be sold to third parties making it a viable option. As in the case of NARAL: where an abortion rights company in United States was barred by Verizon Incorporation to send SMS to NARAL subscribers, over its network out of their own policy, was considered a major blow to freedom of civil rights. In Pakistan, mobile operators do not enjoy the moral or legal authority to exercise such a right, which would limit free flow of information ‘discriminately’.<sup>58</sup>

Although, networks are becoming intelligent and smart, and are capable to decipher and often intercept communications, such an act does not fall in the context of legal interception and often results in irreparable harm to consumers and firms and also is a breach of confidentiality of telecommunications.

A recent case<sup>59</sup>, where a phone service was disconnected without prior notice, aggrieved consumer was awarded damages, it was held that public functionaries must not take terms of law in their own hands violating discharge of their legal responsibility. Principle of natural justice must be upheld - if the law of tort is to prosper in Pakistan. Therefore, a consumer must be served with notice to mitigate harm and terms of service must be applied fairly and uniformly. This case delineates the role of public functionaries but what of private entities?

*Policy Angle:* For private entities some form of restraint should be exercised for decentralized regulation where market players resort to *de minimis* self-regulation upholding fundamental human rights. Behavior by private entities entails tortious liability where an individual seeks reasonable expectation of privacy. It is imperative that the information systems take social responsibility for any improper conduct that might occur as a result of usage of their conduits once notified if not identified through self regulatory mechanism<sup>60</sup>. Self-regulatory policies must ensure the protection of fundamental right to information.

### 5.1. Content – 2.0 - Context

Content emerges as a new force in convergence of technologies which empowers individuals in the electronic sphere. Awareness of Mobile 2.0 technologies in Pakistan is very low and its usage is limited to educated and affluent consumers of mobile services. Democracy 2.0 faces the challenge to protect civil liberties especially where freedom of expression will occasionally find itself battling Repression 2.0.<sup>61</sup> Like in USA, a developing country like Pakistan has already seen civil engagement and political mobilization by way of new media technologies.

Intent must be established and laws should be developed to ascertain behavioral clues as ethics and morals become arbitrary under converging social cultures in new media technologies. The nature of content regulated under the statute would thus determine the viability of such free flow of information, what constitutes as “amoral”, “indecent”, “obscene” or “sacrilegious” would be left for courts to interpret in view of enlightened principles of reason, ethics and morality which evokes whether such content should be appropriated as “harmful” or “illegal. (Shorts and Than, 1998)<sup>62</sup>

Neo-morality seems to be emerging under the auspices of mobile 2.0. How about an argument that the content being disseminated would allow people to engage, share emotions and enhance connections? For instance, legally there is no bar to celebrate Valentine’s Day in Pakistan and many mobile companies benefit from this occasion and design several ways to communicate with ones valentine friends. Culturally the society<sup>63</sup> has slowly started to embrace this day and use various ways to express their sentiments; however, the religious groups largely condemn it. It is then left at the discretion of the operator<sup>64</sup> to determine the nature and type of content being disseminated among consenting individuals. There hasn’t been any legal precedent to suggest that this day should not be celebrated but what if, it is alleged that operators must not allow customized content to be shared among consenting parties under the impression that it is “indecent” or “amoral” or violates the integrity of Islam? Clearly, such wide room for interpretation largely affects freedom of expression and is usually used to restrict rather than encourage socially sensitive issues thereby alienating certain segments of society under repressive regimes.

Clearly, if an operator is notified of an unlawful or amoral act, it is required by policy and law to investigate and takedown such activity without prior notice. Certainly, a network service provider lays out a policy and thus maybe lawfully permitted to retain content or invade the privacy of a session-based transaction, also, if required could be disclosed to law enforcing agencies under the impression of insinuation of criminal offence or to safeguard national security under Pakistan Telecommunication (Re-organization) Act, 1996. However, provided that the terms of service, of the service provider protects privacy and freedom of expression and disclaims any information hosted on it’s network, if then, the network operator gains unauthorized access to terminate service, then, under Section 36 of ETO 2002 - such violation of privacy of information is an offence which incriminates an unauthorized access to any information system for up to seven years in jail or may be fined up to a million rupees. There is no need to

prove intent or awareness for seeking such access. Although, the aforementioned example may be deemed amoral under peculiar social norms, the constitution and under the principle of Good Faith; it serves no reason for the service provider to invade privacy of such transaction usually by monitoring which would violate confidentiality of telecommunications under Section 31 of Pakistan Telecommunication (Re-organization) Act, 1996.<sup>65</sup> Such an offence would lead to three years of extendable imprisonment of the Chief Executive Officer or fine of up to ten million rupees or both under Section 31 subsection (2). The aggrieved party maybe compensated for any mental or monetary loss (tortious liability) under subsection Section 31 subsection (4). The proposed PECO 2009 considers data damage and unauthorized interception as an offence punishable for up to five years or a fine not exceeding 500, 000 rupees or both.

Since, freedom of expression and privacy are interrelated civil rights<sup>66</sup>, appropriate balance should be practiced in view of the fundamental freedoms enshrined in the constitution. While construing legal breaches to right of privacy and freedom of expression, causal connection must be established and appropriate balance should be practiced in view of the fundamental freedoms enshrined in the constitution that would confer “civil” liability on the parties.

*Policy Angle:* It is imperative that necessary stakeholders’ consultation<sup>67</sup> is carried out to promulgate generally agreed principles that protect civil rights in information systems thereby ensuring freedom of expression which would eventually encourage plurality, social inclusion and upgrade archaic cultural norms and values that are not in consonance with the religion, while upgrading legislative instruments.

At present no such consultation is sought before promulgating ICT Laws, recent examples of which is the most controversial PECO 2009 which blatantly violates and is in direct contravention to the fundamental freedoms enshrined in International Covenant on Civil and Political Rights, UN’s declaration of Human Rights and the Constitution of Pakistan. Interestingly Pakistan is not a signatory to the international Cyber Crime Convention (Budapest Convention 2001) and this ordinance is yet under consideration in the Parliament while enforcement agencies such as Federal Investigation Authority (FIA), the Intelligence Bureau (IB) and Inter-Services Intelligence (ISI) Directorate of the Government of Pakistan, continue to rely on its provisions to confiscate personal property and charge individuals without a right to challenge such action on mere suspicion of incitement to terror or actions with terroristic intent<sup>68</sup>, blatantly disregarding its economic implications and defying civil liberties<sup>69</sup>. For instance, Chapter IV of this Ordinance deals with investigation; Section 27 states that licensed operators must share data with investigation authorities and section 28 states that data will be retained for up to 90 days without the data subject’s right to have recourse to his property. This Ordinance came under severe scrutiny of civil society since it was promulgated in January 2007 only a couple of months after imposition of emergency rule under which fundamental freedoms were denied.

The South Asian Free Media Association (SAFMA): a civil society organization; declared that: *“against the backdrop of the use of Internet and cell phones to criticize authorities or send calls for rallies”, the ordinance is liable to be interpreted as a drastic measure aimed at putting curbs on civil rights.*”<sup>70</sup>

## 5.2. Blogger on Mobile 2.0 - Micro-blogging

Pakistanis have hugely subscribed to blogs such as TeathMaestro, Emergency Times and iSMS<sup>71</sup> along with several mailing lists that send SMS and MMS messages to their subscribers. New media has worked wonders as an alternative medium for freedom of expression. Often suppressed information comes out in the mainstream which otherwise would have been silenced by the authorities like in Iran. Election rigging videos were recorded and sent to various blogs which were sent out to their subscribers exposing the allegedly corrupt electoral process and politicians during February 2008 elections<sup>72</sup>. It is believed that such activism led to Government’s ban on websites such as YouTube and blocking SMS centers of various blogs. This ban was hugely contested by the youth as a severe curb on freedom of expression. “Don’t Block the Blog (DBTB)”,<sup>73</sup> a forum formed by couple of bloggers representing the civil society, media and bloggers, took it on them along with Reportiers Sans Frontiers (RSF) and other related originations to demonstrate civil society’s opposition to the authoritarian curbs by garnering international support.

Post elections, websites such as Facebook played a pivotal role in mobile activism by allowing subscribers of various social and political groups to post content online through cell phones. iSMS; a content service

provider, alone claims a subscriber base of 80, 000 Facebook users.<sup>74</sup> Twitter<sup>75</sup> factor is catching up slowly and is the most expedient way for communities to communicate through SMS in real time (micro-blogging) example of which is PakistanPolicy Tweet which reported SMS centers being jammed on Government orders.<sup>76</sup> A similar pattern was observed by Iranian youth, which took to the streets protesting against the ruling Government and its authoritarian conduct by using the right to freedom of expression and assembly through tweets. Consequently, the authorities had shut down SMS centers in a bid to clamp down on political dissent.<sup>77</sup>

The aforementioned incidents bring about the critical disruption between freedom of speech and government intervention which has sparked academic debate on whether Constitutional freedoms extend to matters of public concern and use of state power, relieving the latter under contract law (Richards and Solove, 2009)<sup>78</sup>. The Global Network Initiative (GNI) and civil right legal practitioners recognize double standards with regards the enforcement of exceptions to freedom of expression in both repressive and democratic regimes.

*“The same conduct (of authorities) in Iran or China during recent demonstrations would be called human right violations whereas here (USA) it’s called necessary crime control,” – Vic Walczak, Legal Director of the American Civil Liberties Union of Pennsylvania*<sup>79</sup>

## 6. PRIVACY AND FREEDOM OF EXPRESSION

Legal issues of virtual identity are debated profoundly in the “Laws of Persons and Property”. Who am I? Is my cell phone my property? This new question is rising up in the cyber-world juxtaposing virtual identities to fundamental freedoms particularly freedom of expression. **The Global Network Initiative recognizes privacy as pivotal in promoting freedom of expression.**<sup>80</sup> The European Union Ministerial Statement mandates anonymity as an absolute condition for freedom of expression, which is allowed in the physical world must also be protected in the cyber world ‘... where the user can choose to remain anonymous offline, that choice should also be available online’<sup>81</sup>.

The constitution of Pakistan protects human dignity in both physical and virtual worlds. Intrusion into individual privacy and personal home is not permitted.<sup>82</sup> Mobile phone is also considered personal property under International law and intrusion is thus not permitted unless for lawful and justifiable reasons.

Privacy laws must be strengthened along with freedom of access to information to secure the rights of citizens (Mobizens) and to allow people to have freedom of thought, spirit, emotions and sensations (Warren & Brandis, 1890, pp. 195)<sup>83</sup>. The torts formulated in privacy law to protect human dignity against government intervention are as follows:

“A man whose home may be entered at the will of another, whose conversation may be overheard at the will of another, who’s marital and familial intimacies may be overseen at the will of another, is less of a man, has less human dignity, on that account. He who may intrude upon another at will is the master of the other and, in fact; intrusion is a primary weapon of the tyrant” (Bloustein, 1964)<sup>84</sup>.

Hayat<sup>85</sup> argues that under the guiding principles of Muslim Law, privacy of the home is protected as constitutional right. Wiretapping, eavesdropping<sup>86</sup> and intrusion<sup>87</sup> are prohibited under the injunctions of Islam.

A growing consumer base of new media technology is the youth and children who adopt these technologies earlier than adults. Laws protecting fundamental freedoms do not expressly stipulate youth or children. Privacy laws must not be arbitrary and must protect a child’s right to use technology in a manner that would improve their ability to seek knowledge and take part in social activities. A teenage girl, therefore, may wish to seek information on abortion rights by subscribing to certain content services and maintain her anonymity<sup>88</sup>, as anonymity is the natural condition of freedom. Which law would protect her privacy and maintain her right to seek such content without arbitrary restrictions?

*Policy Angle:* There is a need for mobile companies to design such policies that provide security features to protect privacy and limit undue monitoring of information through content filtering. As of now, no such legislation exists to protect freedom to access such information thereby ensuring freedom of expression in the electronic domain. Surveillance and monitoring of services is extensively codified under developing legislation dealing with Cyber Crime, Data Protection and recently through SMS Monitoring Regulations 2009, taking away individuals right to personal property – online. Generally, privacy policies must ensure that free flow of data and does not fall in the hand of wrong persons, data of person (s) is not processed without the consent and knowledge of the data subject and transaction based information shared by mobile companies as an agent; is used for purposes intended.

### 6.1 Mobile Consumer Rights

Pakistan Telecommunications Authority is required to protect consumer rights under Section 4(1) and Section 6 of Pakistan Telecommunication (Re-organization) Act, 1996; conferring powers and function of the authority to safeguard rights of telecom users.

“(c) promote and protect the interest of users of telecommunication services in Pakistan “

“(m) ..... protect consumer rights”

The codes of commercial practice have been modified in the updated regulation: Telecom Consumer Protection Regulations 2009, which PTA promulgated, only recently, this legal instrument seems quite comprehensive, however, does little in the way of protecting consumer privacy and freedom of expression, thereby ensuring that strict regulatory compliance is imposed upon operators to roll out public awareness, disclosure on data retention and data privacy. However, the regulation comprehensively protects the consumers in the following key areas:

- Consumer’s right to service of their choice
- Fair provision of the service offered
- Prior notice for suspension and disconnection of service
- Indicative list of unfair practices

In particular context of Mobile 2.0 services, suspension and disconnection of services are regulated under Section 9 of PTCR 2009. The operator may not apply unfair terms in consumer contracts by “excluding” or “limiting” liability to performance of services. Unilateral disconnection of service is prohibited without rendering a “reasonable notice”.

The notion of consent figures prominently in PTCR 2009, however, the affinity of privacy and consent is left to the determination of fair disposal of service with limited recourse for consumer grievance for data loss or snooping. In specific context of Mobile 2.0 content services, where users disclose their personal details for using services such as email, social networking, instant messaging or communicating sensitive business data through business solutions such as Blackberry Solutions and or even broadcasting location, this lacunae would significantly affect the use of Mobile 2.0 services where, the user has minimal recourse to damages.<sup>89</sup> The regulation maintains that while such a list shall not violate the confidentiality of information and consumer privacy, moreover ensures non-discriminate and transparent services to all subscribers.<sup>90</sup> However, such a phenomenon of low standards for consumer privacy regulation is not peculiar to Pakistan; alone, the Center for Digital Democracy has criticized the Mobile Marketers Association (MMA) and the United States Federal Trade Commission (FTC),<sup>91</sup> for setting lax standards and regulations thereby putting the consumer at a critical disadvantage.

Operators can build strategies to win consumer confidence and acceptance to adopt Mobile 2.0 technology in Pakistan by following the suggested measures:

- **Low Price:** Maintain low price per data usage
- **More Choice:** Offer customized services through promotional campaigns based on user demographics. Clearly, delineate, who makes the choice - operator or user?
- **Constrain services:** Obtain consent
- **Security:** Offer recourse in form of compensation to customer by liaising with third party data security services especially for corporate customers.

- **Accountability:** Setting up feedback mechanism to ensure that all data services are regulated under appropriate disclosure and privacy policies to persons.

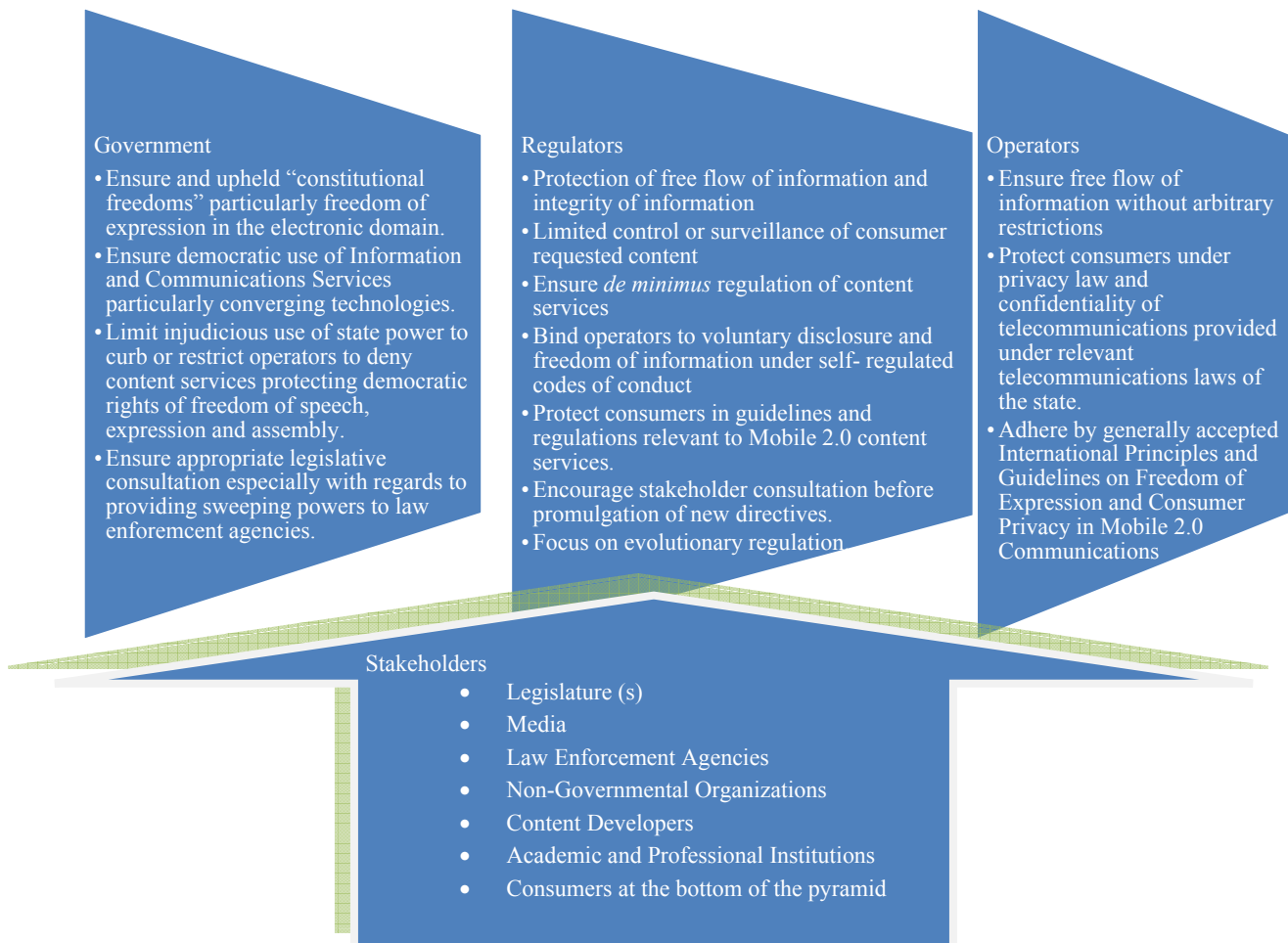
*Policy Angle:* PTA currently does not bind the operators to disclosure of either data protection or privacy policy to persons; it is left to the operators striving to match international best practices of corporate social responsibility. According to the Organization of Economic Cooperation and Development (OECD) guidance on privacy policy and practice<sup>92</sup>, all member states have adopted legal instruments for privacy protection and telecom operators are bound by regulators to endorse privacy policies and maintain a certain level of self-regulatory mechanism.<sup>93</sup> Transparent policies ensure customer retention and bring about fair environment where freedom of expression can thrive without arbitrary restrictions or limitations.<sup>94</sup>

The MMA lays out broad guidelines in form of a global code of conduct<sup>95</sup> for mobile marketers:

Notice	Choice and Consent	Customization and Constraint	Security	Enforcement and Accountability
Inform Consumers	Opt-in or Opt-out	Sensible and targeted communication	Unauthorized use, alteration, disclosure, distribution and access	Privacy code of conduct and Consumer Best Practices Guidelines. Compliance certification through third party enforcement organization

## 7. RECOMMENDATIONS FOR AN INTERGRATED POLICY

The intent is to carve out an integrated policy<sup>96</sup> taking the case of Pakistan and translating it to Asia and the Pacific, where governments, mobile operators and regulators share horizontal objectives incorporating vertical tasks based on the list of aforementioned policy suggestions for mobile 2.0 and evolutionary technologies; merging external influences of consumer groups and stakeholders in forming a cohesive charter that shall ensure free flow of information and freedom of expression protecting fundamental freedoms - essential for a thriving and free democratic society, without the fear of retribution from state authorities or unlawful and unilateral restrictions imposed by regulators and/or mobile operators. The trio of “Government”, “Regulators” and “Operators” must consider the recommendations encapsulated in the figure below, taking into account the stakeholders as integral to policy making since, the potential impact on injudicious use of mobile conduits is phenomenal, as enunciated in this paper, which can have a disquieting effect on “mobizens”:



### Box 1: Recommendations

## 8. CONCLUSION

Divergent views, interests and approaches of regulators and operators have substantially shackled the pace of progress and innovation in telecommunications especially nascent telecommunication freedom dating only less than a decade juxtaposed with the eight years despotic rule caused this slow pace and have questioned the constitutional freedoms along with legal principles of contract, tort and property law in Pakistan and emerging Asia Pacific economies. Nevertheless, positive environment is emerging in both avenues. Mobile 2.0 content based services have huge potential to uplift closed societies by providing them with a pool of knowledge and entertainment based content services without discrimination especially at the BOP. In a free and democratic society, it is incumbent upon operators to discourage unfair practices that deprive stakeholders especially consumers at BOP of their legal right to choice and freedom of expression.

Operators need to build transparent strategies for consumers; freedom expression being a natural ingredient for effective policies in Mobile 2.0 technologies. Regulations and laws are only meant to facilitate services and excessive regulation would only discourage innovation and free competition in free markets. Ethical and value based players can build sustainable commercial policies where democratic values of stakeholder participation, transparency and disclosure are practiced, necessary in a democratic society. Converging technologies bring forth converging roles of regulatory authorities in Pakistan. Freedom of expression in Mobile 2.0 is a challenge not only for mobile operators but also for regulators, legislatures, law enforcement agencies particular with regards to civil rights and constitutional freedoms, especially in the developing democracies like Pakistan with serious security challenges.

The trio of ‘senders’: Government, Regulators and Operators on one hand and the ‘Recipients’ on the other wield responsibility to stay within the parameters of the ideology, morals, values, religion and customs of their society. The fact remains that responsibility and accountability, ensured by the relevant laws, must be balanced against freedom of expression. Over-zealousness can result in iron-clad regulations which may mar innovation and progress in the field. While exploring such a challenge, it will be interesting to see whether there is a dual standard with regards policy and practice of mobile operators and regulators? Will the Global Network initiative be effective in protecting fundamental freedoms against government intervention?

As a matter of policy given the global nature of Mobile 2.0 phenomena, governments need to encourage free and unencumbered flow of information and enforce any directive through consultation with necessary stakeholders, absence of which can deprive the BOP segment of the society, of their legal right to send and receive information without arbitrary restrictions and authoritarian unilateral enforcement of legal exceptions to freedom of expression imposed by the state. Regulators require evolutionary thought in creating new regulation and need to ensure that mobile companies allow their conduits for fair use and free flow of information and maintain policies that adhere to best standards of consumer retention through effective privacy policies ensuring confidentiality of telecommunication services.

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**ANNEXURE****COUNTRY STATISTICS: PAKISTAN****CELLULAR COMPANIES:**

1. TELENOR
2. Ufone
3. Warid Telecom
4. Mobilink
5. ZONG (China Mobile Pakistan)

Source: PTA

**DEMOGRAPHICS:****POPULATION: 176,242,949 (July 2009 est.)****MEDIAN AGE: 21 YEARS****LITERACY: 50%**

Source: CIA FACT BOOK 2009

**MOBILE 2.0 USAGE TRENDS IN PAKISTAN:**

- 44% USE MOBILE FOR GAMES, MUSIC AND VIDEOS, BILL PAYMENTS AND EATING OUT
- 34% USE MOBILE TO COMMUNICATE WITH FRIENDS
- USER BASE BY PROFESSION: SERVICE PERSONEL (29%), STUDENTS (24%)
- 42 % CELLULAR CONSUMERS AT THE BOTTOM OF THE PYRAMID WITH < Rs. 4500 INCOME

Source: BUZZCITY –WHO USES MOBILE INTERNET DECEMBER 30, 2008

**AVAILABLE CONTENT SERVICES IN PAKISTAN:****LOCATION BASED SERVICES: NAVIGATION****ACADEMIC REFERENCE****PAYMENT OF UTILITY BILLS****MOBILE BANKING****ORDERING FOOD****VOICE MESSAGE****MOBILE INSTANT MESSAGEING****INTERNET SERVICE****TV****WEATHER UPDATES****BREAKING NEWS****SPORTS UPDATES****SONGS****GAMES****SMS****MMS****RADIO****ONLINE MAGAZINES****STOCK MARKET UPDATES**

Source: PTA

**TABLE 1: LEGAL INSTRUMENTS APPLICABLE TO FREEDOM OF EXPRESSION IN MOBILE CONTENT: PAKISTAN**



**TABLE 2: ARRESTED BLOGGING, 2003-2008**

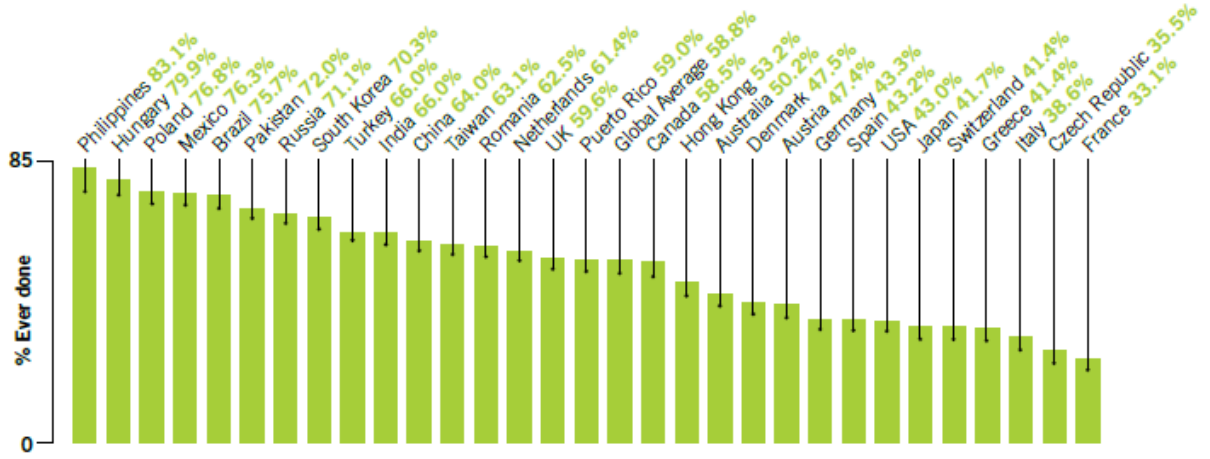
Blogging Activities	Total	2003	2004	2005	2006	2007	2008 – 1 <sup>st</sup> Q
Using blog to organize or cover social protest	15	China (4)			Egypt, Iran	Burma (2), China, Egypt (4), Iran	Egypt
Violating cultural norms	14			Singapore (3)	Egypt, Greece, USA	China, Egypt (2), Hong Kong, India, Philippines	Egypt, UK
Posting comments about public policy	12		France	Iran (2), Tunisia	Egypt, Iran	Fiji, Malaysia, Pakistan <sup>97</sup> , Saudi Arabia, Syria, Thailand	Syria
Exposing corruption or human rights violations	9	Iran				China (3), Tunisia	Burma
Other reason, or no reason given	8				Canada, China, Syria	China, Egypt, Fiji, Malaysia, Thailand, USA (2)	
Posting comments about political figures	6		Iran	Egypt		Egypt, Iran, Kuwait, Russia	
Total Number of Cases	64	5	2	7	10	35	5

Source: World Information Access Project, [www.wiareport.org](http://www.wiareport.org), 2008.

**FIGURE 1: MICROBLOGGING**

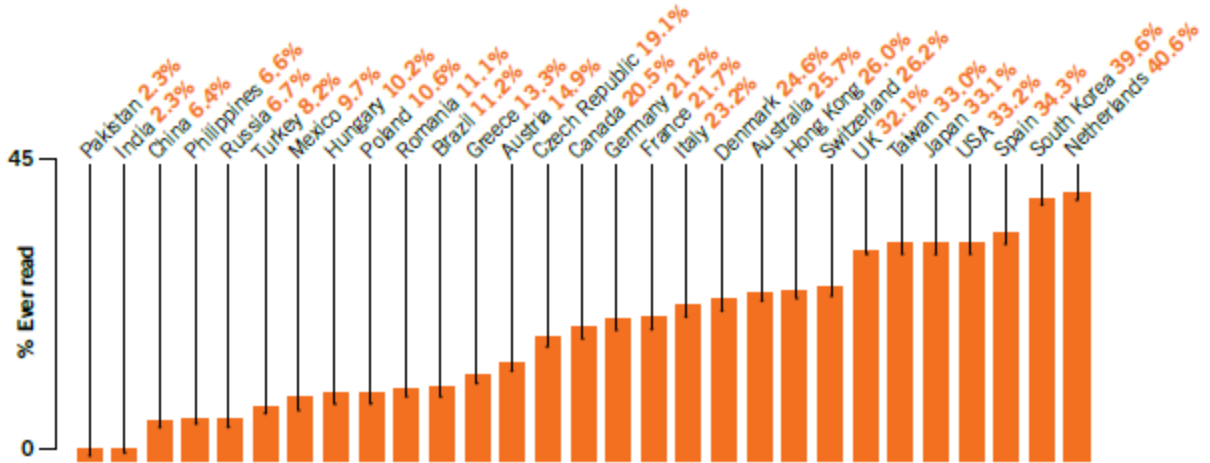
**Belong to a Social Network Wave3**

"Thinking about using the Internet, which of the following have you ever done?" – "Create a profile on a new social network" Active Internet Universe



**Reading blogs: impact versus total market**

Universe Sizes versus total 16-54 population



Power to the people - Social Media Tracker Wave 3

		Mobilink	Ufone	Telenor	Warid	China Mobile Pakistan (ZONG)	Instaphone
Notice		N/A	Yes	Yes	Yes	N/A	N/A
Choice and Consent	Policy	N/A	Opt-in	Opt-in	Opt-in	N/A	N/A
	Practice	N/A	Opt-in	Opt-out	Opt-out	N/A	N/A
Customization and Constraint		N/A	Low	High	Low	N/A	N/A
Security and Disclosure to third parties		N/A	High	High	Medium	N/A	N/A
Enforcement and Accountability		N/A	Low	High	Low	N/A	N/A

LEGEND: HIGH – MEDIUM – LOW

### CHART: PRIVACY POLICY AND PRACTICE OF MOBILE OPERATORS IN PAKISTAN

AN ASSESSMENT OF MOBILE COMPANIES BASED ON THEIR PRIVACY AND DISCLOSURE POLICIES BASED ON THE QUALITATIVE FINDINGS BELOW:

A brief summary of policies of a few mobile companies operating in Pakistan that exist as of now pertaining to freedom of expression and privacy for value added services are as follows:

#### TELENOR

As a policy, Telenor<sup>98</sup> does not monitor communications over its network and does not filter messages which would equate to monitoring the content of such messages, which is a direct violation of confidentiality of telecommunications. Their privacy policy identifies that the user must “opt-out” while signing up to the terms and conditions of services and marketing communications. Telenor disclaims control over any value added service that user pulls especially any liability arising out of the use of network using a third party service and does not as a policy restrict any form of legal communications over its network. It has the most transparent and balanced policies among all mobile companies.

#### WARID

Warid however, explicitly stipulates that all communications allowed over the network are permitted especially of Warid affiliates and the user must opt-out to terminate unwarranted communications. Interestingly, Warid does acknowledge that it monitors communications and thus would be able to make an informed decision to improve the quality of services.<sup>99</sup>

#### UFONE

Ufone does not explicitly accept to monitoring information however, stipulates that user’s personal information and communication shall be shared with third party and does not explicitly disclaim liability of its network services vis-à-vis third party communications.<sup>100</sup>

#### OTHERS

Mobilink and China Mobile Pakistan (CMPak) have the least transparent privacy policies of all. Their websites do not link up to any disclosure of information regarding customer data confidentiality, privacy or terms of service. However, they maintain that nothing in their policies transgress the existing legislation on confidentiality of telecommunication services.

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- <sup>2</sup> Mobile and internet usage surging in Pakistan, (25 Oct 2009) available at <http://propakistani.pk/2009/10/25/mobile-and-internet-usage-surgin-in-pakistan/> (accessed November 11, 2009)
- <sup>3</sup> Pakistan Mobile Communications Ltd. (PMCL), Mobilink, a subsidiary of Motorola Inc., received the Global System for Mobile Communications (GSM) license.
- <sup>4</sup> Pakistan Telecom Mobile Limited (PTML)
- <sup>5</sup> Local Loop, Long Distance and International and Wireless Local Loop, Class Value Added Licenses
- <sup>6</sup> Pakistan has been through several challenges of rising militancy and war being fought on its borders 2001-2011.
- <sup>7</sup> See Appendix
- <sup>8</sup> Muhammad Yasir, "Another Competition: Cellular operators battle on VAS" February 20, 2009. <[http://dailytimes.com.pk/default.asp?page=2009\02\20\story\\_20-2-2009\\_pg5\\_13](http://dailytimes.com.pk/default.asp?page=2009\02\20\story_20-2-2009_pg5_13)> (accessed March 11, 2009)
- <sup>9</sup> Urooj Zia, "PTA orders blockade of political webpages, discussion forums" January 02, 2009. <[http://www.thenews.com.pk/daily\\_detail.asp?id=155004](http://www.thenews.com.pk/daily_detail.asp?id=155004)> (accessed March 23, 2009)
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- <sup>13</sup> Sustainable Development Policy Institute, "52nd Meeting of the Study Group on Information Technology and Telecommunications." <[http://www.sdpi.org/training/52nd\\_meeting\\_of\\_study\\_group.htm](http://www.sdpi.org/training/52nd_meeting_of_study_group.htm)> (accessed March 28, 2009)
- <sup>14</sup> Global Peace Index: Voice of Humanity <<http://www.visionofhumanity.org/gpi/results/pakistan/2008/>> (accessed March 15, 2009)  
Note: Civil liberties: Is there a free electronic media? Is there a free print media? Is there freedom of expression and protest? Are citizens free to form professional organisations and trade unions? Ranked 5 (1- 10 very low to very high) Source: EIU Democracy Index; Year: 2008
- <sup>15</sup> According to Acison, communications solutions provider's report 2008-2009, SMS sent across Asia Pacific totaled 6.37 billion while MMS use amounted to 9.54 million; a growth of 40%. Pakistan is the 4th heaviest SMS (763 million) consumer nations, the highest being Philippines with 2.36 billion messages. The SMS growth volume in terms of year on year was recorded at 253% in just a year: 2008-09, this exponential increase is attributed to incentives offered by mobile companies to encourage the use of value added services specifically: SMS, MMS and VMS (Voice Message Service) along with a rise of mobile activism.
- <sup>16</sup> Geo News, "Journalists condone RSF report, blast media curbs" January 15, 2008. <[http://www.jang.com.pk/important\\_events/curbonmedia/](http://www.jang.com.pk/important_events/curbonmedia/)> (accessed March 11, 2009).
- <sup>17</sup> Manjeet Kripalani, "Cyber Demonstrations: E-resistance Blooms in Pakistan," Spiegel Online, <<http://www.spiegel.de/international/business/0,1518,517023,00.html>> (accessed March 01, 2009).
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- <sup>20</sup> Katrin Verclas, Patricia Mechael, "A Mobile Voice: The Use of Mobile Phones in Citizen Media". November, 2008. <<http://MobileActive.org>> (accessed March 11, 2009).
- <sup>21</sup> Fareed Zakaria, "The Rise of Illiberal Democracy," Foreign Affairs 76 (6) (November/December 1997) <<http://www.foreignaffairs.com/articles/53577/fareed-zakaria/the-rise-of-illiberal-democracy>> (accessed March 13, 2009): The author defines liberal democracy as a political system marked not only by free and fair elections, but also by the rule of law, a separation of powers, and the protection of basic liberties of "speech", assembly, religion, and property. However, illiberal democracies function without recourse to the constitutional right to fundamental freedoms.
- <sup>22</sup> Heacock. Rebekah (2009). "Twitter Revolution" (Columbia Univesity). Available at <<[http://jackfruity.com/wp-content/uploads/2009/12/Heacock\\_TwitterRevolution.pdf](http://jackfruity.com/wp-content/uploads/2009/12/Heacock_TwitterRevolution.pdf)>> (accessed January 27, 2009)
- <sup>23</sup> It is a maxim of human rights jurisprudence that restriction on rights must always be construed narrowly; this is true of the right to freedom of expression in a democratic society. See: Mukong v. Cameeron, 21 July 1994, Communication No. 458/1991, para. 9.7.
- <sup>24</sup> Engineer Jameel Ahmed Malik vs. Pakistan Ordinance Factories Board, Wah Cantt 2004 PSC 130
- <sup>25</sup> Often synonymously used terms – "Freedom of expression" is inevitably linked with "Freedom of Access to Information" – the legal right to know. Freedom to access of information is usually construed as statutory right of to access public information by the public.
- <sup>26</sup> Article 19 (1) Constitution of India; Article (2) and (4) Constitution of Malaysia; Article 2 Constitution of Singapore
- <sup>27</sup> Broadband Policy 2004, p: 32.
- <sup>28</sup> See Appendix for a list of content based services being offered in Pakistan.
- <sup>29</sup> Pakistan Telecommunication (Re-organization) Act, 1996; p: 3.
- <sup>30</sup> Electronic Transactions Ordinance (ETO) 2002
- <sup>31</sup> Article 20: "Freedom to profess religion and to manage religious institutions. Subject to law, public order and morality

- (a) every citizen shall have the right to profess, practice and propagate his religion; and

(b) every religious denomination and every sect thereof shall have the right to establish, maintain and manage its religious institutions."

<sup>32</sup> **Pakistan Penal code: Offenses relating to religion:**

**295-B:** Defiling, etc, of copy of Holy Quran. Whoever will fully defiles, damages or desecrates a copy of the Holy Quran or of an extract there from or uses it in any derogatory manner or for any unlawful purpose shall be punishable for imprisonment for life.

**295-C:** Use of derogatory remarks, etc; in respect of the Holy Prophet. Whoever by words, either spoken or written or by visible representation, or by any imputation, innuendo, or insinuation, directly or indirectly, defiles the sacred name of the Holy Prophet Mohammed (PBUH) shall be punished with death, or imprisonment for life, and shall also be liable to fine.

**298-A:** Use of derogatory remarks, etc..., in respect of holy personages. Whoever by words, either spoken or written, or by visible representation, or by any imputation, innuendo or insinuation, directly or indirectly defiles a sacred name of any wife (Ummul Mumineen), or members of the family (Ahle-bait), of the Holy Prophet (PBUH), or any of the righteous caliphs (Khulafa-e-Rashideen) or companions (Sahaaba) of the Holy Prophet description for a term which may extend to three years, or with fine, or with both.

<sup>33</sup> Websites blocked, PTA tells SC: Blasphemous material. <<<http://www.dawn.com/2006/03/14/top16.htm>>> (accessed on November 13, 2009)

<sup>34</sup> Stephanie Wang, Internet Filtering in Asia in 2006-2007. <<http://opennet.net/studies/asia2007>> (accessed on November 13, 2009)

<sup>35</sup> Aligarh Muslim University Old Boys Cooperatative Housing Society Limited Vs Muhammad Yousaf Qureshi 1997 CIC 918 KHCS

<sup>36</sup> "Pakistan president Asif Zardari bans jokes ridiculing him – Telegraph" <<<http://cyberlaw.org.uk/2009/07/28/pakistan-president-asif-zardari-bans-jokes-ridiculing-him-telegraph/comment-page-1/>>> (accessed on July 28th, 2009)

<sup>37</sup> Defamation is a criminal offence under the Pakistan Penal Code punishable with imprisonment, extending up to two years or with fine, or with both.

<sup>38</sup> Wire Service, "FIA directed to probe fictitious Emails, SMS against politicians" Pakistan Times <<http://www.pakistantimes.net/2008/09/28/newswire3.htm>> (accessed March 11, 2009).

<sup>39</sup> Warrantless searches and seizures without prima facie evidence were per se prohibited until *Katz v United States* 389 U.S. 347 (1967), however, cell phone content is now subject to search and seizures without warrant under the Fourth Amendment: *United States v. Zavala*, 541 F.3d 562, 577 (5th Cir. 2008). In United Kingdom: *Anton Piller Order* allows data to be seized for at least 3 days. In Pakistan, searches and seizures take place without warrants based on the complaints filed under PECO 2009 states that warrants can be contested in the Information and Communication Technologies Tribunals. These tribunals have the powers vested with courts under the Civil Procedure Code, 1908 and the Criminal Procedure Code of 1898. See: Yousaf Khan, "The Flaw in the Prevention of Electronic Crimes Ordinance 2007 and the Terror Of Section 17". Articles <<http://www.pakistanlawsite.com>> (accessed March 16, 2009). Case law in Pakistan has not developed to ascertain whether or not content must be seized for 90 days without recourse to damages as prescribed in PECO 2009. This indisputably puts a question mark to privacy over electronic property?

<sup>40</sup> Section 124-A of Pakistan Penal Code: "Whoever by words, either spoken or written, or by signs, or by visible representation, or otherwise, brings or attempts to bring into hatred or contempt, or excites or attempts to excite disaffection towards, the Federal or Provincial Government established by law shall be punished with imprisonment for life to which fine may be added, or with imprisonment which may extend to three years, to which fine may be added, or with fine."

<sup>41</sup> Battling Seditious Libel in Croatia <<http://www.cpi.org/attacks96/sreports/croatia.html>> (accessed on October 10, 2009)

<sup>42</sup> Abu al Mutasim, "Q&A with Naveed Butt", 07 March 2008 <<http://www.khilafah.com/index.php/activism/asia/2104-qa-with-naveed-butt>> (accessed March 11, 2009).

<sup>43</sup> See Also, *Kartar Singh v. State of Punjab A.I.R. 1956 S.C. 451*

<sup>44</sup> Pakistani law does not have clear definition of "objectionable content". International definitions of objectionable content are as follows: "The publication and storage of objectionable content can lead to civil or criminal liability. It can also be severely disruptive to business activity as servers, hard drives or computers may be seized as evidence. Given the international nature of the internet, clear-cut rules cannot be provided to avoid prosecution for illegal content in all jurisdictions. Content regulation varies between state, territory and country. Whether or not content is illegal depends on which state, territory or country it is published in. Although there is no precise definition of what constitutes objectionable content it would generally include the following:

(a) The storage or publication of obscene or pornographic content such as material involving the instruction or promotion of crime, violence or sexually degrading acts.

(b) The publication of content that portrays racial, gender or religious stereotypes.

(c) The publication of content that encourages the breach of a particular commercial contract or agreement."

<<<http://www.oznetlaw.net/forBusiness/Developabusinesswebsite/Contentregulation/tabid/4589/Default.aspx>>> (accessed November 11, 2009).

See also: Voluntary Code for Self-regulation of *Mobile Content* In Singapore

<[http://home.singtel.com/terms/self-regulation\\_code.pdf](http://home.singtel.com/terms/self-regulation_code.pdf)>> (accessed on October 03, 2009)

<sup>45</sup> *Ibid.* at 25

<sup>46</sup> *Ibid.*

<sup>47</sup> LUMS Press Release, November 05, 2007, <[http://ayasha.files.wordpress.com/2007/11/2007\\_11\\_05-lums-press-release.jpg](http://ayasha.files.wordpress.com/2007/11/2007_11_05-lums-press-release.jpg)> (accessed March 11, 2009).

<sup>48</sup> See Also, *K. Yagnik v. State A.I.R. 1960 Bombay 399*

<sup>49</sup> Supplemental to the 304th M I Bn Periodic Newsletter .Sample Overview: al Qaida-Like Mobile Discussions & Potential Creative Uses By 304th M I Bn OSINT Team. October 16, 2008

<sup>50</sup> p. 18

<sup>51</sup> Pakistani bloggers use SMS during 2007 State of Emergency,

<[http://shareideas.org/index.php?title=Pakistani\\_bloggers\\_use\\_SMS\\_during\\_2007\\_State\\_of\\_Emergency&printable=yes](http://shareideas.org/index.php?title=Pakistani_bloggers_use_SMS_during_2007_State_of_Emergency&printable=yes)> (accessed March 11, 2009).

<sup>52</sup> *Ibid.* 25

- <sup>53</sup> Netsize Guide, "Connecting Always-On Society" (Cia Bourgogne, Portugal, 2008), p: 26.
- <sup>54</sup> Electronic Transactions Ordinance (ETO) 2002, Chapter 2, Sections: 3 - 6
- <sup>55</sup> Baumer. David, J.C. Poindexter (2002) Cyber law and E-Commerce; pp: 151-153 United States .McGraw-Hill.
- <sup>56</sup> Mobile Virtual Network Operator is the new operator that carries content and traditional telephony services. PTA recently issued guidelines for MVNOs. PTA, Framework for MVNO Services in Pakistan May 15, 2007. <[http://www.pta.gov.pk/media/mvno\\_app\\_framework.pdf](http://www.pta.gov.pk/media/mvno_app_framework.pdf)> (accessed March 10, 2009)
- <sup>57</sup> Hosein. Gus (2004). The Bordering and Restraining of Global Data Flows; pp: 19. UNESCO: Publications for the Politics of the Information Society.
- <sup>58</sup> Mobile companies cannot discriminate 'unfairly' among its customers or consumers under the license conditions stated in Pakistan Telecommunication (Re-organization) Act, 1996, Section 21 (4)(i): *restrictions on the licensee giving undue preference to, or unfairly discriminating against, any person.*
- <sup>59</sup> Pakistan Telecommunications Limited (PTCL) v Rizwana Shaheen 2004 Y LLR 999.
- <sup>60</sup> Ibid, at 3
- <sup>61</sup> Digital Media in Repressive Regimes Public sphere, Civic engagement and Political Mobilization -Internet Freedom: Online activism and Emerging Threats. Copenhagen, p: 10-11. November 2008
- <sup>62</sup> Than de. Claire, Shorts. Edwin (1998). Civil Liberties: Legal Principles of Individual Freedom. London: Sweet & Maxwell.
- <sup>63</sup> Javno, World Report, "Laws against love: Meet Countries Which Forbade Valentine's Day." <[http://www.javno.com/en-world/meet-countries-which-forbade-valentines-day\\_234031](http://www.javno.com/en-world/meet-countries-which-forbade-valentines-day_234031)> (accessed February 17, 2009)
- <sup>64</sup> Aamir Attaa, "SMS Delivery Reports will remain disabled on Valentine's Day." February 13, 2009. <<http://www.propakistani.com/2009/02/13/sms-delivery-reports-disabled-valentine-day/>> (accessed February 17, 2009)
- <sup>65</sup> 31. Offences and penalties. — (1) Whoever—
- (a) establishes, maintains or operates a telecommunication system or telecommunication service or possesses any wireless telegraphy apparatus or carries on any other activity in contravention of this Act or the rules or regulations made there under, the Wireless Telegraphy Act, 1933 (XV of 1933) or the conditions of a license;
- (b) knowingly or having reason to believe that any telecommunication system or telecommunication service has been established or is maintained or is being operated in contravention of this Act, transmits or receives any intelligence by means thereof, or performs any service incidental thereto;
- (c) dishonestly obtains any telecommunication service, with the intent to avoid payment of a charge applicable to the provision of that service;
- (d) unauthorisedly transmits through a telecommunication system or telecommunication service any intelligence which he knows or has reason to believe to be false, fabricated, *indecent or obscene*;
- (e) engaged in the operation of a public switched network otherwise than in the course of his duty intentionally modifies or interferes with the *contents of a message sent by means of that network*;
- (f) prevents or obstructs the transmission or delivery of any intelligence through a telecommunication system or telecommunication service;
- (g) intercepts, acquaints himself with the contents of any intelligence or unauthorisedly discloses to any person the contents of such intelligence;
- (h) commits mischief;
- (i) damages, removes, interferes or tampers with any telecommunication equipment;
- (j) unauthorisedly deciphers the contents of any message transmitted over a public switched network;
- (k) assaults or intentionally obstructs a person engaged in the operation of a public switched network or the establishment, maintenance or operation of telecommunication services over a public switched network or intentionally obstructs the course of business of that person;
- <sup>66</sup> Tomlinson. Huges, Clayton, Richard (2010). Privacy and Freedom of Expression; pp: 2-3 OUP Oxford.
- <sup>67</sup> Jehan Ara, Shahzad Ahmad, "Pakistan's Draconian Electronic Crime Bill". 24 September 2007. <<http://www.apc.org/en/news/security/world/pakistan-s-draconian-electronic-crime-bill>> (accessed February 28, 2009)
- <sup>68</sup> Section 511-A of Pakistan Penal Code and Section 6(2) (f) of the Anti Terrorism Act, 1997
- <sup>69</sup> Incitement and Intent need to be justified and were excluded from the aforementioned provisions protecting fundamental freedoms particularly freedom of speech in Masroor Ahsan vs Ardeshir Cowasjee PLD 1998 S.C. 823.
- <sup>70</sup> Irfan Ahmed, "MEDIA-PAKISTAN: Cybercrime Law Infringes on Rights - Activists", January 28, 2008. <<http://ipsnews.net/news.asp?idnews=40879>> (accessed February 10, 2009)
- <sup>71</sup> iSMS is a content service provider that offers real time tweets through twitter under their Twitter Pakistan Project launched in 2009 with 80, 000 subscribers. iSMS has covered long march and other controversial events through their "seenreport" media and broadcast initiative.
- <sup>72</sup> Huma Yusuf, "Old and New Media: Converging During the Pakistan Emergency" (March 2007-February 2008). <<http://civic.mit.edu/watchlistenlearn/old-and-new-media-converging-during-the-pakistan-emergency-march-2007-february-2008>> (accessed March 11, 2009).
- <sup>73</sup> Don't Block the Blog & HelpgPakistan.com, "ALERT! Pakistan Government Issues Further Orders To Control The Internet In Pakistan" June 2007. <[http://help-pakistan.com/main/press\\_release/](http://help-pakistan.com/main/press_release/)> accessed (March 08, 2009)
- <sup>74</sup> iSMS also offers real time tweets through twitter under their Twitter Pakistan Project launched in 2009.
- <sup>75</sup> See Appendix
- <sup>76</sup> Pakistan Policy <<http://twitter.com/pakistanpolicy>> See also: Twitter users in Pakistan: Tweet via SMS to a local number, <<http://adiil.2scomplement.com/2009/02/update-your-twitter-status-via-sms-to-a-local-number/>> (accessed March 15, 2009).
- <sup>77</sup> Ibid. at 22
- <sup>78</sup> Solove, Daniel J., Richards, Neil M. "Rethinking Free Speech and Civil Liability"; pp: 1660-1666 (Vol.109:1650 Columbia Law Review, 2009). Available at: <http://ssrn.com/abstract=1355662>
- <sup>79</sup> "Rights activists see double standard in Twitter arrest" <<<http://www.reuters.com/article/technologyNews/idUSTRE5965LB20091008>>> (accessed October 07, 2009)

- <sup>80</sup> Also see: Right of Privacy versus Freedom of Expression; Aubry v. Edition Vice- Versa Inc. 1998. SCC. <<http://www.robic.ca/publications/pd/173.08.pdf>>
- <sup>81</sup> EU Ministerial Conference: 'Anonymity on the Internet'. Recommendation 3/97. Presentation in Bonn, 6-8 July 1997. <[http://europa.eu.int/ISPO/bonn/Min\\_declaration/i\\_finalen.html](http://europa.eu.int/ISPO/bonn/Min_declaration/i_finalen.html)> and <<http://europa.eu.int/ISPO/eif/InternetPoliciesSite/Crime/PublicHearingPresentations/EuroISPA.html>> (accessed January 07, 2009)
- <sup>82</sup> Article 4: "no action detrimental to the life, liberty, body, reputation or property of any person shall be taken except in accordance with the law".
- Article 14: "dignity of man and, subject to law, the privacy of home, shall be inviolable".
- <sup>83</sup> S.D. Warren, L.D. Brandeis, "The Right to Privacy" (4 Harvard Law Review, 1890) p: 193- 220.
- <sup>84</sup> E.J. Bloustein, "Privacy as an aspect of human dignity: An answer to dean Prosser" (New York University Law Review, 1964), p: 962-1007.
- <sup>85</sup> Hayat, Aslam. Muhammad, "Privacy and Islam: From the Quran to data protection in Pakistan"; pp: 137 - 148 ( Vol. 16:2 Information & Communications Technology Law, 2007
- <sup>86</sup> Manzoor Ahmad v. State, 1990 MLD 1488.
- <sup>87</sup> Mst. Rabia v. The State 2004 LHC
- <sup>88</sup> Article 35 of the Constitution requires the State to protect: the marriage, the family, the mother and the child.
- <sup>89</sup> The Spam regulations bind the operators to ascertain the consent of consumers before offering subscriptions services by telemarketers or commercial entities. Operators are also under an obligation to setup a DO NOT CALL REGISTER; for voice services, however, it is noteworthy that the Spam regulations do not set similar standards for data communications and consumers and thus the element of "choice" and "consent" is left to the operator to ascertain under their own specific policies. The maintenance of "Black, Grey and While lists", shall empower the operators ability to customize and sensitize data for targeted communication.
- <sup>90</sup> PTCR 2009: Regulation 15
- <sup>91</sup> Privacy groups file mobile marketing complaint with FTC <<  
<http://www.idgconnect.com/index.cfm?event=showarticle&cid=116&pk=621>>> accessed November 11, 2009).
- <sup>92</sup> Pg: 961. Privacy Online: OECD Guidance on Policy and Practice. OECD Publishing
- <sup>93</sup> For best practice guidelines and practice in telecom services, see: Gratton, Eloise. (2003) Internet and Wireless Privacy: A Legal Guide to Global Business Practices. CCH, Canadian Limited.
- <sup>94</sup> Idea of consent describes the affinity between democracy and privacy: Brian D. Loader, "The Governance of Cyberspace Politics, Technology and Global Restructuring" (Routledge, UK, 1997), p: 157-160
- <sup>95</sup> Mobile Marketing Association Global Code of Conduct Posted by Bena Roberts on Jul 15, 2008 7:40<http://www.gomonews.com/mobile-marketing-association-code-of-conduct/>
- <sup>96</sup> Integrated policy is devised between components that are similar in hierarchal positions where the mandate is shared between jurisdictions of common interests. See: Smith, B. (2003). Public Policy and Public Participation: Engaging citizens in the community Development of Public Policy. Halifax: Health Canda, Atlantic Region. Pp: 11-12
- <sup>97</sup> Urooj Zia (Pakistan) was arrested on November, 2007 for "Protest against the government: Posting comments about public policy "for duration of 4 hours. Source:"<http://committeetoprotectbloggers.org/2007/11/20/pakistani-blogger-arrested-released/>
- <sup>98</sup> Telenor Privacy Policy <<http://telenor.com.pk/privacy/privacy.php> > (accessed March 11, 2009)
- <sup>99</sup> OSS, "Azure Solutions Wins Telecom Fraud Detection Contract with Warid Telecom Pakistan" September 1, 2005. <<http://www.ossnewsreview.com/azure-solutions-telecom-fraud-warid-telecom-pakistan.html>> (accessed March 11, 2009)
- <sup>100</sup> Websense, "Customer Case Study". <[http://www.websense.com/docs/CaseStudies/casestudy\\_ufone\\_ptcl\\_pk.pdf](http://www.websense.com/docs/CaseStudies/casestudy_ufone_ptcl_pk.pdf)> (accessed March 11, 2009)